



**Office of the Attorney General
State of Texas**

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ATTORNEY GENERAL

August 23, 1995

Mr. Earl Bracken, Jr.
City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

Open Records Decision No. 633

Re: Whether the Texas Open Records Act permits a governmental body to require a requestor to accept one record as a substitute for another; whether the act permits a governmental body to charge a requestor for costs incurred in redacting information that falls within any of the act's nonmandatory exceptions to required public disclosure (RQ-672)

Dear Mr. Bracken:

You raise a number of questions relating to a request the police department of the City of Waco (the "city") received under the Texas Open Records Act (the "act"), Gov't Code ch. 552. Specifically, the requestor seeks a copy of the police narrative reports regarding a "shooting incident on 1/27/94 involving Floyd Willis and Reginald Hubbard at 700 E. Waco Dr.," and a "9-1-1 tape copy of [the] incident . . . around 4:30 at 700 E. Waco Dr. . . . regarding the shooting of Reginald Hubbard (initial call)." You say that the requested police narrative reports are part of an investigation that is of some public interest because it involves an incident in which a white shopkeeper shot a black person for allegedly shoplifting a can of Spam.

You also say that the city is willing to release the requested audiotape recording to the requestor. The city objects, however, to releasing the requested police narrative reports. You claim the city may release to the requestor another document that you believe is responsive to the request, a document entitled "Major Incident Form," in lieu of the requested police narrative reports. In the alternative, you claim that sections 552.103 and 552.108 of the Government Code (the "code") except portions of the requested police narrative reports from required public disclosure and that the city may charge the requestor for the time it takes the employee to review the police narrative reports and redact any "confidential or non-disclosable information" that they may contain. We assume that the quoted reference is to information subject to a nonmandatory exception such as section 552.103 or 552.108.

We address first whether the city may release to the requestor the Major Incident Form in lieu of the requested police narrative reports. You explain that the city prepares

this form in instances involving serious offenses such as murder. The form contains all applicable categories of information that this office has previously determined to constitute public information pertaining to pending criminal investigations. See Open Records Decision No. 127 (1976) at 3-4 (summarizing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976)). We understand, then, that the Major Incident Form contains a summary of the police narrative reports and that you believe the reports do not contain any information subject to required public disclosure that does not also appear in the form.

We also understand that a copy of the Major Incident Form was offered to the requestor in lieu of redacted copies of the police narrative reports, but that the requestor has insisted on obtaining copies of the police narrative reports. In Open Records Decision No. 606 this office held that the act

requires a governmental body to release a copy of an actual requested record, with any confidential or nondisclosable information excised. The act does not permit a governmental body to provide a requestor with a new document on which only the disclosable requested information has been consolidated and retyped.

Open Records Decision No. 606 (1992) at 3 (footnote omitted). While that decision provides us with some guidance, it does not, strictly speaking, govern the situation presented here. In Open Records Decision No. 606, the governmental body proposed to generate a new document in response to a request, one that contained the disclosable information that the requestor sought. Here, you seek to provide the requestor with the disclosable information in the form of a compilation that existed at the time the request was made. Thus, your situation is a novel one for consideration in an open records decision.

It should be said that we commend and encourage the city's efforts to maintain records containing only information for public release separate from records containing information that may be withheld from public disclosure. Such separation makes retrieved public information ready for inspection or copying without the necessity of sorting out or redacting information that is excepted from required disclosure. Separate record-keeping thereby furthers the act's goals by facilitating and expediting requests for information and reducing the costs of providing public information. Guidelines promulgated by the General Services Commission also encourage segregation of excepted information from information that is not excepted from required public disclosure. Section 111.62 of the guidelines provides that "[g]overnmental bodies should compile and maintain information, especially information that is likely to be the subject of repeated requests for access or copies, in a manner that maximizes the ready availability of the information." See 1 T.A.C. § 111.62; see also Act of May 29, 1995,

74th Leg., R.S., ch. 1035, sec. 17, § 552.272(d), *available in* Westlaw, Tx-Legis 1035 (1995) (copies available at House Document Distribution Office) (to be codified as Gov't Code § 552.272(d)) ("If information is created or kept in an electronic form, a governmental body is encouraged to explore options to separate out confidential information and to make public information available to the public through electronic access through a computer network or by other means").

