Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 26, 1998

Ms. Susan M. Cory
General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR98-1307

Dear Ms. Cory:

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# 115380.

The Texas Workers' Compensation Commission (the "commission") received a request for a specific investigative file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You first assert that the investigation material may be withheld under section 552.108. You state that the information contains a record of the agency's investigative action regarding the loss of state property. You refer us to *A & T Consultants, Inc. v. Sharp,* 904 S.W.2d 668 (Tex. 1995), to support your contention. Section 552.108 excepts from disclosure:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:
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> (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
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> (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an

> investigation that did not result in conviction or deferred adjudication; or
>
> (3) it is information that:
>
> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;
>
> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a). We have considered your section 552.108 claim in light of the court's opinion in *A & T*, and we do not believe that the information at issue falls within the scope of section 552.108. *See* Open Records Decision Nos. 493 (1988), 199 (1978). Therefore, the commission may not withhold the requested information under section 552.108.[1]

You also assert that the documents are protected by section 552.103 of the Government Code. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.[2] Thus, under section 552.103(a), a governmental body's burden is two-fold. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is

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[1]It appears that you have notified the Austin Police Department and the Collections Division of the Office of the Attorney General of the criminal conduct at issue. You do not indicate whether these governmental bodies seek to withhold the requested information. However, we note that the need of another governmental body to withhold the requested information may provide a compelling reason for nondisclosure under section 552.108. Open Records Decision 586 (1991).

[2]Section 552.103(a) excepts from required public disclosure information:

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
>
> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[3] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. We do not believe, in this case, that you have demonstrated that litigation is reasonably anticipated. You may not withhold any of the requested records based on section 552.103.

You also claim that section 552.111 of the Government Code protects the information from disclosure. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. The requested information merely involves internal administrative or personnel matters. Thus, the commission may not withhold the materials based upon section 552.111.

You also contend that some of the requested report may be protected from disclosure by the common-law right of privacy. Section 552.101 encompasses information protected by 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). 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

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[3]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

cc: Mr. James Hermon
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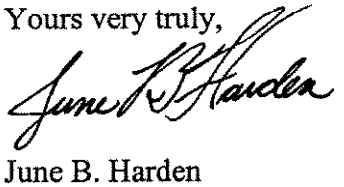
(w/o enclosures)

685; Open Records Decision No. 611 (1992) at 1. We have reviewed the documents at issue and do not believe that any of the information is protected by a right of privacy.[4]

Finally you contend that the requested information is protected from disclosure by section 552.107. 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. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* The documents at issue do not contain client confidences or attorney advice or opinion. Therefore, the documents may not be withheld pursuant to section 552.107. The requested information must, therefore, 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 115380

Enclosures: Submitted documents

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[4]We also note that false light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information under section 552.101 of the Government Code merely because it might place a person in a false light. *See* Open Records Decision No. 579 (1990).