



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 7, 1998

Ms. Christine Lanners  
Assistant City Attorney  
Criminal Law and Police Division  
City of Dallas  
Municipal Building  
Dallas, Texas 75201

OR98-2979

Dear Ms. Lanners

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120116.

The Dallas Police Department (the "department") received a request for a number of investigative files prepared by the department's Internal Affairs Division. You state that you have released some documents from these files to the requestor. You contend that the remaining documents in these files are excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.111, 552.117, and 552.119. We have considered the exceptions you claim and have reviewed a representative sample of the documents at issue.<sup>1</sup>

Initially, we note that the one of the documents submitted to this office appears to be a peace officer's accident report (see red tab). The release of these accident reports is governed by a statute outside the Open Records Act. Open Records Decision No. 525 (1989) (act's exceptions do not generally apply to information made public by other statutes). The Seventy-fifth Legislature, repealed V.T.C.S. article 6701d, and amended section 550.065 of the Transportation Code concerning the disclosure of accident report information. Act of May 29, 1997, 75th Leg., R.S. ch. 1187, 1997 Tex. Gen. Laws 4575, 4582-4583 (to be codified at Transp. Code § 550.065). However, a Travis County district court has issued a

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<sup>1</sup>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.

temporary injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code. *Texas Daily Newspaper Ass'n, v. Morales*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Oct. 24, 1997) (second amended agreed temporary injunction). A temporary injunction preserves the status quo until the final hearing of a case on its merits. *Janus Films, Inc. v. City of Fort Worth*, 358 S.W.2d 589 (1962). The supreme court has defined the status quo as "the last, actual peaceable, non-contested status that preceded the pending controversy." *Texas v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). The status quo of accident report information prior to the enactment of S.B. 1069 is governed by section 47 of article 6701d, V.T.C.S.<sup>2</sup>

Section 47(b)(1) provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report *is required to release a copy of the report* on request to:

.....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident

V.T.C.S. art. 6701d, § 47(b)(1) (emphasis added). Under this provision, a law enforcement agency "is required to release" a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* The requestor has not provided the department with the required information, and therefore, the department may not release the accident report to the requestor under section 47(b)(1)(D) of article 6701d, V.T.C.S.

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<sup>2</sup>Although the Seventy fourth Legislature repealed and codified article 6701d as part of the Transportation Code, the legislature did not intend a substantive change of the law but merely a recodification of existing law. Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25 1995 Tex. Gen. Laws 1025, 1870-71. Furthermore, the Seventy-fourth Legislature, without reference to the repeal and codification of V.T.C.S. article 6701d, amended section 47 of article 6701d, V.T.C.S., relating to the disclosure of accident reports. Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414. Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment is preserved and given effect as part of the code provision. Gov't Code § 311.031(c). Thus, the amendment of section 47 of article 6701d, V.T.C.S. is the existing law regarding the availability of accident report information, and may be found following section 550.065 of the Transportation Code. *See also* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414.

You claim that files related to Officers Sublet and Branton are excepted from disclosure pursuant to section 552.103 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. The 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, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990).

You indicate that the department is a party to civil litigation involving Officer Sublet, a former employee of the department. You have not described the issues in the litigation, and you have not submitted documents regarding Officer Sublet to this office for review. For these reasons, we cannot conclude that any department documents regarding Officer Sublet are related to civil litigation involving the department and Officer Sublet. We must conclude that documents regarding Officer Sublet are not excepted from disclosure under section 552.103(a). On the other hand, you have provided us with sufficient information to determine that the submitted documents regarding Officer Branton are related to pending civil litigation involving the department and Officer Branton. Therefore, the department may withhold the submitted documents regarding Officer Branton (file 97-054) from disclosure under section 552.103(a).<sup>3</sup>

You claim that four files are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” You state that files 97-014, 97-058, 97-071, and 97-160 relate to “ongoing investigations” or “possible / pending prosecutions.” Based upon this representation, we conclude that the release of these files would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases).

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov’t Code § 552.108(c); *Houston Chronicle*, 531 S.W.2d 177; Open Records Decision No. 127 (1976). Thus, you must release

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<sup>3</sup>We note that once all parties to the litigation have gained access to the information at issue, through discovery or otherwise, section 552.103(a) is no longer applicable to the information. Open Records Decision Nos. 551 (1990), 454 (1986). In addition, once the litigation has concluded, section 552.103(a) is no longer applicable. Open Records Decision No. 350 (1982).

the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information in these files from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov't Code § 552.007.

