

January 8, 1999

Mr. Jonathan C. Allen
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OR99-0039



OFFICE OF THE
ATTORNEY GENERAL
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Dear Mr. Allen:

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# 120960.

The Sabine Valley Center (the "Center"), which you represent, received a request for six categories of information relating to the requestor's employment and termination with the Center. In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.¹ You explain that the requestor "is already in possession of documents complying with items 1 and 2 of his request," which we infer to mean that those records have been released by the Center. You further explain that the Center "does not have any documents" responsive to category 5 of the request. *See* Open Records Decision Nos. 605 (1992), 555 (1990) (governmental body is not expected to produce information which does not exist), 362 (1983). Although you express hesitation as to whether the request for information by the requestor constitutes an open records request,² you have submitted the information at issue and claim that the records are excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Generally, a request for information need not name the Open Records Act, since a *written* communication that can reasonably be judged to be a request for *public information* is sufficient. *See* Open Records Decision Nos. 499 497 at 3 (1988) (no particular request form or "magic words" are required to constitute a request under the act), 483 (1987), 44 (1984).

Because section 552.103(a) of the Government Code is the most inclusive exception you raise, we will discuss it first. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To secure the protection of section 552.103(a), the Center must demonstrate that the requested information "relates" to a pending or reasonably anticipated litigation to which the center is a party. *Heard*, 684 S.W.2d at 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 588 at 1 (1991), 551. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3(1990).

We have examined the information and documents submitted to us for review. You argue that the submitted records are protected, in their entirety, under section 552.103 based on a lawsuit styled *Minchew et al. v. Sabine Valley Center*, No. 98-1966-B (District Court, Gregg County, Texas, filed October 6, 1998). The lawsuit alleges violations of the Texas Whistleblower Act, among other claims. We also find that the submitted documents are related to the pending or reasonably anticipated litigation for the purposes of section 552.103(a). Therefore, in this instance, the Center has supplied this office with information indicating that the submitted records relate to pending litigation.

The requested records may be withheld pursuant to section 552.103 only to the extent that the records have not been previously seen by the opposing parties in the anticipated litigation. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We also note that the applicability of this section ends once the litigation has been concluded. Open Records Decision No. 350 at 3 (1982).

As we resolve your request under section 552.103, we need not address your other claimed exceptions at this time.³ 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,



Sam Haddad

Assistant Attorney General
Open Records Division

SH/nc

Ref: ID# 120960

Enclosures: Submitted documents

cc: Mr. Kenneth R. Hanon
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(w/o enclosures)

³We note that some of the information in the submitted records is also confidential by law. Therefore, once litigation has concluded should there be a subsequent request for this information, we advise the Center to exercise caution and seek a ruling from this office concerning the records. See Gov't Code §§ 552.352, 552.114 (student records).