Office of the Attorney General
State of Texas

June 24, 1997

DAN MORALES
ATTORNEY GENERAL

Ms. Lois A. Wischkaemper
Galey & Wischkaemper
P.O. Box 1019
Lubbock, Texas 79408-1019

OR97-1441

Dear Ms. Wischkaemper:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106932.

The Lubbock County Hospital District (the "district"), which you represent, received a request "for all past, present and future correspondence between your office, John Geist, Stover Electric, and Lee Lewis Construction Inc. regarding possible violations of Texas Government Code 2258 by Stover Electric." You claim that you need not provide the requestor with future correspondence. You also assert that the requested information in existence is excepted from disclosure by sections 552.103 and 552.107 of the Government Code. We have considered the exception you claim and have reviewed the documents at issue. We also note that the requestor seeks the investigation materials and results concerning the prevailing wage dispute at issue. Because, you do not seek to withhold this information, we presume that it has been released.

We initially recognize that you are not obligated under the Open Records Act to provide the requestor with information to be created in the future. While chapter 552 does not prohibit a governmental body from voluntarily complying with a standing request for information, neither does chapter 552 require a governmental body to comply with a standing request for information to be collected or prepared in the future. *See* Attorney General Opinion JM-48 (1983). Additionally, chapter 552 does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 (1986) at 3. As the requestor seeks information which has not yet been created, the district need not comply with this portion of the request.

You first argue that the responsive correspondence is excepted from disclosure by section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
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> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[1] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. We do not believe, under the facts you have presented, that the district has established that litigation is reasonably anticipated. You may not withhold the information based on section 552.103.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that

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[1]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that portions of the requested correspondence reveals the client's confidential communications or the attorney's legal opinion or advice and, therefore, may be withheld under section 552.107. However, some information is purely factual and may not be withheld under this exception. We have marked the information that may be withheld.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Don Ballard

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 106932

Enclosures: Submitted documents

cc: Mr. Feliciano Garcia, Jr.
International Brotherhood of Electrical Workers
1906 4th Street
Lubbock, Texas 79415
(w/o enclosures)