



February 24, 1999

Mr. Michael Currie
Henslee, Fowler, Hepworth & Schwartz
Attorneys at Law
800 Frost Bank plaza
816 N. Congress Avenue
Austin, Texas 78701-2443

OR99-0538

Dear Mr. Currie:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122531.

The Ennis Independent School District (the "district"), which you represent, received a request for certified copies of the contracts the district has with Dr. Pepper Bottling Company of North Texas and Coca Cola Bottling Company of North Texas. You claim that the requested information is excepted from disclosure by sections 552.103 and 552.104 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

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 district 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 district must meet both prongs of this test for information to be excepted under 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). The fact that a potential opposing party has hired an attorney who makes a request for information does not 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).

You argue that litigation is reasonably anticipated because a district employee was named in a lawsuit by Dr. Pepper Bottling Company of Texas concerning the district's contract. That lawsuit, however, was dismissed in August 1997. You provided no other evidence to support your claim that litigation can now be anticipated. You have not established the applicability of section 552.103.

Section 552.104 of the Government Code states:

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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).

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 at 2 (1987). As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 at 8 (1991).

You generally argue that section 552.104 applies because release of the information would allow one bottling company to gain an advantage over another company. You have not demonstrated any potential specific harm to the district's interests in a particular competitive situation. *See* Open Records Decision 541 (1990) (discussing applicability of section 552.104 when private party may be harmed by release of bid information; opining that section 552.104 does not protect private bidders' competitive interests in marketplace); *see also* Open Records Decision Nos. 593 at 2 (1991). And, you have provided nothing more than a general allegation of a possible advantage. We do not believe that in this case you have shown the applicability of section 552.104. *See* Gov't Code 552.301(b)(1); Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989). *Cf.* Gov't Code § 552.022(3); Open Records Decision No. 541 at 8 (1990) (terms of contracts with governmental bodies generally open); 514 (1988) (public has an interest in knowing prices charged by government contractors), 184 (1978). Furthermore, it appears that the Dr. Pepper Bottling Company of Texas filed its contract with the district in its original petition, submitted as Exhibit D, against the district employee. *Dr. Pepper Bottling Company v. Cox*, No. 56182 (40th Dist. Ct., Ellis County, Tex.) (plaintiff's original petition, attachment A). Documents filed with the court are public documents and must generally be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). The contracts may not be withheld under section 552.104. The requested contracts must, therefore, be released.

You also question whether the district must provide the requestor with certified copies of the requested documents. Nothing in the Open Records Act requires or prohibits the district from providing certified copies. Gov't Code §§ 552.221 - .231 (procedures related to access); .265 (charge for certified record provided by district or county clerk). The district

need not provide the requestor with certified copies of the contracts.

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,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB\nc

Ref: ID# 122531

Enclosures: Submitted documents

cc: Ms. Catherine Henigan
Cooper & Scully
900 Jackson Street -Suite 100
Dallas, Texas 75202
(w/o enclosures)