



September 8, 2000

Mr. Gary W. Smith
City Clerk
City of Baytown
P. O. Box 424
Baytown, Texas 77522-0424

OR2000-3465

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138739.

The City of Baytown (the "city") received a request for copies of original complaints made against the requestor, a former employee of the city. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your section 552.103 claim as that exception is the more inclusive of the exceptions you have raised. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body 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. *See 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for the information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). 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 more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). You explain that the requestor’s employment with the city was terminated and that the requestor has filed an appeal of that dismissal. You state that although the appeal is not filed in a court and is not subject to the Administrative Procedure Act (“APA”), it is a contested matter at which the requestor may be represented by counsel. You contend that the information responsive to the request is related to the appeal and, as such, is excepted from public disclosure, in its entirety, based on section 552.103.

Contested administrative proceedings constitute pending litigation for purposes of section 552.103 if the proceeding is conducted under the APA, Government Code, Chapter 2001. Open Records Decision No. 588 at 7 (1991). In this instance, however, the city has not demonstrated that the grievance proceeding at issue is pending litigation for purposes of section 552.103. Therefore, we conclude that the city has not demonstrated under section 552.103 that litigation was reasonably anticipated at the time of the request for information.

You also argue that the information you have marked is excepted from public disclosure under Government Code section 552.108(a)(1). Section 552.108(a)(1) excepts from public disclosure information which would “interfere with the detection, investigation, or prosecution of crime[.]” You assert that the requested information is part of a law enforcement record which was developed in response to the complaints against the employee. You state that the district attorney has presented “the matter” to a Grand Jury. You argue that the release of the information would interfere with the prosecution of the case and would likely harm the investigation and potential prosecution. You have not, however, explained the nature of the criminal charges filed against the requestor, nor have you submitted a letter or other documentation that the District Attorney’s Office or the prosecuting attorney with the litigation interest stating that the information should not be released.

This office has stated that where an incident allegedly involving criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to the incident. *See* Open Records Decision Nos. 624 at 5-6 (1994), 474 (1987), 372 at 4 (1983). Therefore, if the submitted information has been presented to a grand jury, we conclude that you may withhold the submitted information under section 552.108. If the submitted information has not been presented to the grand jury, then section 552.108 does not except the information from disclosure.

In the event the submitted information has not been presented to the grand jury, we now proceed to address your section 552.101 claim. You contend that the identity and statements of the witnesses in the investigation are protected from disclosure by Government Code section 552.101 in conjunction with the informer’s privilege. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by

law, either constitutional, statutory, or by judicial decision.” The 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. *See 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 at 2 (1981) (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)*. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. *See Open Records Decision No. 549 at 5 (1990); Open Records Decision No. 156 (1977)* (name of person who makes complaint about another individual is excepted from disclosure by informer’s privilege so long as information furnished discloses potential violation of state law).

We agree that a portion of the submitted information is protected from disclosure under section 552.101 in conjunction with the informer’s privilege. We have marked the information necessary to protect the informer’s identity. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 138739

Encl. Submitted documents

cc: Ms. Gloria Wright Poyner
2504 Crosby Dayton Road
Crosby, Texas 77532
(w/o enclosures)