



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 20, 1996

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 E. 11th Street  
Austin, Texas 78701-2483

OR96-2451

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102561.

The Texas Department of Transportation (the "department") received a request for information relating to tow truck operators and operators of vehicle storage facilities. You state that the department will release most of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under the informer's privilege as incorporated by section 552.101 of the Government Code and under section 552.103 of the Government Code. You have submitted samples of the requested information.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted samples.

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 department 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

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has previously concluded that "litigation" for purposes of section 552.103(a) includes a contested case under the Administrative Procedure Act that is before an administrative agency. Open Records Decision No. 588 (1991). Here, the department has established that litigation is pending. However, most of the submitted documents relating to a contested case have been seen by the opposing party in the litigation. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, with the exception of information that the opposing party in these cases has seen, the department may withhold the requested information relating to cases pending before the State Office of Administrative Hearings under section 552.103(a).<sup>2</sup>

Next, we consider the arguments you make under the informer's privilege. 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 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.

Here, even assuming that the reported activity is a violation of a criminal or civil statute and that the department is the agency responsible for enforcing this statute, the requestor knows the identity of the one person whom you have identified as an informer. The department may not withhold the identity of that person under the informer's privilege. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. As the department has identified only this informer, the department may not withhold any of the submitted information under the informer's privilege.

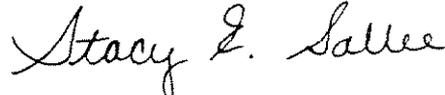
We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

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<sup>2</sup>We note that 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).

under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 102561

Enclosures: Submitted documents

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(w/o enclosures)