



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 11, 1997

Ms. Sandra C. Joseph  
Open Records Counsel/Disclosure Officer  
Comptroller of Public Accounts  
111 East 17<sup>th</sup> Street  
LBJ State Office Building  
Austin, Texas 78774-0100

OR97-2032

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108693.

The Comptroller of Public Accounts (the "Comptroller") received a request for various information pertaining to the request for tax exemption of the Ethical Culture Fellowship of Austin. You say the Comptroller is releasing some information to the requestor. You seek to withhold from required public disclosure portions of the requested information based on sections 552.103, 552.107(1) and 552.111 of the Government Code.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is 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

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.

You assert that the information relates to reasonably anticipated litigation. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat. *See* Open Records Decision No. 452 (1986) at 5.

We conclude that the Comptroller has not shown that the claim that litigation will ensue is more than conjecture. *See* Open Records Decision No. 555 (1990). Thus, the Comptroller may not withhold the requested information from the public based on section 552.103.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* The exception also protects preliminary drafts of a document and any comments or other notations on the drafts because they necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). We agree that this exception applies to portions of the information and have marked the documents accordingly.

Section 552.107(1) of the Government Code protects from disclosure attorney advice and opinion and client confidences. *See* Open Records Decision No. 574 (1990). As we believe the coverage of section 552.107(1) is coextensive with that of section 552.111, we need not address the applicability of section 552.107(1) to the information.

We are resolving this matter with this 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 may 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,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/rho

Ref.: ID# 108693

Enclosures: Marked documents

cc: Mr. David M. Bagley  
RR 1 Box 532  
Killeen, Texas 76542-9712  
(w/o enclosures)

