



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 17, 1995

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR95-1076

Dear Mr. Perry:

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# 35274.

The City of Dallas (the "city") received a request for a complete copy of all complaints filed against the requestor and all notes taken by the Dallas Fire Department, Internal Affairs Section, regarding an internal affairs investigation of the requestor. You state that the city will provide to the requestor a full copy of the requested complaint, a copy of which was submitted to this office as Exhibit "B."¹ You claim that the remainder of the requested information is excepted from disclosure under the informer's privilege, incorporated into the Open Records Act through section 552.101, and sections 552.103(a), and 552.108 of the Government Code. You also claim that the requested notes are personal notes of the investigators and are therefore excepted from disclosure. We have considered the exceptions you claimed and have reviewed the documents at issue.

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

¹We note that in correspondence to this office, the requestor admits receiving a copy of that complaint. Additionally, the requestor has sent us copies of other requests for documents to the city. However, we note that the city has not requested an opinion from this office as to whether the documents are excepted from disclosure. Therefore, we do not address those requests for records in this ruling.

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 informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5.

You do not cite us to any criminal or civil statute that the requestor may have violated. The only provision cited in the complaint is an internal rule. Moreover, the complaint, which the requestor has, lists possible witnesses and identifies the complainant. It appears that the requestor knows the identity of the complainant and the potential witnesses. Therefore, the city may not withhold the requested information under the informer's privilege.

You do not indicate whether you are claiming that section 552.108(a) or section 552.108(b) excepts the requested information from disclosure. Therefore, we will address both subsections. Section 552.108(a) excepts from disclosure records of law enforcement agencies or prosecutors that deal with criminal investigations and prosecutions. When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. 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 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). Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." See *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 444 (1986), 434 (1986). 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 at 710). 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 have not indicated that any criminal investigation is involved here. Therefore, section 552.108(a) does not except the requested information from disclosure. Likewise, you have not established how the requested information would unduly interfere with law enforcement under section 552.108(b), nor do the documents show such interference on their face. Therefore, the city may not withhold the requested information under either subsection of section 552.108.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). You contend that "[i]f disciplinary action against the requestor results from the investigation, the City believes litigation will probably commence." However, you have not provided this office with any other evidence of a preliminary step toward litigation. In fact, the city has not even decided whether to institute disciplinary action against the requestor. Therefore, the city has not established that litigation is reasonably anticipated and may not withhold the requested documents under section 552.103(a).²

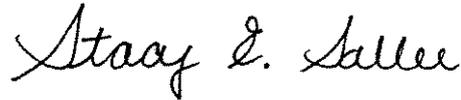
You claim that the requested notes are personal notes of the investigators and, as such, are excepted from disclosure under the "personal notes exception." We disagree. In an analogous situation, we have concluded that where a city secretary is under a duty to record minutes of a meeting of a governmental body, the notes are distinguishable from the type of personal notes held to be outside the act. Open Records Decision No. 225 (1979); *Cf.* Open Records Decision Nos. 145 (1976) (concluding that

²We assume that you have released or will release to the requestor the other document in Exhibit "B," as the city has previously disclosed that document to him.

handwritten notes in personal calendar not within Open Records Act), 116 (1975) (Open Records Act does not reach personal notes in public employee's sole possession made solely for his own use). The notes appear to have been taken by the investigators as part of their job responsibilities for the city. Therefore they are not "personal notes," but are notes pertaining to their jobs and the city may not withhold them.

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,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 35274

Enclosures: Submitted documents

cc: Mr. Arlie Coll Edwards
(w/o enclosures)