



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Ms. Beverly J. Luna
Senior Staff Attorney
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR95-795

Dear Ms. Luna:

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# 32873.

The Texas Parks and Wildlife Department (the "department") received an open records request for an internal affairs investigation file regarding the requestor. You state that you have provided the requestor with the complete investigatory report except for the evaluation portion of the report and an office memorandum. You have submitted these two documents for our review. You contend that the department may withhold these two documents from required public disclosure pursuant to sections 552.101 and 552.111 of the Government Code. Additionally, you contend that section 552.108 of the Government Code exempts the memorandum from required disclosure. The only argument you make is that the memorandum "reveals the identity of the confidential informant who initially alleged and reported [that the requestor engaged in the possession of illegal drugs while on the job]."

You assert that section 552.101 of the Government Code exempts from required disclosure the two documents at issue. Section 552.101 exempts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from mandatory disclosure if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685 (construing the predecessor to 552.101); Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)).

In *Industrial Foundation*, the court considered the following kinds of information to be intimate and embarrassing: information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.023 of the Government Code provides an individual with a limited special right of access to information about himself or herself. Section 552.023 provides in pertinent part:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to records and copies of records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

See also Open Records Decision No. 481 (1987) (determining that common-law privacy does not provide a basis for withholding information from its subject). Consequently, the department may not withhold the requested information from the requestor on privacy grounds.

You contend that because the memorandum at issue contains the name of the individual who reported allegations that the requestor had violated the law to a member of the department, that the informer's privilege aspect of section 552.101 of the Government Code enables the department to withhold the memorandum. 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. 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. [Citations omitted.]

Though the privilege ordinarily applies to the efforts of law enforcement agencies, it may apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 (1981) at 1, 279 (1981) at 1-2; *see also* Open Records Decision No. 208 (1978) at 1-2. This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988) at 3, 391 (1983) at 3.

We examined the documents you have submitted, and we agree that the documents allege violations of the law. However, the alleged violations of law were not reported to a governmental body responsible for enforcing the laws. Accordingly, we conclude that you may not withhold from the requestor information in the memorandum that identifies the complainant pursuant to section 552.101 and the informer's privilege.

You contend that section 552.111 excepts both of the submitted documents from required disclosure. Section 552.111 excepts from required disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993) at 5, in light of *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), this office concluded that information excepted from disclosure under section 552.111 "must be related to the *policymaking* functions of the governmental body." *See also* Open Records Decision No. 631 (1995) at 3. "[P]olicymaking functions of a governmental body include advice, recommendations, and opinions regarding administrative and personnel matters of a broad scope that affect the governmental body's policy mission." *Id.* We indicated in Open Records Decision No. 631 (1995) at 3, on the other hand, that an agency's policymaking functions do not encompass information that pertains solely to internal administrative or personnel matters. Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the advice and opinion portions of internal memoranda. *Id.*

The documents at issue do not relate to the policymaking function of the department. Rather, they relate to personnel matters that are not of a broad scope. Consequently, neither of the documents you have submitted for our review may be withheld from required disclosure pursuant to section 552.111 of the Government Code.

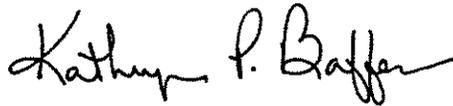
Finally, you contend that the memorandum may be withheld from the requestor pursuant to section 552.108 of the Government Code. However, you make no argument about how or why this exception applies to the memorandum. Section 552.108, known as the "law enforcement" exception, excepts from required public disclosure:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime
[and]
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement

Information that is collected, assembled, or maintained by a governmental body is public information. If a governmental body wishes to withhold information from a member of the public, it must show that the requested information is within one of the exceptions to required disclosure. Open Records Decision Nos. 542 (1990), 515 (1988). Without such a showing, this office has no basis upon which to determine that information is protected. You have not shown how or why the submitted memorandum should be withheld pursuant to section 552.108. In this instance, the report of an alleged violation of law was made to a member of the department and not to an agency that is responsible for the investigation and prosecution of crimes. You may not withhold the memorandum pursuant to section 552.108.

Having addressed your arguments, we conclude that the two submitted documents must be released to the requestor. We are resolving this matter with this 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,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/LRD/rho

Ref: ID# 32873

Enclosures: Submitted documents

cc: Ms. Nina N. Pace
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(w/o enclosures)