



September 20, 1999

Ms. Kristi DeCluitt  
Assistant City Attorney  
City of College Station  
P. O. Box 9960  
College Station, Texas 77842

OR99-2612

Dear Ms. DeCluitt:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 127513.

The City of College Station (the "city") received an open records request for "any and all letters, memorandum, notes, or other documents concerning the City Attorney's interpretation of the ordinances," concerning matters relating to the requestor's client. In response to the request, you submit to this office for review the information which you assert is responsive.<sup>1</sup> You contend, however, that the records, submitted as Exhibit B, are excepted from required public disclosure by sections 552.103 and 552.107 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

You contend that the marked/highlighted information, you submitted to this office within Exhibit B, is excepted from required public disclosure pursuant to section 552.107 of the Government Code. Section 552.107 excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107 (1). Section 552.107(1) protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion,

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<sup>1</sup>We assume that you will release other responsive records to the extent they exist, since you have not raised any other exception nor submitted other records.

and recommendation. *See* Open Records Decision No. 574 (1990). In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. We note that section 552.107 does not provide a blanket exception for all communications between clients and attorneys or all documents created by an attorney. Where an attorney represents a governmental entity, the attorney-client privilege protects an attorney’s legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. However, section 552.107(1) does not protect purely factual information. *Id.* You state that the city code enforcement officer “called the City Attorney’s office for legal advice . . . as to the meaning of the statutory language,” at issue. Based on your representation, we have marked the information, within Exhibit B, which the city may withhold from the public pursuant to section 552.107(1).

You also claim that “the remainder of Exhibit B is excepted from disclosure” pursuant to section 552.103 of the Government Code. 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 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, 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 city 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 city 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 the request letter to support your claim under section 552.103. You state that “[i]n addition to the veiled threats of litigation . . . the Open Records Request is made at the end of a letter which takes an adversary stance and tone against the City.” However, it does not appear at this time that an attorney has threatened the city with a lawsuit, nor have you provided any concrete evidence to support a claim that litigation is reasonably anticipated. *See* Open Records Decision Nos. 361 (1983), 346 (1982). Based on the facts presented and the information at issue, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated. Therefore, you may not rely on section 552.103 to withhold any of the submitted information, within Exhibit B, other than the information subject to section 552.107 from 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,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 127513

Encl: Submitted information

cc: Ms. Carla Robinson  
West, Webb, Allbritton & Gentry, P.C.  
1515 Emerald Plaza  
College Station, Texas 77845-1515  
(w/o enclosures)