



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 11, 1998

Mr. David Motley
Kerr County Attorney
County Courthouse, Suite BA-103
700 Main Street
Kerrville, Texas 78028

OR98-3064

Dear Mr. Motley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120186.

The Kerr County Attorney's Office (the "county attorney") received a request for "all public documents you have regarding the theft case of Benino Mermella." In response to the request, you submit to this office for review the information at issue numbered pages 1 through 37. Based on your submitted brief, we understand that pages 10-13 and 30-37 have previously been released.¹ However, you claim that remaining records, submitted as pages 1-9 and 14-29, are excepted from disclosure under sections 552.101² and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 county attorney 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*

¹To the extent the submitted information has been filed with a court, it is part of the public record and must be released. See *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (orig. proceeding) (if documents are part of public record they cannot be withheld under section 552.108). Furthermore, if a probable cause affidavit was made to support a search warrant, the affidavit is public by statute if it has been executed. See Code Crim. Proc. art. 18.01(b).

²Information about public employees' job performance and work behavior is commonly held not to be excepted from required public disclosure under section 552.101 in conjunction with common-law privacy. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

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 county attorney 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 county attorney must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). 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, the county attorney has supplied this office with information which shows that there is an ongoing investigation, and the county attorney is "considering the matter for criminal prosecution." Thus, we conclude that litigation is reasonably anticipated. We additionally find that the responsive records are related to the reasonably anticipated litigation for the purposes of section 552.103(a). Therefore, you may withhold pages 1-9 and 14-29 of the requested information pursuant to section 552.103.

We further note that, generally, 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. We also note that the applicability of section 552.103(a) ends once the litigation has been concluded.³ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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.

Yours very truly,

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

³We note that some of the information in the submitted records is also confidential by law. Therefore, once litigation has concluded should there be a subsequent request for this information, we advise the county attorney to exercise caution and seek a ruling from this office concerning the records. See Gov't Code § 552.352; see also Open Records Decision No. 565 (1990) (information generated by Texas Crime Information Center or National Crime Information Center must not be made available except in accordance with federal regulations).

SH/mjc

Ref.: ID# 120186

Enclosures: Submitted documents

cc: Mr. Jeff Davis
The Mountain Sun
P.O. Box 1249
Kerrville, Texas 78029-1249
(w/o enclosures)