Next, you contend that legal opinions given to the Police Chief by Assistant City Attorneys are excepted from disclosure under section 552.111 of the Government Code as attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. *Id.* You have not demonstrated that the legal opinions at issue were created for trial or in anticipation of litigation. Therefore, we conclude that the department may not withhold these opinions from disclosure under section 552.111.

You assert that some of the information at issue is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) provides for the confidentiality of the home addresses, home telephone numbers, and social security numbers of peace officers, as well as information that reveals whether the peace officer has family members. Similarly, section 552.117(1) protects these categories of personal information for current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. The protection for peace officers is automatic. However, current and former officials and employees of a governmental body are entitled to this protection only if they opt for the protection under section 552.024 prior to the governmental body's receipt of a request for the information. *See* Open Records Decision No. 530 at 5 (1989) (whether particular piece of information is protected by section 552.117 is determined at time request for it is made). We have marked the types of information that are excepted from disclosure under section 552.117.

The submitted documents include copies of photographs of police officers. Except in limited circumstances that do not appear to apply here, section 552.119(a) protects from disclosure "a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure." A photograph that depicts a peace officer may be released only if the

peace officer consents to the disclosure in writing. Gov't Code § 552.119(b). Thus, the department must withhold the submitted photographs from disclosure unless the officers have given their written consent for release.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality statutes. Several of the submitted documents are confidential by statute and must be withheld from disclosure pursuant to section 552.101. First, the submitted documents include criminal history information obtained from the National Crime Information Center or the Texas Crime Information Center. Criminal history information obtained from these databases is generally confidential by law. 28 C.F.R. § 20; Gov't Code § 411.083.

Second, the submitted documents include medical records. Medical records created or maintained by a physician are confidential under the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Medical records may only be released only in accordance with the MPA. *See* V.T.C.S. art. 4495b, §§ 5.08(c), (j); Open Records Decision No. 598 (1991).

Third, one of the documents at issue is a polygraph report. Section 19A(b), article 4413(29cc) of Vernon's Texas Civil Statutes provides as follows:

Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Both polygraph reports and references to polygraph results are confidential under section 19A(b), and the department must withhold such information from disclosure pursuant to section 552.101 of the Government Code.

Fourth, section 552.101 encompasses the common-law right to privacy. Information is protected by the common-law right to privacy if (1) the information is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). We have marked the information that is protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (common-law right to privacy protects some personal financial information).

Fifth, section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

You characterize file 97-240 as an investigation of child sexual assault or indecency with a child. Because this file relates to an allegation of child abuse, the file falls within the scope of section 261.201 of the Family Code. You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, file 97-240 is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold file 97-240 from disclosure under section 552.101 of the Government Code.

Sixth, you contend that file 97-166 is excepted from disclosure in its entirety pursuant to section 552.101 and the informer's privilege. The informer's privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects 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 at 3 (1988), 208 at 1-2 (1978). 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 at 2 (1990), 515 at 4-5 (1988). You generally allege that the context of file 97-166 identifies the informer, but you offer no explanation to support this allegation. Having reviewed the file, it is not apparent to us why it would be necessary to withhold the entire file to protect the identity of the informer. Thus, we conclude that you may only withhold the name and physical description of the informer under section 552.101. The department should release the remainder of file 97-166.

Finally, you contend that police officers' cellular phone numbers are excepted from disclosure under section 552.101. However, in Open Records Decision No. 506 (1988), we stated that cellular phone numbers are not generally excepted from disclosure under section 552.101 on privacy grounds. We note, however, that cellular phone numbers may be excepted from disclosure under section 552.117. If a cellular phone was purchased and is privately owned by a police officer, then the cellular phone number would be excepted from disclosure pursuant to section 552.117. *See* ORD 506 at 5-6 (statutory predecessor to section

552.117 does not apply to cellular mobile phone numbers paid for by county and intended for use at work for county business; different considerations apply if employee pays for purchase and installation of and calls to and from mobile phone in his private vehicle and simply seeks reimbursement for calls made on county business).

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,



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Assistant Attorney General  
Open Records Division

KEH/mjc

Ref: ID# 120116

Enclosures: Marked documents

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(w/o enclosures)