OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

July 25, 2001

Ms. Laura Garza Jimenez
County Attorney, Nueces County
Nueces County Courthouse
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-3236

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149888.

The Nueces County Sheriff's Department (the "department") received a request for three categories of information.[1] You inform us that you have released to the requestor the lists referenced in the third category of information save for those regarding the year the named classes of officers achieved their rank, which you state you are in the process of providing for release. We thus assume that you have released all information responsive to the third category of information. However, in your May 18, 2001 correspondence to this office, you claim that the information responsive to categories 1 and 2, which you have submitted for our review, is excepted from disclosure under sections 552.107(1) and "the policy manual exception recognized in *Cornyn v. City of Garland*, 994 S.W. 2d 258 (Tex. App.–Austin, 1999)." Thus, we understand you to assert section 552.103 of the Government Code, commonly referred to as the "litigation exception." In subsequent correspondence to this office you additionally assert that information responsive to request items 1 and 2 is excepted from disclosure under section 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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[1]The requestor seeks, in three separate requests, 1) access to or copies of the Vertex Jail Costs Study, 2) copies of the department's standard operating procedures, and 3) access to or copies of a list of all sergeants, lieutenants, captains, and chiefs employed by the department with their rank, the year they achieved that rank, the number of years with the department, and their gender and ethnicity, excluding jail staff; the number of all sheriff's deputies with rank lower than sergeant separated by gender and ethnicity, excluding jail staff; a list of all sergeants, lieutenants, captains, and chiefs employed by the department's jail division with their rank, the number of years with the department, and their gender and ethnicity; and the number of all sheriff's deputies employed in the jail division with rank lower than sergeant separated by gender and ethnicity.

At the outset, we must address certain procedural matters. Section 552.301(b) requires a governmental body to "state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(b). You inform this office that the department received the request on May 7th, 2001. Thus, the tenth business day after that date was May 21, 2001. However, you did not assert the applicability of sections 552.108 and 552.111 until after that date. Thus, the department did not timely comply with section 552.301(b) with respect to the section 552.108 and 552.111 assertions.

In addition, the department was required to submit to this office no later than the fifteenth business day after the date of receiving the written request, among other information, "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld[.]" Gov't Code § 552.301(e)(1)(A). You did not submit any written comments in support of the section 552.107(1) claim, nor was any of the submitted information marked as excepted by this exception. *See* Gov't Code § 552.301(e)(2).

If a governmental body fails to request a decision from this office as provided by section 552.301, the information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. *See also Hancock v. State Board of Insurance*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predeccessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). In this case, the department has not provided a compelling reason under sections 552.107(1), 552.108, or 552.111 to overcome the presumption of openness.[2] *See, e.g.*, Open Records Decision No. 150 (1977) (compelling reason under section 552.302 demonstrated only where information is confidential by law or its release implicates third party interests); *but see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information under section 552.108 provides compelling reason for nondisclosure of information). Accordingly, none of the information may be withheld under sections 552.107(1), 552.108, or 552.111 of the Government Code. We next address the department's assertion under section 552.103.

You argue that section 552.103 excepts from disclosure the department's Standard Operating Procedures Manual and Jail Division Standard Operating Procedures Manual. Section 552.103 provides, in relevant part:

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[2]Discretionary 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)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception), 177 (1977) (section 552.108 is discretionary exception to disclosure that protects governmental body's interests and may be waived), 522 (1989) (discretionary exceptions in general).

> (a) Information is excepted from [required public disclosure] if it is 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.
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> . . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) 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). The city 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 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 city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform us that on May 4, 2001, the Nueces County judge was served with an original complaint, and you provide a copy of this complaint filed in federal district court, naming Nueces County, Texas and the department, among others, as defendants. Among the allegations in this complaint is a failure on the part of the defendants to provide proper and sufficient policies or procedures as to the screening of inmate, detainees, and arrestees in regard to their medical needs. After considering your arguments and the information provided, we conclude that the department has met the first prong of the test in that litigation was pending or reasonably anticipated at the time the department received the request. We further conclude that the information at issue in Exhibit 3 is related to that litigation, thus meeting the second prong of the test. Therefore, we agree that section 552.103(a) is applicable to the Exhibit 3 information, and that the information may be withheld under that section.

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. Further, 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).

As for the Exhibit 2 Vertex Jail Costs Study, in addition to denying the department's claims under section 552.302, we also find that the exhibit is subject to disclosure pursuant to section 552.022. Section 552.022 of the Government Code states in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category is "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]" *Id.* § 552.022(a)(5). Exhibit 2, the Vertex Jail Costs Study, is information used to estimate the need for or expenditure of public funds or taxes by a governmental body and thus is subject to section 552.022(a)(5). You have not established that the study is "made confidential under other law." Thus, the department must release the study to the requestor.

In summary, the department may withhold the information in Exhibit 3 under section 552.103 of the Government Code. The remaining information must be released to the requestor pursuant to sections 552.022 and 552.302.

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).

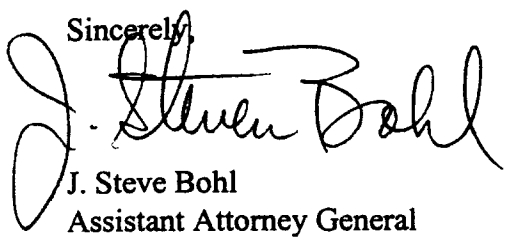
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



J. Steve Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 149888

Enc: Submitted documents

c: Ms. Mary Moreno, Staff Writer
Corpus Christi Caller-Times
820 N. Lower Broadway
Corpus Christi, Texas 78401-2025
(w/o enclosures)