



February 16, 1999

Ms. Priscilla Lozano
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701

OR99-0467

Dear Ms. Lozano:

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# 122025.

The University of Texas at Austin (the "University"), which your office represents, received a request from an attorney for "all records in the possession of the University or its affiliates pertaining to the complaint my client filed with University Health Services against Don Lovering, M.D. . . . includ[ing] . . . photos, witness statements, tape recordings, transcriptions and statements of fact." 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 state that the "University has released records" to the requestor. You contend, however, that the remaining submitted records are excepted from required public disclosure by sections 552.101 and 552.103 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

Because section 552.103(a) of the Government Code is the most inclusive exception you raise, we will consider this exception first. 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

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.

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 University 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 University must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the University must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, you have supplied to this office a claim letter from an attorney, who represents an opposing party. You state that the requestor's letter is a "notice of claim" letter for damages on behalf of his client.² The notice of claim involves an alleged claim against the University for injuries and damages sustained by the requestor's client. Based on your arguments and the submitted records, we conclude that litigation is reasonably anticipated. Open Records Decision No. 638 (1996). We also conclude that the documents submitted by the University are related to the litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103(a).

² Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney, and (2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA") or applicable municipal statute or ordinance.

Generally, however, once information has been obtained by all parties to the litigation 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 it must be disclosed. Specifically, we note that the submitted records contain transcribed records of proceedings where the requestor or his client was in attendance; we believe that such records should be released. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³

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

Sincerely,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.:ID# 122025

³We note that some of the information in the submitted documents is also confidential by law. Therefore, once litigation has concluded should there be a subsequent request for this information, we advise the University to exercise caution and seek a ruling from this office concerning the records. See Gov't Code § 552.352; see also section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA") (access to medical records is not governed by chapter 552 of Government Code, but rather provisions of MPA).

cc: Mr. John W. Ragland
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(w/o enclosures)