



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1994

Mr. Matthew Masek
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002-1891

OR94-307

Dear Mr. Masek:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 24190.

The Harris County Sheriff's Office (the "sheriff") has received a broad request for information relating to county jail operations. Specifically, the requestor seeks:

- (1) Names of all ranking personnel and position; shifts and telephone extension numbers at central and annex jails - Downtown Houston;
- (2) Personnel Conduct Manual;
- (3) Personnel Rules and Regulation Manual;
- (4) Inmate Classification Rules, Regulations; Procedure and Guidelines for custody and housing assignments, jobs, and educational assignments;
- (5) Department Grievance Procedural Manual, or Rules and Procedures for handling inmates' grievances, as certified by the Atty Gens of the United States, and the State of Texas, or County Commissioners Court;
- (6) Department Disciplinary Procedural Manual, Rules and Procedural Guidelines for administering disciplinary action upon inmates; include confinement in solitary, or administrative segregation due to disciplinary authority sanction;

- (7) Department Mail Handling Policies/Procedures relating to incoming inmate mail and items rejected as contraband; and rules and regulations for pre and post disposition of nude magazines and photos; stationary supplies; and operations of jail mail room policies - days and hours;
- (8) Policy regarding use of mechanical restraints;
- (9) Policy regarding strip searches;
- (10) Policy regarding cavity searches (Visual);
- (11) Policy regarding uses of force, Admin Seg.;
- [12] Housing and Classification Criterias [*sic*]
 - (a) assaultive status;
 - (b) nonassaultive status;
 - (c) criteria for confinement;
 - (d) criteria for release;
- [13] Admin Seg. assignment categories and criterias [*sic*]
 - (a) protective custody;
 - (b) assaultive to staff and inmates;
 - (c) disciplinary - repetitious infractive [*sic*] behavior;
 - (d) escape risk.

The requestor defines "manual" broadly as:

Any written document describing rules, regulations, policies and procedures and containing guidelines, instructions and directions; also, authorizing or restricting activities. Including: inter-departmental memorandas, post-orders, bulletins, directives and other administrative written communications amending, modifying or deleting any of the above aforementioned and/or hereinafter indicated and requested information. [*sic*]

You object to the release of the requested information, representative samples of which you have submitted to us for review. You seek to withhold the requested information under sections 552.103(a) and 552.108 of the Government Code.

You claim that section 552.103(a) of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103(a) 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 (1989) at 4. 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 (1990) at 3. Information is excepted from public disclosure by section 552.103(a) if litigation is pending or reasonably anticipated and the information relates to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Whether litigation may be anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You claim that the requested information relates to anticipated litigation. You advise us as follows:

The Sheriff anticipates that [the requestor] will pursue litigation against Harris County, the Sheriff's Department, and the Sheriff's employees in the future. The information requested . . . may be related to such litigation. [The requestor] has previously filed suit against the City of Houston regarding the city's no smoking ordinances in the Harris County Jail. [The requestor], a current inmate at the Jail who refers to himself as a "Jailhouse Lawyer", has filed innumerable complaints and grievances against the Sheriff during his incarceration. For these reasons, the Sheriff anticipates that [the requestor] plans to file suit.

This office has concluded that a reasonable likelihood of litigation existed in the following circumstances: Where a person made allegations which indicated that a police officer engaged in actionable conduct and stated in writing that he believed he could seek

redress in federal court, Open Records Decision No. 418 (1984); where an attorney made a written demand for disputed payments and promised further legal action if they are not forthcoming, Open Records Decision No. 551 (1990); and where a requestor hired an attorney who asserted an intent to sue, Open Records Decision No. 455 (1987). We have examined the requestor's letter to the sheriff. Nowhere in this letter does the requestor evince an intent to seek redress for alleged wrongs in court or any other judicial or quasi-judicial forum. The fact that the requestor has sued the city in the past is not by itself probative of his intent to sue the county in the future. Moreover, the fact that the requestor has filed complaints or grievances against the jail does not, by itself, indicate his intent to institute litigation against the county. We conclude that you have not provided this office with evidence sufficient to demonstrate that litigation may be reasonably anticipated. Accordingly, we conclude that in this instance litigation may not be reasonably anticipated and that the county may not withhold the requested information under section 552.103(a) of the act.

You also claim that section 552.108 of the Government Code exempts the requested information from required public disclosure. Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An 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 is excepted from [required public disclosure].

Gov't Code § 552.108.

When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 exempts from disclosure all information except that generally found on the first page of the offense report. *See generally* Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). This office has on numerous occasions concluded that section 552.108 exempts from public disclosure information relating to the security or operation of a correctional facility. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 exempts detailed guidelines regarding a police department's use of force policy); 508 (1988) (holding that release of dates of prison transfer could impair security); 413 (1984) (holding that section 552.108 exempts sketch showing security measures for execution).

