



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 22, 1997

Mr. Larance Coleman  
Director  
Harris County Community Supervision  
and Corrections Department  
Courthouse Annex 21  
49 San Jacinto Street  
Houston, Texas 77002

OR97-1199

Dear Mr. Coleman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35657.

The Harris County Community Supervision and Corrections Department (the "department") received a request for the personnel file of Mark E. Domio and "any other file, to include but not limited to, the internal affairs file." You inform us that the personnel file will be disclosed. However, you claim that the department is a member of the judiciary and therefore not subject to the Open Records Act. You also claim that the race discrimination investigation file is excepted from disclosure under section 552.103 of the Government Code and that the internal affairs file is excepted from disclosure under section 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

In Open Records Decision No. 646 (1996), this office concluded that a community supervision and corrections department is a governmental body and is not part of the judiciary for purposes of the Open Records Act. Records pertaining to judicial proceedings fall under the judiciary exception, section 552.003 of the Government Code. However, administrative records such as personnel files and other records reflecting the day-to-day management of a community supervision and corrections department are subject to the Open Records Act. Open Records Decision No. 646 (1996). Therefore, we conclude that the department is subject to the Open Records Act as the records do not pertain to judicial proceedings.

Next, we address your section 552.103 claim. 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 (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).

You advise this office that the subject of the race discrimination investigation has filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of potential litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). Therefore, the department has met the first prong of the section 552.103(a) test. We also conclude that the requested information relates to the anticipated litigation. Therefore, the department may withhold from required public disclosure the race discrimination investigation file under section 552.103(a). We note that 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). In addition, 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).

Lastly, we address your section 552.108 claim. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[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." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Section 552.108 is inapplicable in this instance because the information does not appear to deal with the detection, investigation, or prosecution of crime. See generally *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Thus, you may not withhold the internal affairs file under section 552.108.

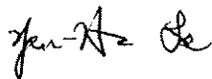
However, we note that the internal affairs file contains information that must be withheld under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. A polygraph examination or any information acquired from a polygraph examination is made confidential by V.T.C.S. article 4413(29cc), section 19A. We have marked the polygraph examination information that you must withhold.

The internal affairs file also contains criminal history record information ("CHRI") that is protected by statutory confidentiality provisions. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We have marked the records that contain CHRI that you must withhold.

Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Information deemed confidential under common-law privacy include information regarding drug overdoses, acute alcohol intoxication, convulsions or seizures, and emotional or mental distress. Open Records Decision No. 434 (1986). We have marked information that you must withhold under common-law privacy. All other information in the internal affairs file must be released.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/rho

Ref.: ID# 35657

Enclosures: Marked documents

cc: Mr. Brian C. Mercer  
Staff Representative  
Texas Public Workers Association  
East Texas Office  
3605 Katy Freeway, #111  
Houston, Texas 77007  
(w/o enclosures)