The foregoing notwithstanding, we believe that the city may not require the requestor to accept the Major Incident Form as a substitute for any portions of the requested narrative reports that are not excepted from required disclosure.¹ The Open Records Act implements the policy of promoting the people's control over their governmental institutions. Gov't Code § 552.001(a). "The people . . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.* The act's policy is not served by a construction that permits a governmental body to provide another record in lieu of one that has specifically been requested. If a requestor seeks a particular public record and that record is not completely excepted from required public disclosure, the act requires the release of the record or the portions thereof that are not excepted. *See id.* §§ 552.021, .101 - .203. Information is not removed from the scope of the act merely because a governmental body has copied it into another record, either in the same language or in a compiled, edited, summarized, improved, or otherwise altered form. *See id.* § 552.228 (requiring "governmental body to provide a suitable copy of a public record"); Open Records Decision No. 606 (1992) at 2-3.

We recognize that inconvenience and added expense may sometimes be the consequences of this interpretation of the act. We are convinced, however, that in many, if not most, cases the governmental body will be able to avoid these consequences. Requestors ordinarily will have more interest in the substance of the information sought, as opposed to its form, and will therefore be satisfied with the requested information in the form most convenient to the governmental body.² Moreover, requestors ordinarily will wish to avoid the added delay that compliance with a "special" request may entail. It

¹You cite Open Records Decision Nos. 353 (1982) and 87 (1975) as authority for the proposition that a governmental body may "extract" information suitable for public release from documents containing "non-disclosable" information and then create a new document containing only the information suitable for public release. Open Records Decision No. 606 implicitly overruled Open Records Decision Nos. 353 and 87.

²The court in *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex. App.—Houston [1st Dist.] 1984, no writ), discussed the differences between a request for records and a request for information and suggested that where a requestor merely seeks *information*, the act requires the governmental body to release the requested information on any, not every, record on which it is contained, unless it is excepted from required disclosure. *Id.* at 323. Here, however, we are dealing with a request for specific *records*.

is proper for a governmental body to respond to a request by advising the requestor of the types of information available so that he may narrow his request. Open Records Decision No. 31 (1974); *see also* Open Records Decision No. 561 (1990) at 8-9. Such advice will benefit both parties to many requests, for in those cases the requestor will be satisfied to receive the desired information in a record that is immediately available and the governmental body will thereby avoid the chore of redacting excepted information.

On the other hand, there will be instances when the requestor will insist on a particular record that contains excepted public information. Although compliance with the request may burden the governmental body, the custodian of records is not authorized to assume the power of determining whether the public has a legitimate reason to see a redacted copy of a record. We believe that when a person requests a specific record that contains excepted information that may be redacted, the locations of the redactions in the record and the amount of information redacted may in themselves constitute information of public significance.

For the foregoing reasons, we conclude that the city may not discharge its duty to comply with the Open Records Act by releasing the Major Incident Form as a substitute for the requested police narrative reports, unless, of course, the requestor specifically agrees to such a substitution.

Next, we address whether section 552.108 of the code excepts portions of the requested narrative reports from required public disclosure. Section 552.108 excepts from required public disclosure “[a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime” and “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.” Section 552.108 applies only to cases that are still under active investigation and not to those that are closed. *See, e.g.*, Open Records Decision No. 611 (1992) at 2-3. In cases that are still under active investigation, this section excepts from required disclosure all information except that which is generally found on the first page of the offense report. *See generally* Open Records Decision No. 127 (1976) (citing *Houston Chronicle Publishing Co.*, 531 S.W.2d 177).

