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December 18, 2020

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711

Re: November 12, 2020 Request from Collin County Community College to Withhold Public Information (Collin College Reference # CC0012)

Dear Attorney General:

I am writing to address the request sent to the Office of the Attorney General by Collin County Community College (“Collin College”) on November 12, 2020 to withhold responsive records under Texas Government Code Section 552.103.¹

To withhold responsive records pursuant to Section 552.103, Collin College must show that litigation is “reasonably anticipated.”² To do so requires evidence that sufficient “objective steps” towards litigation have been taken, such as the hiring of an attorney combined with assertions of an intent to sue.³ Collin College has shown insufficient evidence that such steps have been taken by potential litigants and thus does not qualify to withhold responsive information and documents under Section 552.103.

First, even if taken at face value, the assertion in Collin College’s Novem-

¹Letter RE: Collin County Community College: Public Information Act Request, October 29, 2020 (Collin College Reference # CC0012).

²Open Records Decision No. 331 (1982), Open Records Decision No. 361 (1983) at 2.

³Open Records Decision No. 331 (1982), Open Records Decision No. 555 (1990).

ber 12, 2020 letter that “[a]n attorney with an organization that represents the employee’s interests then submitted a demand letter to Collin College seeking specific relief for the employee” does not rise to the level of showing such concrete steps toward litigation as, for example, “hiring of an attorney combined with assertions of an intent to sue.”⁴ Representing “interests” is not the same as acting under the auspices of an attorney-client relationship and “seeking specific relief” is not the same as “assertions of an intent to sue.”

This asserted evidence falls significantly short of, for example, “receipt of a letter containing a specific threat to sue governmental body from an attorney for a potential opposing party.”⁵ There is no asserted “specific threat to sue,” and Collin College relies on the mere implications of its assertions to suggest that what they characterize as a demand letter was sent by an attorney acting on behalf of their client.

Other fact patterns in other open-records decisions also indicate that significantly more is required to demonstrate that the “controversy ... has reached the stage at which the potential opposing party [has begun] to take objective steps towards *actually filing* a lawsuit” (emphasis in original).⁶ There is no assertion that a formal complaint has been filed with an outside agency.⁷ There is no unambiguous assertion that an attorney has actually been retained nor that actual threats of lawsuits have been made by a retained attorney.⁸ There is no unambiguous assertion that a retained attorney has issued threats to sue if specific actions are not taken.⁹

In short, the assertions made by Collin College do not support a finding that otherwise public information can be excepted from disclosure under Section 552.103’s litigation exception.

⁴See Open Records Decision No. 331 (1982), Open Records Decision No. 555 (1990).

⁵Open Records Decision No. 638 at 2-3 (1996).

⁶*Id.* at 3.

⁷See Open Records Decision No. 336 (1982) (filing a complaint with the EEOC is sufficient).

⁸See Open Records Decision No. 288 (1981) (threatened to sue on several occasions and hired an attorney).

⁹See Open Records Decision No. 346 (1982) (hired an attorney, made demands for payment, threatened to sue if payments not made).

Second, publicly available evidence also does not support a conclusion that litigation is “pending or reasonably anticipated” and thus that public information can be withheld under Section 552.103. Although Collin College has withheld all exhibits and redacted all identifying information in the public-version of its request letter, the public-interest organization most likely meant here—the Foundation for Individual Rights in Education—has specifically denied in a November 9, 2020 letter to the Office of the Attorney General both that it has an attorney-client relationship with a Collin College employee and that it had sent a legal “demand letter” at all.¹⁰ In other words, the employee most likely to be at issue in this controversy has not retained attorneys at the public-interest organization to represent her in litigation, and that organization has not sent a demand letter on her behalf. Any implications otherwise drawn from the ambiguous assertions made by Collin College are not supported by publicly available evidence. There is no publicly available evidence supporting the withholding of information under Section 552.103.

Neither the assertions made by Collin College nor the publicly available evidence demonstrate that sufficient objective or concrete steps have been taken towards litigation to meet the standard for withholding public information under Section 552.103. Given the mandate in Section 552.001(d) that “[t]his chapter shall be liberally construed in favor of granting a request for information,” the request by Collin College to withhold public information should be denied.

Sincerely,

Kristopher A. Nelson

¹⁰See Letter from Adam Steinbaugh Re: Public Information Request to Collin College at 4, November 9, 2020, available at <https://www.thefire.org/fire-letter-to-the-office-of-the-attorney-general-open-records-division-november-9-2020/>.