



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 23, 1998

Mr. Rick Faulkner
Brown McCarroll & Oaks Hartline, L.L.P.
P.O. Box 3999
Longview, Texas 75606-3999

OR98-1027

Dear Mr. Faulkner:

On behalf of Kilgore College, you ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 114135.

Kilgore College (the "college") received a request from an attorney for various categories of information concerning bid number "9798-004, dated November 3, 1998." In response to the request, you submitted to this office for review the records which you assert are responsive. You assert that the requested information is excepted from required public disclosure by sections 552.103 and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

As a preface to our discussion, we note that you did not initially assert the applicability of section 552.103(a) to the records at issue. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within ten business days following the governmental body's receipt of an open records request. *See* Gov't Code § 552.301(a). This office usually will not consider an exception raised after the initial ten business days unless there exists a compelling reason for doing so. Open Records Decision No. 515 (1988) at 6.

You state that on "February 20, 1998, [the requestor] commenced a lawsuit in the 4th Judicial District Court of Rusk County, Texas, including claims against Kilgore College, . . . and Tangent Computer Corporation, arising out of competitive bid and purchase of Tangent Computers, which is also the subject of the Open Records Request." Based on the specific facts presented in this file, this office agrees to consider the applicability of section 552.103 to the information being requested.¹ In arriving at this decision, we assume good

¹This office will consider changes in circumstances surrounding litigation when timely informed by governmental body of changes. Open Records Decision No. 638 (1996) at 3.

faith on the part of the college in taking a reasonable amount of time to submit the responsive information and raise the litigation exception. *See* Gov't Code § 552.228(a) ("it shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested."); Open Records Decision No. 467 (1987).

Section 552.103(a) of the Government Code, the "litigation exception," 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.).

In this instance, you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a). Therefore, the requested records may be withheld under section 552.103. However, if the opposing party in the litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation is concluded.² Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²In this regard, we note you also seek to withhold the requested information under section 552.110. Because we resolve your request under section 552.103, we need not address your section 552.110 argument at this time. However, upon conclusion of the pending litigation, should the college receive a request for the information that is the subject of this request, it should seek a ruling from this office under that exception.

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 black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 114135

Enclosures: Submitted documents

cc: Mr. J. Paul Nelson
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(w/o enclosures)

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