You inform us that a state grand jury has indicted the shopkeeper for murder and that the murder charge is pending. We have reviewed the initial police narrative report at issue³ and generally agree that the information you have marked comes under the

³It appears from your correspondence that there are other police narrative reports relating to the subject file, but you submitted only the initial report to us for review. We are treating this initial report as a “representative sample,” and we assume that it is truly representative of the requested records as a whole. *See* Open Records Decision No. 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This decision does not reach, and therefore does not authorize the

protection of section 552.108 in accordance with Open Records Decision No. 127. We have marked those portions of the report that are not so excepted and that the city must release.⁴

Finally, we address whether the city may charge the requestor for the employee time that will be spent in reviewing the narrative reports and redacting information subject to nonmandatory exceptions. Subchapter F of the act (code sections 552.261 through 552.269) generally governs charges for copies of and access to public records, depending, among other things, on the type of records sought, for example, standard pages (section 552.261), nonstandard pages (section 552.262), and certified pages (section 552.265), and the volume of records requested. The records at issue here are standard or legal size and are therefore governed by section 552.261(b), which provides as follows:

(b) The cost of obtaining a standard or legal size photographic reproduction shall be an amount that reasonably includes all costs related to reproducing the record, including costs of materials, labor, and overhead, unless the request is for 50 or fewer pages of readily available information.

In Attorney General Opinion JM-114 (1983) this office addressed issues similar to those arising here. Specifically, this office addressed charges associated with voluminous requests for information and held that it is impermissible to charge for employee time spent in deleting any excepted material from requested documents. Attorney General Opinion JM-114 (1983) at 4. That opinion construed an earlier version of the act's cost provisions. Responding to concerns raised by the effect of Attorney General Opinion JM-114, see Bill Analysis to S.B. No. 560, 70th Leg. (1987), the Seventieth Legislature amended the statutory predecessor of section 552.261(b), adding language that permitted a governmental body to charge "all costs related to reproducing the record, including costs of materials, labor, and overhead unless the request is for 50 pages or less of readily available information," see Act of June 1, 1987, 70th Leg., R.S., ch. 964, § 1, 1987 Tex.

(footnote continued)

withholding of, any other requested records to the extent that those records contain substantially different types of information than that contained in the representative sample submitted to this office.

⁴To the extent that information in the narrative reports is excepted under section 552.108, we need not consider whether it is also excepted under section 552.103. Furthermore, to the extent that information in the narrative reports is not excepted under section 552.108, we believe that all such information would have been made known to the defendant shopkeeper in the indictment or supporting affidavits. "Because section [552.103] does not allow a governmental body to withhold information that has already been made available to the other party in litigation, the basic information in the offense report must be made available to the requestor." Open Records Decision No. 597 (1991) at 3.

Gen. Laws 3282, 3282. *See also* Open Records Decision No. 488 (1988) at 6-7. This amendment to the act's cost provisions substantially reflects the law in its current state.⁵

In Open Records Decision No. 488 (1988), this office revisited the Open Records Act's cost provisions, addressing the extent to which the 1987 amendments to the cost provisions supersede Attorney General Opinion JM-114. In particular, this office considered the meaning of the qualification "unless the request is for 50 pages or less of readily available information," Open Records Decision No. 488 (1988) at 6-8, holding that records containing information made confidential by code section 552.101⁶ may not be "readily available" for purposes of section 552.261(b) if a governmental body is required to redact or sort out such information before it permits public access to the records and incurs costs in the process of sorting or redacting. *Id.* at 8. Relying in part on *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 688 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), this office held that

the deletion of [section 552.101] material may be considered in determining whether information is "readily available" under [section 552.261(b)]. In requests of 50 pages or less, if public information is intertwined with *confidential information* or if the governmental body must perform an extensive physical search to sort out *confidential records*, charges may be made for materials, overhead, and labor in deleting or separating the confidential information.

Open Records Decision No. 488 (1988) at 8 (emphasis added); *see also* Attorney General Opinion JM-292 (1984) (holding that governmental body may under certain circumstances charge requestor for redacting confidential information before providing access to requested information).

