



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 7, 1998

Mr. Michael P. Hull
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR98-2387

Dear Mr. Hull:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118878.

The Harris County Attorney received a request for copies of:

any and all records of complaints made concerning alleged violations Tex. Trans. Code §§ 728.001-728.004 and any and all records of communications with automobile dealers and/or automobile dealers associations concerning Tex. Trans. Code §§ 728.001-728.004 for the years 1984 to the present date.

You indicate that you have to date located no records responsive to the part of the request asking for "complaints." You submit information responsive to the part of the request asking for "records of communications with automobile dealers and/or automobile dealers associations," but seek to withhold that information under sections 552.101, 552.103, and 552.111 of the Government Code.

You first raise Government Code section 552.103(a), known as the litigation exception. Section 552.103(a) excepts from required public 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986) and authorities cited therein. 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.*

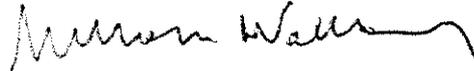
You advise that, prior to the receipt of this request, Harris County, through the County Attorney's Office, filed suit against Carmax Auto Superstores for violation of Texas Transportation Code § 728.002, which prohibits the sale or offer for sale of motor vehicles "on consecutive days of Saturday and Sunday." *See also id.* § 728.003 (civil penalties), 728.004 (enforcement and injunction). The action, styled *Harris County, Texas, By and Through Its County Attorney, Michael P. Fleming v. Carmax Auto Superstores, Inc.* is now pending in the United States District Court for the Southern District of Texas, Houston Division, cause number H-98-2087. The requestor here is among the attorneys representing Carmax in that litigation. Carmax's pleadings in the suit include claims that the county's action against Carmax is discriminatory in that it has not brought enforcement proceedings against other dealers doing business on consecutive Saturdays and Sundays. *See* Defendant Carmax's Answer to Plaintiff's Original Petition and Counterclaims, pp. 16-17. You also note that Harris County has been named by Carmax as a third-party defendant in another suit brought against Carmax by the Texas Automobile Dealers Association ("TADA") under Transportation Code chapter 728 and now pending in the United States District Court for the Northern District of Texas, Dallas Division, cause number 398-CV-1405-R. The only documents which you have submitted as responsive to the instant request are correspondence between your office and TADA which you say were "prepared and compiled in anticipation of litigation."

We have reviewed your arguments and the information at issue. We conclude that you have demonstrated that the information at issue relates to pending or anticipated litigation. Therefore you may withhold the requested information at this time under section 552.103(a).¹ Since we have resolved this request under section 552.103(a), we need not address your other claims for withholding the information at issue here.

¹We assume, however, that none of the information in the records at issue has previously been made available to Carmax. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent Carmax has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a).

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,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 118878

Enclosures: Submitted documents

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(w/o enclosures)