



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 9, 2019

Mr. Michael Shaunessy
Counsel for the Comal County District Attorney's Office
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2019-28391

Dear Mr. Shaunessy:

You ask 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# 790683.

The Comal County District Attorney's Office (the "district attorney's office"), which you represent, received a request for the names of employees of the district attorney's office who resigned or were terminated during a specified time period. The district attorney's office claims the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception the district attorney's office claims and reviewed the submitted information.

Initially, we note the requestor seeks only the names of the employees at issue. The district attorney's office has submitted documents that contain information beyond these specific pieces of information. Thus, the portions of the submitted documents that do not consist of the information requested are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release that information in response to the request.

Section 552.103 of the Government Code provides in relevant part 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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show 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 the governmental body received the request for information 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, orig. proceeding); *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 from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision Nos. 331 at 1-2 (1982), 361 (1983) (litigation not reasonably anticipated when an individual who was rejected for employment hired attorney to investigate the circumstances of the rejection or when individual hired attorney who made request for information).

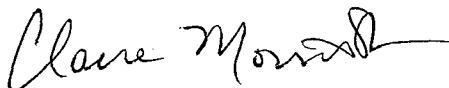
The district attorney's office contends it reasonably anticipates litigation related to the requested information because the requestor, who was an employee of the district attorney's office and was terminated, seeks information related to other employees who were terminated. Further, the district attorney's office states the requestor filed a separate request for different information, in response to which the district attorney's office provided an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code

§ 552.2615. The district attorney's office states in response to its cost estimate, the district attorney's office received a letter from an attorney for the requestor requesting clarification of the charges. We note the attorney states she represents the requestor "to assist her with the . . . request for public information, specifically regarding the proposed cost estimate[.]" However, we note the attorney's correspondence contains no threat to sue and makes no claim for damages. Therefore, upon review, we find the district attorney's office has not demonstrated any party had taken concrete steps toward filing litigation when the district attorney's office received the request for information. Thus, we conclude the district attorney's office has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the district attorney's office may not withhold the submitted information under section 552.103(a) of the Government Code. Accordingly, the district attorney's office must release the submitted information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eb

Ref: ID# 790683

Enc. Submitted documents

c: Requestor
(w/o enclosures)