



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 14, 1997

Ms. Glenda Robinson  
Senior Associate General Counsel  
Texas Tech University Health Sciences Center  
Office of Vice Chancellor and General Counsel  
3501 4th Street, 2B141  
Lubbock, Texas 79530-0001

OR97-2490

Dear Ms. Robinson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110679.

The Texas Tech University Health Sciences Center (the "center") received a request for information regarding the requestor's status in a graduate medical training program. You claim that the requested information is excepted from disclosure as attorney work product and under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to a pending or reasonably anticipated judicial or quasi-judicial proceeding to which the state or a political subdivision is or may be a party. *See* Open Records Decision No. 588 (1991). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You have provided this office a copy of the administrative guidelines, and you explain that the center's hearings procedure is conducted in a "non-adversarial manner." We

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<sup>1</sup>We note that you have submitted and marked the documents for which you claim exceptions under chapter 552 of the Government Code as Exhibit "B." It appears that you have submitted the documents in Exhibit "C" and some of the documents in Exhibit "D" for informational purposes only. However, Exhibit "D" appears to contain a document for which you claim exceptions under section 552.103 and 552.111, which we will consider.

have reviewed your arguments and conclude that the internal procedure you have described is not "quasi-judicial" in nature. Furthermore, we observe that litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). 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. 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. After reviewing your arguments, we conclude that you have not made the requisite showing that litigation is reasonably anticipated. Accordingly, you may not withhold the requested information pursuant to section 552.103.

You assert that the submitted documents are excepted from disclosure under section 552.111 both as attorney work product and as internal memoranda. We consider first whether the documents constitute work product. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111. For information to be considered "attorney work product," a governmental body must first show that the information was created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*See National Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

Second, the governmental body must show that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege

protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein. Upon review of the submitted documents, we conclude you have not demonstrated how these documents meet the requirements set forth in *National Tank* and Open Records Decision No. 647 (1996). Therefore, the center may not withhold the documents as attorney work product under section 552.111.

Now we consider whether the submitted documents are excepted from disclosure under section 552.111 as internal memoranda. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. The documents in this case relate to a routine personnel matter. Section 552.111, therefore, does not except these types of records from required public disclosure.

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 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. Open Records Decision No. 574 (1990) 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.* Moreover, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records No. 630 (1994) at 4. We agree that a portion of the information for which you claim protection under section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. We have marked the type of information which you may withhold from disclosure under section 552.107(1).<sup>2</sup>

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<sup>2</sup>We do not consider your argument that some of the information at issue is protected as attorney work product under section 552.107. In Open Records Decision No. 647 (1996) at 3, this office determined that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or 552.111.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/alg

Ref.: ID# 110679

Enclosures: Submitted documents

cc: Dr. Tommy E. Swate  
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(w/o enclosures)