



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 13, 1998

Mr. John Carlton
Ambrust, Brown & Davis, L.L.P.
100 Congress Avenue, Suite 300
Austin, Texas 78701-4042

OR98-1923

Dear Mr. Carlton:

You have asked 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# 118037.

The Wells Branch Municipal Utility District (the "district"), which you represent, received a request for documentation relating to the Travis County Housing Authority's ("TCHA") proposed Shoreline Drive project. You have released some of the requested information. You contend that the requested information submitted as Exhibits B and D is exempt from disclosure under section 552.103(a) of the Government Code and Exhibit D is exempt from disclosure under section 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.103, the "litigation exception," exempts from disclosure information relating to litigation to which the state or a political subdivision may be a party. The district has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. The test for meeting this burden is 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 district must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You assert that Exhibits B and D relate to an investigation by the district to review TCHA records to determine if the TCHA took any improper actions in connection with an affordable housing project located near the district. You assert that it appears from your investigation that TCHA took improper actions and you anticipate bringing litigation. However, Exhibits B and D relate to an investigation of the possibility to bring suit. A governmental body's investigation of the possibility of bringing suit is not sufficient to establish that it reasonably anticipates litigation for the purposes of section 552.103(a). Open Records Decision No. 557 (1990). Thus, you may not withhold the requested information pursuant to section 552.103(a).

You also assert that Exhibit D is exempt from disclosure under section 552.111. Under this section, information is excepted from public disclosure if it is "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), the attorney general held that this section applies only to internal communications consisting of advice, recommendations, or opinions reflecting policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The purpose of withholding advice, opinion, or recommendation under section 552.111 is "to encourage frank and open discussion within the agency in connection with its decision-making processes" pertaining to policy matters. *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). "An agency's policymaking functions do not encompass routine internal administrative and 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). They do include, however, administrative and personnel matter of broad scope that affect the governmental body's policy mission. Open Records Decision No. 631 (1995) at 3. Information created for an agency by outside consultants acting on behalf of the agency in an official capacity may be within the scope of section 552.111. Open Records Decision No. 462 (1987).

You assert that Exhibit D falls within the scope of section 552.111 because it contains advice, recommendations, and opinions from a consultant retained by the district's attorney regarding a matter that the district had instructed its attorney to investigate. However, most of the information does not reflect the policymaking process of the district. Disclosure of this information will not discourage frank and open discussion within the district in connection with its decision-making processes pertaining to policy matters. Accordingly, you may not withhold most of the information requested pursuant to section 552.111. We have marked the information in Exhibit D that you may withhold under section 552.111 because they contain advice, recommendations, and opinions relating to the policymaking process of the district.

We are resolving this matter with an informal letter 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 should have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/SF/nc

Ref: ID# 118037

Enclosures: Marked documents

cc: Ms. Patricia Rodriguez
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(w/o enclosures)