Apart from generalized assertions that release of jail operation manuals might undermine jail security, you have not reasonably explained how the release of the jail manuals at issue here would unduly interfere with law enforcement. Having examined the submitted information, however, we conclude that portions of the requested manuals demonstrate on their face that their release would undermine jail security. Specifically, we conclude that the sheriff may withhold sections 11.6 through 11.6h of the document titled "Department Manual" and the marked portions of the document titled "Harris County Sheriff's Department Classification Division Directives Policy & Procedures Manual & Housing and Cellblock Classification Index" under section 552.108 of the Government Code.¹ The sheriff may also withhold section P3.29 of the document titled "Standing Policies for Inmate Management" and sections 3.05 through 3.10 and sections 3.45, 3.50, 3.50b, and 3.54 of the document titled "Standard Operating Procedures for Inmate Management" provided that this information is not being released to federal prisoners pursuant to section 2.29 of the same document. If the information is being released to federal prisoners, its release under the Open Records Act would not further undermine jail security and the information must also be released to other prisoners. Release of the remaining portions of the requested information would not, in our opinion, unduly interfere with law enforcement. Accordingly, we conclude that section 552.108 of the Government Code does not except the remaining portions of the requested information.

We note, however, that you may not withhold under section 552.108 any information that you have not submitted for review. Generally, we may not review one set of documents and conclude that releasing another set of documents would unduly interfere with law enforcement. Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision Nos. 434 at 2; 287 (1981) at 1-2. We must review each document you claim is excepted from disclosure by section 552.108 to determine whether releasing the document would unduly interfere with law enforcement.

Finally, we address your contention that the Open Records Act does not require you to respond to the request for information merely because the requestor seeks to exempt himself from the cost provisions of the Open Records Act. Subchapter F (sections 552.261 through 552.269) of the Open Records Act generally governs charges for copies of and access to public records. Section 552.261 regulates charges for copies of public records. We note that the requestor does not seek copies of the requested information, but seeks only that the requested information "be made accessible . . . by general

¹We note that section 552.101 of the Government Code in conjunction with common-law privacy may protect portions of the Classification Division manual. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public); Open Records Decision Nos. 565 (1990); 216 (1978). We need not reach this question, however, as we resolve this matter under section 552.108 of the Government Code.

publication in the law library; or, accessible in a secure confined area where applicant may copy and inspect the records, books or documents." Accordingly, we address only the cost provisions relating to access to public records.

Section 552.262 regulates charges for access to inspect nonstandard public records. This section generally requires a charge for access to public records that are in a form other than pages of legal size or smaller, including those "that are in computer record banks, microfilm records, or other similar record keeping systems." Gov't Code § 552.262; *see Hendricks v. Board of Trustees*, 525 S.W.2d 930, 932-33 (Tex. Civ. App.-Houston [1st Dist.] 1975, writ ref'd n.r.e.). The governmental body's officer for public records must consult with the General Services Commission before setting the charge and must "make[e] every effort to match the charge with the actual cost" that "reasonably includes all costs related to providing the record, including costs of materials, labor, and overhead." Gov't Code § 552.262. If the requestor desires mere access for inspection and the requested information does not contain and is not commingled with information that is confidential by law, section 552.261 does not authorize a charge for access to any number of pages of legal size or smaller. *See Hendricks*, 525 S.W.2d at 933 (construing the statutory predecessor to section 552.261 to place documents of legal size or smaller in "the class for which no charge may be made" for access); Attorney General Opinion JM-114 (1983) at 4.

We have examined the information submitted to us for review. We conclude that it does not include records other than pages of legal size or smaller and does not contain information that is commingled with information that is confidential by law.² Accordingly, we conclude that the sheriff may not charge the requestor for access to the requested information and, except as noted above, must provide the requestor access to the requested information in its entirety.³

²"[T]he option of access is not available if giving the requestor access to the records would give access to information deemed confidential under the act." Open Records Decision No. 488 (1988) at 6; *see Industrial Foundation*, 540 S.W.2d at 687; Attorney General Opinion JM-672 (1987). Where granting a request to inspect records is impracticable because it will be necessary to copy and redact the requested records to delete confidential information, the governmental body must prepare redacted copies in lieu of the original records. *See* Gov't Code § 522.221(a) (concluding that "a governmental body shall promptly produce public information for inspection, duplication, or both"). In such a case the governmental body may treat the request as though it were one for copies under section 552.261 and may charge for the preparation costs to the extent permitted by that section. *See* Open Records Decision No. 488 at 7-8. Here, however, redaction of information protected under section 552.108 is not required. Accordingly, the sheriff may not charge for preparation costs to the extent permitted under section 552.261.

³We note that other statutes may prevail over the cost provisions in the act. Sections 552.261 and 552.262 do not repeal a fee schedule for copies established by another statute. *See* Attorney General Opinions MW-163 (1980); H-560 (1975); *see also, e.g.,* Local Gov't Code §§ 118.141(3), .144 (county treasurer may collect one dollar for certified or noncertified copy of each page or part of page of document); *cf.* Gov't Code § 552.266 (charge for copy made by municipal court clerk shall be as set by ordinance). Section 9A is cumulative of former V.T.C.S. article 6252-17a, section 9, *see* Acts 1993, 73d Leg., ch. 428, sec. 5, § 9A(d), and thus also appears to leave other statutory fee schedules unaffected. We are unaware of any statutes that in this instance prevail over the cost provisions of the Open Records Act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



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Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 24190

Enclosures: Marked documents

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