



June 11, 1999

Mr. Victor M. Mellinger
Associate General Counsel
Texas Tech University Health Sciences Center
Box 42021
Lubbock, Texas 79409-2021

OR99-1641

Dear Mr. Mellinger:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125121.

The Texas Tech University Health Sciences Center (the “university”) received a request for two documents: a letter accusing the requestor of academic impropriety and a report prepared by Associate General Counsel Ronald Phillips at the request of Deputy Chancellor Jim Crowson. You state that the university intends to release the letter. You claim that the report is excepted from disclosure pursuant to sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed a copy of the report.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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 governmental body 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

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

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). Further, 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).

You contend that the report was prepared in anticipation of litigation and therefore should be excepted from disclosure pursuant to section 552.103(a). However, you have not provided this office with concrete evidence to support your claim that the university reasonably anticipates litigation relating to the personnel matters discussed in the report. Therefore, the university may not withhold the report from disclosure under section 552.103(a).

You also claim that the report is excepted from disclosure pursuant to section 552.107. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only the attorney’s legal advice and client confidences communicated to the attorney. *See* Open Records Decision No. 574 (1990). Section 552.107(1) does not except from disclosure purely factual information or information gathered by an attorney as a fact-finder. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987). The requested report contains legal advice that is excepted from disclosure under section 552.107(1). We have marked this information accordingly. The remainder of the report is purely factual and not protected by section 552.107(1). The university may withhold the marked information but must release the remainder of the report to the requestor.

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

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).

KEH/ch

Ref: ID# 125121

Encl. Submitted documents

cc: Ms. Kathleen A. Ellis
7205 Memphis Avenue
Lubbock, Texas 79423
(w/o enclosures)