



Office of the Attorney General
State of Texas

July 20, 1998

DAN MORALES
ATTORNEY GENERAL

Ms. JoAnn S. Wright
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 168046
Irving, Texas 75016-8046

OR98-1702

Dear Ms. Wright:

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# 116689.

The Marlin Independent School District (the "district") received a request for various documents, which include compromise/settlement agreements and depositions with regard to a specific case. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The governing 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 governing body must meet both prongs of this test for information to be excepted under section 552.103(a).

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

¹In 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).

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.

Having considered the totality of the circumstances presented in this case, we find that you have not provided this office with concrete evidence to substantiate the claim that the district reasonably anticipates litigation or that the information requested relates to anticipated litigation. Additionally, we note in reference to the requested deposition that, although the Open Records Act does not require a governmental body to obtain information that is not in its actual possession,² whether a custodian has actual control of information has no bearing on whether the information is subject to disclosure.³ Therefore, we conclude that the requested information is not excepted from disclosure under section 552.103(a) and must be released to the requestor.⁴

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

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Ref.: ID# 116689

²Open Records Decision No. 518 (1989).

³Open Records Decision No. 425 (1985).

⁴We also bring to your attention this office’s recently released Open Records Decision No. 658 (1998) which provides that section 552.101 of the government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body’s mediated final settlement agreement.

Enclosures: Submitted documents

cc: Ms. Katherine L. Duff
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(w/o enclosures)