



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2011

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

OR2011-08644

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# 420934.

The Ellis County Sheriff's Office (the "sheriff") received a request for basic information, including the front page from a specified offense report regarding the requestor's client, and any related search warrant, search warrant affidavit, arrest warrant, arrest warrant affidavit, arrest report, or booking report. You claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.108 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.¹

Initially, we note you have submitted information other than basic information, including the front page from a specified offense report regarding the requestor's client, and any related search warrant, search warrant affidavit, arrest warrant, arrest warrant affidavit, arrest report, or booking report as specified in the request. This information is not responsive to the request. This ruling does not address the public availability of non-responsive

¹We assume, to the extent any additional information responsive to the instant request existed when the sheriff received the request for information, you have released it to the requestor. If not, then you must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

information, and the sheriff is not required to release non-responsive information in response to this request.

You seek to withhold the responsive information pursuant to article 39.14 of the Code of Criminal Procedure. 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 that information shall not be released to public); *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating that discovery privileges are not covered by statutory predecessor to section 552.101). We therefore conclude the sheriff may not withhold any of the responsive information under article 39.14.

Section 552.103 of the Government Code 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). 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 (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. *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.*); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Although you assert the basic information in the submitted offense report relates to pending criminal litigation by the Ellis County District Attorney (the "district attorney"), in Open

Records Decision No. 597 (1991), this office determined that basic information may not be withheld under the statutory predecessor to section 552.103. ORD 597 at 3. Accordingly, the basic information in the submitted offense report may not be withheld under section 552.103 of the Government Code.

You also assert the responsive arrest report and arrest warrant affidavit relate to pending criminal litigation. We note that the sheriff is not a party to the criminal prosecution by the district attorney, and therefore does not have a litigation interest in the matter for purposes of section 552.103. In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You, as a representative of the district attorney, state that the release of the submitted arrest report and arrest warrant affidavit could interfere with the district attorney's prosecution of the pending criminal litigation. Based on your representations and our review, we agree litigation was pending as of the date the request was received and that the submitted arrest report and arrest warrant affidavit relate to the pending criminal litigation. Thus, section 552.103 is generally applicable to the submitted arrest report and arrest warrant affidavit.

However, it appears that the opposing party to the pending criminal litigation may have seen or had access to the arrest warrant affidavit. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party to pending litigation has already seen or had access to the arrest warrant affidavit through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent the opposing party to the pending criminal litigation has already seen or had access to the arrest warrant affidavit, such information is not excepted under section 552.103; however, to the extent the opposing party to the pending criminal litigation has not already seen or had access to the arrest warrant affidavit, the sheriff may withhold this information, along with the responsive arrest report, under section 552.103 of the Government Code.

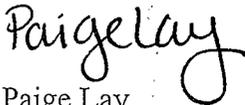
In summary, to the extent the opposing party to the pending criminal litigation has not seen the arrest warrant affidavit, the sheriff may withhold this information, along with the responsive arrest report, under section 552.103 of the Government Code. To the extent the opposing party has seen or had access to this information, it must be released.²

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eb

Ref: ID# 420934

Enc. Submitted documents

cc: Requestor
(w/o enclosures)