



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 15, 1996

Mr. Terrence S. Welch  
Vial, Hamilton, Koch & Knox, L.L.P.  
1717 Main Street, Suite 4400  
Dallas, Texas 75201

OR96-0539

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38865.

The Town of Flower Mound ("Flower Mound"), which you represent, received four open records requests for documents relating to the internal affairs investigations of four Flower Mound police officers. You contend that the requested information is excepted from required public disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.

Section 552.108 excepts from disclosure (a) information held by a law enforcement agency or prosecutor that deal with the detection, investigation, or prosecution of crime and (b) internal records or notations of a law enforcement agency or prosecutor that are maintained for internal use in matters relating to law enforcement or prosecution. You argue that the release of information about a pending internal affairs investigation would unduly interfere with law enforcement because "the investigation will be impeded - witnesses may be unwilling to speak for fear of retaliation, investigative strategies may be revealed, [and] confidential information may be revealed . . . ." We agree that release of this information while the internal affairs investigation is pending would unduly interfere with law enforcement.<sup>1</sup> Consequently, we conclude that you may continue to withhold the requested information under section 552.108 until the investigation is concluded.

We also address your argument that section 552.103 excepts the requested information from required public disclosure. To show the applicability of section

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<sup>1</sup>We note that you do not argue that section 552.108 should except the requested information once the internal affairs investigation is concluded and, therefore, we do not address that issue.

552.103(a), a governmental entity 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. This office was provided a declaration of intent to pursue civil litigation from the attorney representing the requestor indicating that litigation is reasonably anticipated. Our review of the records at issue shows that these records are related to the subject of the anticipated litigation. Since you have shown the applicability of section 552.103(a), the records at issue may be withheld from disclosure.

In making this determination, we assume that the documents at issue have not been seen by the opposing parties to the litigation. Generally, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding those records from disclosure under section 552.103(a). Also, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

You also assert that the "investigation into the Wess Jones matter. . . is confidential because officers and others gave statements about possible criminal conduct by Officer Jones," raising the informer's privilege as incorporated by section 552.101 of the Government Code. The informer's privilege protects the identity of a person who reports a violation or possible violation of law to officials charged with the duty of enforcing the particular law. See Open Records Decision Nos. 515 (1988), 191 (1978). We note, initially, that the privilege excepts information from disclosure only to the extent necessary to protect an informer's identity from the subject of the communication. *Rovario v. United States*, 353 U.S. 53 (1957); Open Records Decision Nos. 549 (1990) at 5, 202 (1978) at 2 (informer's privilege exception is not applicable when the identity of the informer is known to the subject of the communication). Thus, the entire "investigation into the Wess Jones matter" would not be excepted by the informer's privilege. In *Rovario 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.* [Emphasis added.]

As noted above, the purpose of the informer's privilege is to protect the identity of *citizens* in order to encourage the reporting of violations of the law. We do not believe that the informer's privilege was intended to protect the identities of law-enforcement officials whose duties include the reporting of crime. Accordingly, the informer's privilege is inapplicable to the police officers' statements; only the names (and the contents of any communications where the content would tend to reveal the identity of the informant, *see Roviario v. United States*, 353 U.S. at 60) of the other individuals may be withheld pursuant to the informer's privilege; assuming, of course, that these individuals did, in fact, report a violation of the law and assuming that the identity of the informer is not known to the subject of the communication.

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

Yours very truly,

A handwritten signature in black ink that reads "Todd Reese". The signature is written in a cursive style with a long horizontal line extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/ch

Ref.: ID# 38865

Enclosures: Submitted documents

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(w/o enclosures)