



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 24, 1998

Ms. Julie B. Ross
Haynes & Boone, L.L.P.
201 Main Street, Suite 2200
Fort Worth, Texas 76102

OR98-2848

Dear Ms. Ross:

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# 119974 (your city request# 4344).

The City of Coppell (the "city") received a request for a copy of I.A. file #98-083. You contend that the requested file is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The city 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 at 4 (1986). 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 No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that the Ms. Lisa Andrus was terminated from her position as police officer with the Coppell Police Department following internal affairs investigation, I.A. #98-083. Ms. Andrus has employed an attorney, Mr. David B. Sloane, to represent her in matters relating to her termination. You have submitted a Verified Petition to Perpetuate Testimony of Employees of the City of Coppell in which Mr. Sloane state that he anticipates that Ms. Andrus "will be a party to a lawsuit for wrongful termination, negligent and/or intentional infliction of mental distress, and various causes of action for unlawful and discriminatory employment practices." In addition, you have submitted an affidavit from the attorney representing the city in connection with the termination of Ms. Andrus in which the attorney states that, during a court hearing, "Mr. Sloane represented that Ms. Andrus planned to sue the City for wrongful termination if her termination was not overturned and she was not reinstated to her job with the Police Department." We have considered your arguments and the submitted materials and conclude that you have shown that litigation is reasonably anticipated. We have reviewed the documents at issue and agree that they are related to the anticipated litigation.

However, I.A. file #98-083 includes documents that were obtained from or have been provided to the opposing party in the anticipated litigation. Information that has either been obtained from or provided to the opposing party in anticipated litigation, through discovery or otherwise, is not excepted from disclosure under section 552.103(a), and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). The city may withhold the remaining information in I.A. file #98-083 from disclosure under section 552.103(a). We note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

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,

A handwritten signature in black ink that reads "Karen Hattaway". The signature is written in a cursive style with a large, flowing "K" and "H".

Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/mjc

Ref.: ID# 119974

cc: Mr. R. G. Harrell
458 W. Oak Grove
Coppell, Texas 75019
(w/o enclosures)