



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 25, 1995

Mr. Peter G. Smith
Law Offices of Nichols, Jackson, Dillard
Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR95-205

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31134.

The City of Coppell (the "city"), which you represent, received an open records request for a copy of "Porter's memo referred to in Friedman & Associates Invoice Bill date [*sic*] 11/22/94." You contend that the memorandum is excepted from required public disclosure by sections 552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code.

You contend that the memorandum at issue comes under the protection of the informer's privilege, as incorporated into section 552.101, because it contains allegations of certain wrongdoings within the Coppell Police Department. 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.

In this instance, we note that the informant's identity has been revealed by the city's public release of the attorney billing statement containing the informant's name. Consequently, the city has waived the privilege to whatever extent it would have otherwise applied. *See* Open Records Decision No. 208 (1978) (privilege does not apply when the informant's identity is known to party who is accused of wrongdoing); *see also* *Roviaro*, 353 U.S. at 60 (informer's privilege does not protect contents of communications).

We next address your claims that the city must withhold the complaint in order to protect the subject police officers' privacy interests. Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information at issue pertains solely to city employees' actions while acting as public servants and, as such, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here.¹

Section 552.103(a) of the Government Code, known as the litigation exception, excepts 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.

¹*See also* *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (state of Texas does not recognize tort of false-light invasion of privacy). If, however, portions of the information at issue are in fact inaccurate or untrue, there is no reason that the city may not also release, along with the requested document, other supplemental information that explains why and to what extent the information is inaccurate or that otherwise clarifies the information contained in the record at issue.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 (and authorities cited therein). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You do not explain why this exception is applicable in this instance. If a governmental body fails to explain how an exception applies, the exception is ordinarily waived unless the information is deemed confidential under the act. *See* Attorney General Opinion JM-672 (1987). Because you have not met your burden under section 552.103, this office considers this exception as being waived.

You contend that section 552.108 of the Government Code protects the requested complaint because the city police department is currently conducting an internal affairs investigation into the allegations contained in the complaint. Section 552.108, known as the "law enforcement" exception, excepts from required public disclosure

(a) [a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . ;
[and]

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement.

When a governmental body claims section 552.108, the relevant question this office must address is whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986) at 2. The primary purpose of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. *See* Open Records Decision Nos. 133, 127 (1976).

You inform us, however, that "the Texas Rangers have concluded their investigation [into the allegations], and the Dallas County District Attorney's Office has completed its review [of this matter]." You do not contend that the memorandum pertains to any ongoing criminal investigation, but rather characterize the purpose of the internal investigation so as to determine "whether any department rules and regulations were violated, and, if so, whether disciplinary action should result." Clearly, the internal investigation is administrative, rather than criminal, in nature. You have not explained, nor is it apparent to this office, how the release of the complaint to the public would unduly interfere with law enforcement, especially if the officers who are the subjects of the complaint are familiar with the nature of the allegations. *See also* Open Records Decision No. 208 (1978). Consequently, the city may not withhold the memorandum pursuant to section 552.108 of the Government Code.

Finally, we address your section 552.111 claim. Section 552.111 of the Government Code protects interagency and intra-agency memoranda and letters, but only to the extent that the documents contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 (1993), this office held that:

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). We have marked the portions of the memorandum that the city may withhold under section 552.111 of the Government Code. The remaining information is purely factual in nature and as such does not come under the protection of section 552.111. All but the information we have marked must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/RWP/rho

Ref.: ID# 31134

Enclosure: Marked document

cc: Mr. R. G. Harrell
548 Oak Grove
Coppell, Texas 75019
(w/o enclosure)