



Office of the Attorney General
State of Texas

June 21, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Lonnie E. Blaydes
Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
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OR93-336

Dear Mr. Blaydes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 20421.

Dallas Area Rapid Transit ("DART") has received a request for information relating to a certain police investigation. Specifically, the requestor seeks "copies of all documents, correspondence, and tapes of your recent transit police investigation into the alleged misconduct of three Crawford Technical Services employees." You have submitted the requested information to us for review and claim that it is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

You contend that some of the requested information is excepted from required public disclosure by section 3(a)(1) in conjunction with the informer's privilege. Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of *citizens* to communicate their

knowledge of the commission of crimes to law- enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

The informer's privilege aspect of section 3(a)(1) protects the identity of persons who report violations of the law. The content of an informer's communication may be withheld where it is necessary to protect the informer's identity. Open Records Decision No. 377 (1983). When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). Thus, the informer's privilege does not protect memos or written statements complaining of a public employee's work performance when those statements do not reveal a crime or the violation of specific laws. Open Records Decision No. 515. Moreover, when statements are taken from employees responding to questions presented to them in the scope of their employment, the informer's privilege is ordinarily inapplicable. Open Records Decision No. 579 (1990).

We have examined the information that you seek to withhold under the informer's privilege. On its face, this information does not constitute a communication reporting a violation of the law, but merely a factual corroboration relating to a public employee's work performance. Moreover, the information appears to have been taken from employees, who are Dallas police officers, responding to questions presented to them in the scope of their employment. You have provided us with no information otherwise demonstrating the applicability of the informer's privilege. Accordingly, we conclude that none of the requested information may be withheld from required public disclosure under section 3(a)(1) of the Open Records Act.

You also claim that the requested information is protected from required public disclosure by section 3(a)(3) of the Open Records Act, which excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only where a governmental body has reasonably established the relationship of the subject matter of the requested information to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). The pendency of a complaint before the Equal Employment Opportunity Commission ("EEOC") indicates a substantial likelihood of litigation. Open Records Decision No. 386 (1983).

You advise us that two subjects of the investigation at issue here have filed notices of discrimination with the EEOC. Thus, litigation may be reasonably anticipated. You have not reasonably established, however, nor is it otherwise apparent, that the requested information bears a relationship to the subject matter of the anticipated litigation. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

Finally, you claim that the requested information is excepted from required public disclosure by section 3(a)(8) of the Open Records Act. Section 3(a)(8) excepts:

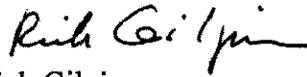
records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Where an incident involving allegedly criminal conduct is still under active investigation, section 3(a)(8) may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983). However, when the "law enforcement" exception is claimed as a basis for excluding from public view information relating to closed investigation files, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement. Open Records Decision Nos. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)); 397 (1983). Whether disclosure of particular records will unduly interfere with law enforcement must be determined on a case-by-case basis. Open Records Decision No. 409 (1984).

We have examined the documents submitted to us for review and have considered your arguments. You advise us that the DART Transit Police investigation regarding the allegations of employee misconduct at issue here has been completed, but that "a continuing District Attorney investigation of fraud surrounding the DART HandRides programs . . . could reasonably reach to these allegations of misconduct." You have not demonstrated, however, that the criminal conduct alleged in the DART Transit Police investigation is the subject of the district attorney investigation. We do not believe that the mere speculation that the district attorney investigation "could reasonably reach to these allegations of misconduct" is a reasonable explanation demonstrating how and why release of the records here would unduly interfere with law enforcement, nor do they offer an explanation on their face. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act and must be released in its entirety.

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,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/GCK/jmn

Ref.: ID# 20421
ID# 20433

cc: Mr. Michael Hill
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