



May 6, 2002

Mr. Jose R. Guerrero  
Montalvo & Ramirez  
900 North Main  
McAllen, Texas 78501

OR2002-2379

Dear Mr. Guerrero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162369.

The LaJoya Independent School District (the "school district"), which you represent, received a request for six categories of information relating to a contract between the school district and the requestor's client. You indicate that the school district will release school board policies and meeting minutes that are responsive to two categories of the request. In addition, you have informed the requestor that the school district has no information responsive to another category of the request. You claim that the information you have submitted to this office as responsive to the other three categories of the request is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibits C and E are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

Gov't Code § 552.022(a)(1), (3). Exhibit E consists entirely of completed reports, which are made public by section 552.022(a)(1). Exhibit C is a contract relating to the expenditure of public funds made public by section 552.022(a)(3). Because this information is subject to section 552.022, it may only be withheld if it is confidential under other law. Section 552.103 is a discretionary exception and is not other law for the purpose of section 552.022. *See* Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Accordingly Exhibit E must be released to the requestor.

You assert, however, that Exhibit C, which is an insurance policy, is protected from disclosure by section 101.104 of the Texas Civil Practice and Remedies Code, which provides:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Tex. Civ. Prac. & Rem. Code § 101.104; *see In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute “prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claims] Act”). We agree that section 101.104 of the Texas Civil Practice and Remedies Code constitutes other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Furthermore, we believe this discovery provision applies to the requested insurance policies. Therefore, we conclude that the school district must withhold Exhibit C under section 552.101 in conjunction with this provision.

We now address Exhibit D, which appears to consist almost entirely of information that this office ruled on in Open Records Letter No. 2002-1541 (2002). The documents in Exhibit D that were subject to that ruling may be withheld to the extent authorized by that decision. *See* ORL 2002-1541 at 4-5. With regard to any information in Exhibit D that was not previously ruled on, we address your claim that it is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The school 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 on the date that a governmental body receives the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 school 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.<sup>1</sup> 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).

In support of your contention that litigation against the school district is reasonably anticipated, you rely on three letters sent to the school district by the requestor's firm. In the first letter, dated October 26, 2001, the firm demands arbitration of a dispute with the school district concerning the payment of a subcontractor. In the second letter, dated

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<sup>1</sup>In 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).

November 19, 2001, the firm indicates that the school district did not respond to the arbitration demand and again asks the school district to submit to arbitration in order to avoid going to court to resolve the dispute. In the third letter, dated February 5, 2002, the firm reiterates its arbitration request and again threatens to file suit. You have informed this office that the school district maintains that it is not liable and that no enforceable arbitration agreement exists between the school district and the requestor's client. Based on the information you have provided, we agree that litigation is reasonably anticipated against the school district. Furthermore, we find that Exhibit D relates to the anticipated litigation.

We note, however, that 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. Exhibit D contains documents that have been seen by the requestor's client, as evidenced by the client's agent's signature. These documents are not protected under section 552.103 and must be released. The district may, however, withhold the remaining documents in Exhibit D under section 552.103.

In summary, the school district must withhold Exhibit C and must release Exhibit E. Exhibit D may be withheld except for documents that the requestor's client has already seen and that must therefore be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 162369

Enc. Submitted documents

c: Mr. Chad V. Theriot  
Smith, Currie & Hancock  
233 Peachtree Street N.E., Suite 2600  
Atlanta, Georgia 30303-1530  
(w/o enclosures)