



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 10, 1998

Mr. Robert L. Flournoy
Attorney at Law
Flournoy & Deaton
P. O. Box 1546
Lufkin, Texas 75902

OR98-2147

Dear Mr. Flournoy:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 117836.

The City of Lufkin (the "city"), which your firm represents, received a request for 21 categories of information concerning the Paul Avenue project, as well as KSA Engineers. In response to the request, you submit to this office for review the information which you assert is responsive. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure 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.

The city 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 city must meet both prongs of this test for information to be excepted under 552.103(a).

To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that “[the city] entered into a construction contract with the applicant and has had numerous difficulties with them, and because of which, the City anticipates a lawsuit and/or arbitration concerning the disputes.” You also assert that “the applicant . . . intends to proceed to arbitration as soon as the project is finished.” In this instance, however, there is no evidence that requestor has taken concrete steps toward litigation. Given the information provided, the prospect of litigation at this point is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 at 5 (1989)(governmental body must show that litigation involving a specific matter is realistically contemplated). Therefore, the submitted information may not be withheld under section 552.103.

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

Yours very truly,


Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref: ID# 117836

Enclosures: Submitted documents

cc: Mr. Mark Clifton, P.E.
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(w/o enclosures)