



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 13, 1998

Mr. Lindsey Roberts
Assistant District Attorney
Dallas County
Frank Crowley Courts Building, LB 19
Dallas, Texas 75207-4399

OR98-0710

Dear Roberts:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113492.

The Dallas County District Attorney received a request for the office files, including several specific categories of information, relating to the prosecution of Fernando Garcia in cause number F89-96959. You state that you seek to withhold only the responsive information that has not been previously "turned over to Mr. Garcia's defense counsel through traditional discovery." Thus, we presume that some of the requested information has been released to the requestor. You seek to withhold all of the remaining requested information under sections 552.103 and 552.108 of the Government Code. We have considered the exception you claim and have reviewed the sample documents that you have submitted.¹ You have labeled the sample State Exhibits 2 through 23.

Initially, we note that some of the submitted documents are court records. Documents filed with the court are public documents and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

Second, we note that State Exhibit 16, which you have submitted, may contain medical records governed by another statute. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

by a physician.” V.T.C.S. art. 4495b, § 5.08(b). Access to medical records is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA.

Third, Exhibit 12 contains an autopsy report. The autopsy report must be disclosed. It is expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11. And fourth, Exhibit 18 contains other public information. The affidavit to support a search warrant is made public by statute if the warrant has been executed. *See* Code Crim. Proc. art. 1801(b). Therefore, you may not withhold an executed search warrant from required public disclosure under either section 552.103 or 552.108 of the Government Code.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body 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. *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 (1990) at 4. Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

Generally, however, 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. Again, you state that you seek to withhold only the responsive information that has not been previously “turned over to Mr. Garcia’s defense counsel through traditional discovery.”

Thus, you are asserting section 552.103 only as to the remainder of the prosecution file that were not turned over to defense counsel.

You explain that Mr. Fernando Garcia's conviction for capital murder has been upheld by the Texas Court of Criminal Appeals. You state that an attorney has been appointed by the court to represent Mr. Garcia in his state *habeas corpus* writs challenging the conviction. After reviewing your arguments and the submitted material, we find that litigation is reasonably anticipated. We also conclude that the documents you have submitted relate to the anticipated litigation, and may be withheld. We also note that 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).²

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 113492

Enclosures: Submitted documents

cc: Mr. Alexander L. Calhoun
Attorney at Law
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(w/o enclosures)

²As we resolve this matter under section 552.103, we need not address your arguments under section 552.108. We caution, however, that some of the information may be confidential by law. Therefore, if the district attorney receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the district attorney should seek a ruling from this office before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).