



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 15, 2011

Mr. W. Lee Auvenshine
Assistant Ellis County & District Attorney
Ellis County Courts Building
109 South Jackson
Waxahachie, Texas 75165

OR2011-08517

Dear Mr. Auvenshine:

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# 420654.

The Ellis County and District Attorney's Office (the "district attorney") received a request for basic information from a specified offense report regarding the requestor's client and any related arrest warrant, arrest warrant affidavit, arrest report, or book-in report. You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, 552.130, and 552.147 of the Government Code and privileged under article 39.14 of the Code of Criminal Procedure. We have considered your arguments and reviewed the submitted information.

Initially, we note you have submitted information other than the basic information and any related arrest warrant, arrest warrant affidavit, arrest report, or book-in report. This information is therefore not responsive to the request. This ruling does not address the public availability of non-responsive information, and the district attorney is not required to release non-responsive information in response to this request.

Next, you seek to withhold the submitted information pursuant to article 39.14 of the Code of Criminal Procedure. We note, however, article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. Article 39.14 does not expressly make information confidential for purposes of the Act. *See* Open Records

Decision Nos. 658 at 4 (1998) (statutory confidentiality under section 552.101 must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating information shall not be released to public); *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating discovery privileges are not covered by statutory predecessor to section 552.101). We therefore conclude the district attorney may not withhold any of the submitted information under article 39.14 of the Code of Criminal Procedure.

You seek to withhold the responsive information under section 552.103 of the Government Code, which provides in relevant part as follows:

(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.

...

(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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that, prior to the district attorney's receipt of the present request for information, the district attorney was prosecuting an alleged offense in a pending criminal case, styled *State of Texas v. Rogelio Reymundo Aguilar*, Cause No. 11:0192 CR, in Ellis County Court at Law No. 2. Furthermore, you state the responsive information relates to the

substance of this litigation. Based on your representations and our review, we conclude litigation was pending when the district attorney received the request. We also find the responsive information relates to the pending litigation for purposes of section 552.103. Therefore, section 552.103 of the Government Code is generally applicable to the responsive information.

However, the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.); see Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code even if it is related to the anticipated litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from this incident report and the arrest report may not be withheld on the basis of section 552.103 of the Government Code. We note basic information does not include Texas motor vehicle record information subject to section 552.130 of the Government Code. Therefore, with the exception of basic information, the district attorney may generally withhold the responsive information under section 552.103 of the Government Code.¹

Additionally, once information is obtained from or provided to all the opposing parties in the litigation, there is no interest in withholding that information under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

In summary, except for basic information, the district attorney may withhold the responsive information under section 552.103 of the Government Code, to the extent the district attorney's opposing party has not seen or had access to this information.² To the extent the district attorney's opposing party has seen or had access to this information, it must be released.

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue, except to note section 552.103 does not generally except from disclosure the same basic information that must be released under section 552.108(c). See Open Records Decision No. 597 (1991).

²We note the information being released contains the requestor's client's social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b). However, section 552.147 is based on privacy principles; therefore, the requestor has a right of access to her client's social security number. See generally *id.* § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 420654

Enc. Submitted documents

c: Requestor
(w/o enclosures)