



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 9, 1996

Mr. J. Robert Giddings
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR96-0505

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38935.

The University of Texas System (the "system") received a request for "any and all documents concerning past UT-System police investigations of housing, physical plant and/or maintenance departments that have been conducted at UT-System institutions during the past 10 years."¹ You submitted files from two system police investigations to this office for review. You contend that this information is excepted from required public disclosure by sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, a governmental body must show 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. As you have not established that litigation is pending or reasonably anticipated, you may not withhold the requested information from disclosure pursuant to section 552.103.

¹The requestor also seeks two other categories of documents. You raise no objection to the release of these documents, and state that the University of Texas at Arlington will furnish the requestor with copies of the documents.

Section 552.108 excepts the following from required public disclosure:

(a) information held by 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.

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). Neither of the two cases at issue here appears to be under active investigation. You have not shown how releasing documents related to these cases would unduly interfere with law enforcement or crime prevention. Therefore, the documents are not excepted from disclosure by section 552.108.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common-law right of privacy under 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). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release 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. The court considered intimate and embarrassing information such as that 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. Portions of the requested documents are excepted from disclosure under section 552.101 by common-law privacy. We have marked those portions of the documents accordingly.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to information compiled during an investigation of sexual harassment allegations. The *Ellen* court recognized that sexual harassment in the workplace is, by its very nature, a highly intimate and embarrassing situation. Therefore, the *Ellen* court held that the public did not have a legitimate interest in the identities of witness or the details of their personal

statements beyond what was contained in the summary documents that were released. You contend that the reasoning in *Ellen* “may be applicable to protect the identities of individuals such as the witnesses and the details of their personal statements and to protect the identity of the accused in those cases where the allegations of criminal misconduct were not sustained.” However, the investigation files at issue relate to allegations of bid-rigging, bribery, and theft. The information contained in these files is not type of information that Texas courts have recognized as highly intimate or embarrassing. Thus, section 552.101 does not except from disclosure the identities of witnesses, their statements, or the identities of those accused of malfeasance.

The informer’s privilege, incorporated into the Open Records Act by section 552.101, protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer’s privilege does not, however, apply to information that does not describe alleged illegal conduct. Open Records Decision No. 515 (1988) at 5. For example, the informer’s privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee’s work performance when those statements do not reveal the suspected violation of specific laws to the officials charged with enforcing those laws. See Open Records Decision Nos. 579 (1990) at 8, 515 (1988) at 3. In addition, the informer’s privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60. System police initiated these two investigations because they received information about possible violations of the law from several informants. The identities of informants named in the investigation files are excepted from required public disclosure by the informer’s privilege and section 552.101. We have marked the documents accordingly.

You invoke the “attorney-client privilege as incorporated by sections 552.101, 552.107, and 552.111” to protect the marked portions of Attachment C from disclosure. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 (1990) at 5. Section 552.107(1) does not except purely factual information from disclosure, Open Records Decision Nos. 574 (1990), 559 (1990), nor does it protect information gathered by an attorney as a fact-finder. Open Records Decision No. 462 (1987). Attachment C consists of documents from the investigation files that reflect an attorney’s advice and recommendations to a client. However, the documents also contain purely factual information that is severable from the advice portions of the documents. We have marked those portions of the documents that are excepted from disclosure by section 552.107.²

²We note the presence of an employee or former employee’s home address in the requested documents. Sections 552.024(a) and 552.117(1) provide that current or former public employees may elect

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/rho

Ref.: ID# 38935

Enclosures: Marked documents

cc: Mr. Chris Payne
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(w/o enclosures)

(Footnote continued)

to keep private their home addresses, home telephone numbers, social security numbers, and information that reveals whether they have family members. You must therefore withhold this information for those current or former employees who, at the time the system received the request for information, had elected to keep this information private.