



October 16, 2000

Ms. Karen Brophy
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
300 Bank One Center
1717 Main Street
Dallas, Texas 75201-4335

OR2000-4020

Dear Ms. Brophy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139657.

The City of Weatherford (the "city"), which you represent, received a request for eight items of information relating to an investigation of a municipal court judge. The city has released all of the requested information except for the "copies of transcripts and taped interviews for" seven named witnesses. You claim that the witness interviews are 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 representative sample of information.¹

We first address your assertion of section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Public Information Act by section 552.101, 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 from disclosure

¹We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

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 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). You inform us that the witnesses provided information that various city employees had "engaged in either misconduct, as defined by the City's Personnel and Administrative Regulations Manual, or violations of the law." However, since you have not identified any of the witnesses as informants or explained which criminal or civil statutes have been alleged to have been violated, we conclude that you may not withhold any of the requested information under the informer's privilege.

We next address your section 552.108 argument. Section 552.108 of the Government Code excepts from disclosure information 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." Gov't Code § 552.108(a)(1). Section 552.108 applies only to records created by an entity, or a portion of an entity, whose primary function is to investigate crimes and enforce criminal laws. See Open Records Decision Nos. 493 (1988), 287 (1981). However, an entity that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. See, e.g., Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981). If a governmental body conducts an investigation that reveals possible criminal conduct that the governmental body intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the governmental body if its release would interfere with law enforcement. See Gov't Code § 552.108(a)(1), (b)(1), Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981).

You explain that a criminal investigation is being conducted by the Texas Rangers. You also explain that your firm's "administrative investigation of the city operations" has resulted in certain documents being turned over to the Texas Rangers to further their criminal investigation. This office has previously held that any proper custodian of records can claim the section 552.108 exception while an incident involving alleged criminal conduct is under active investigation. Open Records Decision Nos. 474 (1987), 372 (1983). We find that you have shown the applicability of section 552.108 to any information that relates to the pending criminal investigation by the Texas Rangers. 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); Open Records Decision No. 216 (1978); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information may provide compelling reason for nondisclosure). You specifically inform us that “[w]hile the audio tapes have not been given to the Ranger, as criminal information was discovered in the interviews, it was given to the Ranger.” As we are unable to deduce what pieces of information were given to the Texas Rangers, and in what form, we can only conclude that information that has actually been turned over to the Texas Rangers, and the portions of the tapes and transcripts that relate to the criminal investigation, may be withheld under section 552.108. Portions of the tapes and transcripts that have not been turned over to the Texas Rangers and that do not relate to the criminal investigation may not be withheld under section 552.108.

You also claim that the remainder of the requested information is excepted from required public disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information “relating to litigation of a civil or criminal nature 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.” Gov’t Code § 552.103. You contend that the subject information relates to anticipated criminal and civil litigation. The city 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (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). The city must meet both prongs of this test for information to be excepted under 552.103(a). 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; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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 hired an attorney and threatened to sue on several occasions, *see* Open Records Decision No. 288 (1981). In this instance, you do not inform us, and it is not apparent to this office, that the city would be a party to any criminal prosecution that might ensue. Moreover, the only prospect of civil litigation is a contingent and speculative one: “In the event any further adverse employment action is taken against [the attorney’s clients], rest assured that suit will be filed to recover all damages incurred.” Furthermore, you do not inform us that any objective steps have been

taken toward litigation to which the city may be a party. Therefore, we find that you have not established that either civil or criminal litigation is reasonably anticipated. Therefore, the city may not withhold any of the requested information under section 552.103.

In addition, you assert sections 552.107 and 552.111 of the Government Code. Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.*, communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). After reviewing the transcript of the witness interview which you submitted, we do not believe that it reveals the attorney's advice, opinions, or recommendations. Therefore, the witness interview may not be withheld under section 552.107.

We also conclude that the city may not withhold any of the information at issue as "attorney work product" under section 552.111 of the Government Code. 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 or release 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. Open Records Decision No. 647 at 4 (1996). As you have not informed us of any objective steps taken toward the institution of litigation by any party, we find that you have not demonstrated that there is a substantial chance that litigation will ensue. Furthermore, you have not met the second part of the attorney work product test because the submitted transcript of the witness interview does not reveal an attorney's mental processes, conclusions, or legal theories. Consequently, the city may not withhold any of the records at issue under section 552.111 as "attorney work product."

However, we do find that the submitted records contain some information that is excepted from public disclosure by section 552.117 of the Government Code, which reads in relevant part:

Information is excepted from the [public disclosure] requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024[.]

Section 552.117(2) requires you to withhold information pertaining to a peace officer, without regard to that officer's election under section 552.024. We have marked the information that must be withheld under section 552.117.

In summary, the city may withhold under section 552.108 information that has actually been turned over to the Texas Rangers and the portions of the tapes and transcripts that relate to the Rangers' criminal investigation. The city must withhold the information we have marked under section 552.117. The city must release the remaining requested information.

This letter ruling is limited to the particular records at issue in this request and limited 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. Question or complaints about over-charging must be directed to the General Service 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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/pr

Ref: ID# 139657

Encl. Submitted documents

cc: Ms. Donna R. Morris
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(w/o enclosures)