



June 28, 2001

Mr. Jefferson B. Davis
County Attorney
Nacogdoches County
101 West Main Street, Room 218
Nacogdoches, Texas 75961

OR2001-2777

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148980.

The Nacogdoches County Juvenile Probation office ("NCJP") received a request for the personnel file of the requestor. You indicate that a redacted copy of the file has already been released to the requestor. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

NCJP 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). NCJP must meet both prongs of this test for information to be excepted under 552.103(a).

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 (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.¹ ORD No. 555 (1990); *see* ORD No. 518 at 5 (1989) (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* ORD 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. ORD No. 361 (1983). Based upon the information you have provided to us, we conclude that NCJP has failed to prove that litigation is reasonably anticipated. Therefore, the submitted information is not excepted from disclosure under section 552.103 of the Government Code.

Section 552.111 of the Government Code excepts from required public disclosure "[a]n 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, this office concluded that information excepted from disclosure under section 552.111 "must be related to the *policymaking* functions of the governmental body." ORD 615 at 5 (1993). This information includes advice, recommendations, and opinions on matters involving the agency's policy mission. We indicated, however, that an agency's policymaking functions do not include information that pertains solely to internal administrative or personnel

¹In 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).

matters. Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the advice and opinion portions of internal memoranda. *Id.*; see *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex.App.—Dallas 1998, pet. granted). We find section 552.111 inapplicable to the submitted information.

You contend that some of the documents you have submitted are excepted from disclosure under section 552.107. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. See Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) does not except purely factual information from disclosure. *Id.* at 5. Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* We find that the information marked "Label 3" and "Label 7" consists of legal advice and opinion, and is therefore excepted from disclosure under section 552.107(1). The information marked "Label 6" consists partly of factual data, which must be released, and partly of client confidences which are excepted from disclosure under section 552.107(1). We have marked the information accordingly.

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 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). In addition, the informer's privilege protects the content of the communication only to the extent that it identifies the informant. *Roviaro*, 353 U.S. at 60. You suggest that the information involves a reporting of a possible violation of section 58.007(c) of the Family Code. However, section 58.007, which generally prohibits the public disclosure of juvenile offender records, provides no civil or criminal penalties for an unauthorized disclosure of such records. Furthermore, you have not shown that the situation reported involved a public disclosure of juvenile offender records. Thus, NCJP has not established that the information contains a report of a violation of any law reported to the

police or a similar law-enforcement agency. We therefore find that the informer's privilege is inapplicable here.

In summary, NCJP may withhold the attorney-client communications as marked, pursuant to section 552.107(1). All of the remaining information must be released to the requestor.

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. Questions or complaints about over-charging must be directed to Hadassah Schloss at 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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 148980

Enc. Submitted documents

c: Ms. Kay Hooper
715 West Main
Nacogdoches, Texas 75961
(w/o enclosures)