



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1994

Mr. David M. Douglas  
Assistant Chief, Legal Services  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR94-605

Dear Mr. Douglas:

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# 26623.

The Texas Department of Public Safety (the "department") has received a request for information relating to a certain internal affairs investigation. Specifically, the requestor seeks "all documentation concerning the investigation of my complaint against Texas Ranger Sergeant Tommy Ratliff . . . [including] Sergeant Ratliff's statement of the event and the letter of reprimand he received." You have submitted the requested information to us for review and claim that sections 552.103 and 552.108 of the Government Code exempt it from required public disclosure.

First, we address your argument under section 552.103 of the Government Code. Section 552.103(a) exempts from required public disclosure 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.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate 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.); *see also* Open Records Decision No. 551 (1990) at 5. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. *Attorney General Opinion JM-266* (1984) at 4; *Open Records Decision Nos. 518* (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990). On the other hand, the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). Open Records Decision No. 452 (1986).

You argue that the department may withhold the requested information under section 552.103(a) because the requested information relates to litigation to which the department may reasonably anticipate being a party. You advise us that "Chief Maurice Cook, of the Texas Rangers Division, has advised . . . that the employee, who is the subject of the investigation sought by the requestor, has implied that he will sue the Department over this matter," "that he would hire an attorney, which he has done, and that he would not take the matter lying down." The fact that a person has "implied" a threat of litigation against a governmental body, hired an attorney, and manifested an attitude of resistance with respect to a governmental body's action against him does not alone give a governmental body a basis for reasonably anticipating litigation. *See, e.g.,* Open Records Decision No. 452. Accordingly, we conclude that the department may not withhold the requested information under section 552.103(a) of the Government Code.<sup>1</sup>

Next, we address your assertion that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts from disclosure the following information:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . .
- (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 . . . .

---

<sup>1</sup>We note that the opposing party to the claimed anticipated litigation has previously had access to much of the requested information. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.,* through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that is generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); 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) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

We have examined the records submitted to us for review. They appear to have been generated in connection with an on-going internal affairs investigation involving a department employee. Although law enforcement personnel are conducting the investigation, the investigation at issue cannot properly be characterized as a "law enforcement" investigation within the meaning of section 552.108, because it does not "deal[] with the detection, investigation, or prosecution of crime." Specifically, the investigation involves alleged violations of internal departmental policies and procedures, *i.e.*, a Texas Ranger's alleged lack of courtesy in dealing with the public, and does not involve the investigation and enforcement of criminal laws. Thus, the requested information does not relate to a pending law enforcement investigation. In addition, you have not explained, nor does the submitted information supply an explanation on its face, how release of the submitted information would unduly interfere with law enforcement. We conclude, therefore, that the department may not withhold the requested information under section 552.108 of the Government Code. The department must release the requested information 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,



Margaret A. Roll  
Assistant Attorney General  
Open Government Section

MAR/GCK/rho

Enclosures Submitted documents

Ref.: ID# 26623

cc: Mr. James H. Barry  
4812 Marblehead Drive  
Austin, Texas 78727-5231  
(w/o enclosures)