



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 26, 1995

Honorable Steven C. Hilbig
Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205-3030

OR95-295

Dear Mr. Hilbig:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32242.

The Bexar County Criminal District Attorney's Office (the "county") received a request for the following information:

- (1) A copy of all reports, documents, data, cost figures, etc. used by Vice Detective Pat Michalec of the San Antonio Police Department at the Public Meeting held on February 22, 1995, at the Lion's Field Center;
- (2) A copy of the video made by SAPD Vice of the Public Meeting, held on February 22, 1995, at the Lion's Field Center;
- (3) A copy of the sign in sheet for the Public Meeting, held on February 22, 1995, at the Lion's Field Center; and
- (4) A copy of the findings to be submitted by Mr. Tom Harmon of the Public Meeting held on February 22, 1995, at the Lion's Field Center when received by your office.

Regarding item 4, you state you possess the information requested. You contend that the information requested by item 4 may be withheld from disclosure based upon Government Code section 552.103, commonly referred to as the litigation exception. You state that item 4 was prepared by Mr. Harmon pursuant to sections 125.042 and 125.044 of the Civil Practice and Remedies Code for the sole purpose of instituting litigation. You state that these findings are the basis for and will be used in the litigation that will arise out of the registered voters request that a business known as Video X-Change be closed as a public nuisance pursuant to Civil Practice and Remedies Code section 125.042. You submit Mr. Harmon's findings from the meeting at issue for our review.

Section 552.103(a) excepts from public disclosure information which relates to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party. Section 552.103 was intended to prevent the use of the act as a method of avoiding the rules of discovery used in litigation. Attorney General Opinion JM-1048 (1989) at 4. For information to be excepted from public disclosure under section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Whether litigation is anticipated is determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989), 328 (1982). Once the governmental body has shown that litigation is pending or anticipated, the governmental body must then explain how the information requested is related to the subject of the litigation. Open Records Decision Nos. 588 (1991), 551 (1990) at 5.

Section 125.041 *et. seq.* of the Civil Practice and Remedies Code, titled "Additional Nuisance Remedies," provides methods for members of the public to determine whether or not a situation exists in the community which they believe constitutes a public nuisance and which they think the district attorney should commence proceedings to stop the nuisance activity. Civil Practice and Remedies Code section 125.042 provides that the voters in an election precinct in which a public nuisance is alleged to exist may request the district attorney, city attorney, or county attorney having geographical jurisdiction of the place that is the subject of the voters' complaints to authorize a meeting at which interested persons may state their complaints about the matter. After the meeting, the person appointed to conduct the meeting shall report the findings to whomever appointed the person to conduct the meeting, either the district

attorney, city attorney, or county attorney. Civ. Prac. & Rem. Code § 125.044.¹ The district attorney, city attorney, or county attorney, after reviewing the meeting findings and upon a finding by the attorney that a public nuisance exists, may then initiate appropriate available proceedings against the persons owning or operating the place at which the public nuisance exists. *Id.*

The findings requested by item 4 are the result of a community meeting held pursuant to section 125.042 of the Civil Practice and Remedies Code. The meeting and resulting findings are those required by statute when the public seeks to have litigation commenced by the district attorney to close a business because it is a public nuisance. We conclude, after reviewing the records at issue, that you have made the requisite showing that the information requested by item 4 relates reasonably to anticipated litigation for purposes of section 552.103(a). Because the findings relate to anticipated litigation, we conclude that they may be excepted from required public disclosure based upon section 552.103(a).

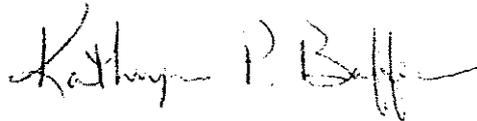
We note that if the opposing parties in the anticipated litigation have seen or had access to any of the information in the requested findings, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within your discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

You state that you do not possess the information requested by items 1, 2, and 3. You state that you are not the custodian of these records under the act. The broad purpose of the act is to give the citizenry complete information regarding the affairs of government. Open Records Decision No. 44 (1974). A hypertechnical reading of the act does not effectuate this purpose. *Id.* Where a request has been directed to a responsible person in a position of authority, the agency cannot ignore the request simply because it may not have been directed to the legal custodian of the records. *Id.* We note that a request for information need not be addressed to the officer for public records. *See* Open Records Decision Nos. 497 (1988), 44 (1974). Since you did not submit the records at issue to this office, we cannot determine that section 552.103(a) is applicable to these records.

¹We note that the document at issue is not a public record of a public hearing that would constitute minutes of a meeting held pursuant to the Open Meetings Act, chapter 551 of the Government Code. *See* Open Records Decision No. 221 (1979).

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 under section 552.301 regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/RHS/rho

Ref.: ID#32242

Enclosures: Submitted documents

cc: Mr. Victor A. Gonzalez
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(w/o enclosures)