



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 26, 1995

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Legal Affairs Division  
Texas Department of Criminal Justice  
P.O. Box 99  
Huntsville, Texas 77342-0099

OR95-224

Dear Mr. Peck:

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# 27781.

The Texas Department of Criminal Justice (the "department") has received a request for records pertaining to the termination of a certain department employee. Specifically, the requestor seeks the internal affairs department file relating to his termination, his employee disciplinary file, and his personnel file. We understand that the department has or will make available to the requestor the requested employee disciplinary and personnel files. You object, however, to releasing the requested internal affairs department file. You have submitted the internal affairs department file to us for review and seek to withhold it under sections 552.101, 552.103, and 552.108 of the Government Code.<sup>1</sup>

First, we address your assertion that section 552.101 of the Government Code exempts some of the requested information from required public disclosure. Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in

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<sup>1</sup>You advise us that you have withheld under section 552.107(2) of the Government Code certain sensitive information protected by the *Stipulated Modification of Section II, D and Section II, A of the Amended Decree of the Ruiz Amended Decree*, namely, inmate travel cards. You do not request our decision with respect to this information. Accordingly, we do not address it here.

conjunction with the informer's privilege. The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3; 208 (1978) at 1-2. The records submitted to us for review indicate that the requestor already knows the informer's identity. Accordingly, the informer's privilege aspect of section 552.101 does not apply in this instance.

We also note that the submitted information appears to include criminal history record information ("CHRI") distributed at the state and federal level. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.") In addition, section 411.097(c) of the Government Code prohibits the department from disclosing any CHRI obtained from the Department of Public Safety (DPS) or any other criminal justice agency. *See also* Gov't Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Accordingly, pursuant to state law and federal regulations, the department may not release the submitted CHRI to the requestor.

Next, we address your assertion that section 552.103(a) of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts from 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).

You advise us that the requestor, when visiting your office, inquired about the status of the request at issue here and mentioned to you that he and his lawyer required the information for purposes of instituting legal action against the department. You have provided us with no other information, however, indicating an intent on the part of the requestor to sue the department. As we concluded in Open Records Decision No. 452 (1986), the mere fact that a requestor, on more than one occasion, publicly states an intent to sue does not trigger section 552.103(a). We conclude, therefore, that in this instance you have not demonstrated a reasonable likelihood of litigation. Accordingly, the department may not withhold the submitted information under section 552.103(a) of the Government Code.

You also contend that section 552.108 of the Government Code excepts the submitted information from required public disclosure. Section 552.108(b) excepts from disclosure “[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 or prosecution . . . .” This section excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 531 (1989) at 2 (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3. You argue that releasing the information requested in these items would reveal “investigation techniques.” However, the information you submitted for review does not reveal any investigation techniques that could not be observed by the inmates and the person being investigated, nor does it reveal any secrets not known outside of the law enforcement community. We cannot see how releasing information concerning “investigation techniques” would unduly interfere with law enforcement.

We agree with your assertion of section 552.108, however, to the extent that it is intended to protect the identity of inmate informants. You argue that inmate informants will be subject to harassment and retaliation by prison staff and by other inmates. We believe you have demonstrated that releasing information that identifies or would tend to identify inmate informants would unduly interfere with law enforcement and crime prevention. Accordingly, the department may withhold the information that we have marked under section 552.108 of the Government Code. However, the department may not withhold the remainder of the submitted information under section 552.108.

Finally, we note that section 552.117 also protects some of the information you submitted for review. Section 552.117(2), in pertinent part, excepts from disclosure "the home address, home telephone number, or social security number of an employee of the Texas Department of Criminal Justice . . ." The information you submitted for review contains the home addresses and social security numbers of some department employees other than the requestor. You must withhold this information. However, except as noted above, the department must release the remainder of the information.

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 may 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

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Ref.: ID# 27781

Enclosures: Marked documents

cc: Mr. Raymond Hamilton  
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(w/o enclosures)