



February 7, 2001

Mr. Michael G. Morris
Attorney at Law
5350 South Staples, Suite 222
Corpus Christi, Texas 78411-4684

OR2001-0477

Dear Mr. Morris:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143622.

The City of Port Aransas Police Department (the "department"), which you represent as the city attorney for the City of Port Aransas, received a request for eight enumerated categories of information made by an attorney in connection with the arrest of his client on September 12, 2000. You have advised the requestor that there exists no information responsive to item 2 of the request. You have submitted for our review documents marked with tabs 1 and 3 through 8, which we understand comprise information responsive to the same respective enumerated items of the request. Among other arguments, you assert that this information is excepted from disclosure under section 552.103 of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the exception you claim, the submitted comments and arguments, and we have reviewed the submitted information.

At the outset, the requestor contends that because the department "failed to respond within the requisite ten (10) days" of his request, the information is presumed to be public. We note that section 552.301 provides for time limits of ten and fifteen *business* days after the date of the governmental body's receipt of the request. *See* Gov't Code § 552.301(b), (d), (e); *see also* Gov't Code § 552.302. Based on your representation that the request was received by the department on November 3, 2000 and our review of the submitted information, we have no indication that the department failed to comply with the timeliness requirements of section 552.301. Therefore, we do not agree that the section 552.302 presumption of openness has been triggered in this instance.

Next, we address your contention that, in order for the department to provide information responsive to items 1, 5, and 6, the request “requires that the [department] accept” the requestor’s characterizations of the arrest and booking of the named individual. We disagree. Whatever the particular wording of the request, a governmental body must make a good faith effort to relate a request under the Act to information which it holds. Open Records Decision No. 561 at 8 (1990). The department may also explain to the requestor the types of records it holds which *may be* responsive to the request, and seek clarification from the requestor as to the particular records the requestor seeks. *See* Gov’t Code § 552.222(b). With respect to items 5 and 8 of the request, you also essentially assert both that the department is not required to “perform a search” for responsive information and that the department is not required to prepare new information in order to respond to the request. As to the former assertion, we disagree. The department’s good faith effort to relate a request to information held by it includes the obligation to “perform a search” for records held by the department that are responsive to the request. As to the latter assertion, we agree. It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov’t Code §§ 552.002, .021, .227, .351. Thus, this office has held that a governmental body is not *required* by the Act to prepare new information in order to respond to a request, or prepare new information in order to answer questions. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 555 at 1-2 (1990), 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). You indicate that the department, although not required by the Act to do so, has prepared new information responsive to item 5. You have also appropriately compiled and submitted for our review the information responsive to item 8. Accordingly, we shall next address the submitted information.

In pertinent part, section 552.022 provides that the following categories of information “are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Gov’t Code §552.022(a)(1), (14). The information in tabs 1 and 6 each document completed investigations, and tab 1 contains completed reports. This information is therefore subject to section 552.022(a)(1). You do not assert section 552.108 with respect to any of the information in tab 1 or 6. The information in tab 3 is subject to section 552.022(a)(14), in that it evidently was obtained from an administrative staff manual, and comprises instructions to staff that affect a member of the public. Even if applicable, section 552.103 is a discretionary exception under the Act and does not thereby constitute other law that

makes information expressly confidential.¹ The information in tab 6 is marked "classified," but you have cited no authority that makes the entirety of this information confidential, nor are we aware of any. Information subject to the Act is not confidential simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential, nor can a governmental body promise to keep information confidential absent statutory authorization. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). Accordingly, except as otherwise specifically noted herein, we conclude that the information in tabs 1, 3, and 6 is subject to release to the requestor pursuant to section 552.022. We next address the section 552.103 assertion with respect to the remaining information.

Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature 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.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the department must demonstrate that (1) litigation involving the department was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *University of Texas Law Sch. v. Texas Legal 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). As to the first prong of section 552.103, you represent that "criminal litigation" is pending in cause number 00-7854-3 in the Nueces County Court at Law No. 3. We understand this to be the criminal case arising from the September 2000 arrest of the requestor's client. The

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

information you have provided indicates that the county attorney is the prosecutor in the pending case. Although your representations indicate that litigation was pending or reasonably anticipated at the time the department received the request, other than the defendant, you do not inform this office of the parties in the case. We have no indication that the department or any employee of the department is a party to the case. Thus, you have not demonstrated that the department is involved in the litigation. In addition, you have not demonstrated that the county attorney, on his or her own behalf, has requested that the department's information be withheld by the department pursuant to section 552.103. *See, e.g.,* Open Records Decision No. 469 (1987). As you have not met the first prong of the above-stated test, we have no basis for concluding that any of the submitted information is excepted from disclosure pursuant to section 552.103.

We note, however, that the submitted information includes the social security number of a peace officer, which we have marked. Section 552.117(2) of the Government Code makes this information confidential. *See* Gov't Code § 552.117. The department must therefore redact the officer's social security number prior to the release of the documents.

We also note that portions of the submitted information must be withheld pursuant to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license number, vehicle identification number, and license plate number information we have marked under section 552.130.²

Finally, we note that the submitted information includes an individual's social security number, which we have marked, and which may be subject to required withholding under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These

²We have not marked for redaction the section 552.130 information of the requestor's client, in that the requestor has a special right of access to this information. *See* Gov't Code § 552.023.

amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, pursuant to section 552.022 and because the department has not demonstrated the applicability of section 552.103, the submitted documents are subject to release to the requestor. However, prior to their release, the department must first redact from the documents the information we have marked that is subject to sections 552.117 and 552.130. The department may be required to also redact the social security number we have marked pursuant to section 552.101, as provided above. For your convenience, we have placed blue flags on the particular documents that contain our markings.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

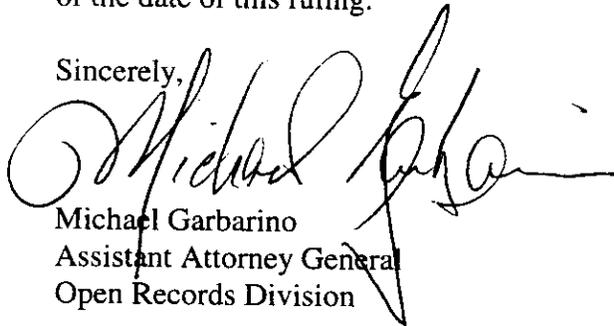
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 143622

Encl. Submitted documents

cc: Mr. Arnold Govella
Lawyer
P.O. Box 1433
Port Aransas, Texas 78343
(w/o enclosures)