



May 20, 1999

Mr. David Anderson
Chief Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR99-1405

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126116.

The Texas Education Agency (the "TEA") received a request for a variety of information concerning driver education schools. You seek to withhold, under sections 552.101 and 552.103 of the Government Code, some of the records responsive to the part of the request asking for information pertaining to complaints against the requestor's driving school. You have submitted representative samples of the information at issue.

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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You indicate that the documents in Exhibit 2 concern pending investigations in which the agency anticipates there will be contested case proceedings. Sections 16 of article 4413(29c) Section 16 provides that the TEA may deny, suspend or revoke a driving instructor's license. Section 17 provides that a person aggrieved by the denial, suspension, or revocation may appeal that decision and request an administrative decision. Section 18 provides that the administrative decision may be appealed to district court in Travis County for review on a good cause showing. Sections 19 through 21 concern class action suits, section 22 discusses surrender of a license, and section 23 outlines the TEA's injunction authority. Based upon TEA's assertion that litigation is likely in these particular investigations, we agree that the documents submitted as Exhibit 2 may be withheld under section 552.103(a).

We assume, however, that none of the information in the records at issue has previously been made available to the opposing parties in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing parties have seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

You have marked identifying information about the complainants in Exhibit 3 which you claim is protected from disclosure under the informer's privilege as incorporated in section 552.101 of the Government Code. For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). In *Roviaro 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.

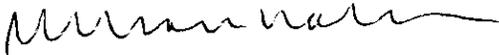
Although the "informer's privilege" aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of

enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 at 3 (1988), 391 at 3 (1983). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990).

It appears the complaints in question allege violations of article 4413(29c), V.T.C.S. *See id. supra*. Section 27 of article 4413(29c) provides that a violation of article 4413(29c) can result in both civil and criminal penalties. Accordingly, we conclude that the identifying information about the complainants you have marked in Exhibit 3 may be withheld from disclosure under the informer's privilege. Except as noted above, you must release the requested information.

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.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/eaf

Ref: ID# 126116

encl. Submitted documents

cc: Mr. Richard Reyna
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(w/o enclosures)