We do not believe that the rationale of Open Records Decision No. 488 can be extended to permit a governmental body to charge a requestor costs incurred in redacting or sorting out information excepted under any of the act's nonmandatory exceptions, for example, information excepted from disclosure under section 552.103, 552.107, 552.108, or 552.111 of the Government Code. Open Records Decision No. 488 limited its discussion to the redaction of confidential information and premised its holding that a

⁵The Seventy-third Legislature codified the Open Records Act (formerly V.T.C.S. article 6252-17a) as Government Code chapter 552. Act of April 30, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 583. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47, at 986.

⁶Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.352 of the code makes it a criminal offense to release information excepted under section 552.101.

governmental body may charge a requestor for redacting confidential information on the statutory prohibition against release of confidential information. While a governmental body may expose itself to criminal and civil liability for releasing confidential information, the release of information excepted under the act's nonmandatory exceptions gives rise to no liability whatsoever. By the same token, the release of copies of records containing information excepted under the act's nonmandatory exceptions does not require a governmental body to redact records prior to their reproduction and release. Thus, under the analysis offered in Open Records Decision No. 488, we believe that the fact that portions of a record fall within any of the act's nonmandatory exceptions to required public disclosure is not a factor properly considered in determining whether the record is "readily available."⁷ Cf. Open Records Decision No. 488 (1988) at 8. Similarly, we do not believe that costs incurred in redacting from a record information excepted under any of the act's nonmandatory exceptions constitute "costs related to reproducing the record" under section 552.261(b) of the Government Code. Cf. *id.* at 6.

We also believe there are important policy reasons for disallowing redaction charges with respect to nonmandatory exceptions. First, as noted in Attorney General Opinion JM-114, if a requestor could be charged for the time it takes a governmental body to redact information that it merely chooses to withhold from the public, the requestor would have to pay *more* for *less* information. "Under this conclusion, the more the government decides to withhold, the more the requestor will have to pay." Attorney General Opinion JM-114 (1983) at 4. Furthermore, if a governmental body were authorized to charge for the time it takes to redact information that comes under the protection of one of the Open Records Act's nonmandatory exceptions, it would have no incentive to exercise restraint in raising nonmandatory exceptions, and thus the requestor's costs of access and barriers to access would be unnecessarily high. Conversely, lacking authority to charge for redacting, a governmental body has an

⁷The Seventy-fourth Legislature's House Bill No. 1718 amends code section 552.261 to read as follows:

The cost of obtaining a copy of public information shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead. If a request is for 50 or fewer pages of paper records, the charge for the public information may not include costs of materials, labor, or overhead, but shall be limited to the photocopying costs, unless the pages to be copied are located in:

- (1) more than one building; or
- (2) a remote storage facility.

Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 16, available in Westlaw, Tx-Legis 1035 (1995) (copies available at House Document Distribution Office) (to be codified at Gov't Code § 552.261). The amendment thus substitutes the specific criteria found in subsections (1) and (2) above for the current standard of ready availability. The above-quoted change to section 552.261 becomes effective on September 1, 1995. *Id.* § 29.

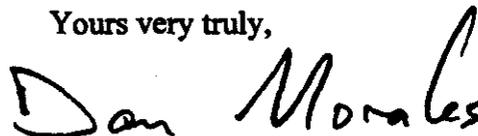
incentive to consider more carefully whether it is in its best interest to withhold information from public view because it, and not the requestor, must bear the costs of denying access to the information.

We therefore conclude that a governmental body may not charge for costs incurred in redacting information excepted from disclosure by the act's nonmandatory exceptions. Accordingly, the City of Waco may not charge the requestor any cost incurred in redacting information excepted under section 552.108 of the Government Code.

S U M M A R Y

The City of Waco does not comply with the Open Records Act by releasing to a requestor of police narrative reports a "Major Incident Form" as a substitute for any report portions that are not excepted from required public disclosure, unless the requestor agrees to the substitution. In addition, the Open Records Act does not permit the City of Waco to charge the requestor for costs incurred in redacting from the requested narrative reports information that falls within any of the Open Records Act's nonmandatory exceptions to required public disclosure.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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