



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 31, 1994

Ms. Gretchen Kuehn Bohnert  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR94-053

Dear Ms. Bohnert:

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 (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 22701.

The City of Houston (the "city") has received an open records request for information obtained by the Public Integrity Review Group (PIRG), specifically information relating to all completed PIRG investigations in the past two years. You describe the PIRG as "an investigatory division of the Houston Police Department that reviews allegations of misconduct and criminal behavior of city employees (other than police) and presents criminal cases to the District Attorney or other law enforcement agencies." You state that the city has released some of the information requested, but that some of the material should be excepted from disclosure. The city claims that this remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code, (former sections 3(a)(1), 3(a)(3), and 3(a)(8) of article 6252-17a, V.T.C.S.).

The city has divided the remaining requested information into Exhibits C and D. Exhibit C contains PIRG reports which have resulted in cases which have gone to the district attorney and are being investigated or prosecuted. Exhibit D contains investigations in which litigation is not pending, but some of these cases were sustained

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<sup>1</sup>The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

and may result in prosecution at a later date. These sustained cases you identified as "D-S."

Section 552.103(a)(1) of the Government Code excepts from required public disclosure information:

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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance, the city argues that Exhibit C should be exempted from disclosure under this litigation exception since it contains information relating to pending litigation of a criminal nature. We agree the requested information in Exhibit C relates to pending litigation for purposes of section 552.103(a), and documents in Exhibit C may therefore be withheld.

In reaching this conclusion on section 552.103(a), however, we assume that the parties to the litigation have not previously had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the 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. We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The city contends that section 552.108 also excepts the remaining information from disclosure in Exhibit D, which relates to sustained cases, because these cases "may result in prosecution at a later date." All of these investigative files are closed. Section 552.108 provides:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of section 552.021.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of section 552.021.

Traditionally, when applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. In cases that are still under active investigation, this section exempts from disclosure all information except that generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 127 (1977). Once a case is closed, information may be withheld under section 552.108 only if its release "will unduly interfere with law enforcement or crime prevention." See *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-466 (1982); Open Records Decision Nos. 434; 444 (1986). In some of these closed cases, the claims were sustained and resulted in criminal charges filed by the district attorney. If such cases are still pending, then the information is excepted from disclosure under section 552.108 and should be redacted. Otherwise, the city has not shown how the release of the requested information would unduly interfere with law enforcement or crime prevention. Thus, this exception to disclosure does not apply to the remainder of Exhibit D.

The city also claims that section 552.101 of the act in conjunction with common law privacy precludes the disclosure of highlighted portions of the requested materials, which we note are names and identifying information of suspected individuals or other individuals mentioned in the files, such as witnesses or possible witnesses. Section 552.101 of the act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Under section 552.101, information may be withheld on the basis of common-law privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex.1976), *cert.denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 579 at 2, 562 at 9, 561 at 5, 554 at 3 (1990); see also *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S. W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information at issue in this instance pertains primarily to employees' or former employees' actions as public servants and as such is of legitimate interest to the public. See, e.g., Open Records Decision No. 444 (1986).<sup>2</sup> Thus, common-law privacy is not applicable.

In addition, the city asserts the informer's privilege in conjunction with section 552.101. The city claims that Exhibit D, including D-S, contains the names of informants

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<sup>2</sup>The city also argues that the requested records might place many of these individuals in a "false light" since many of these complaints were not sustained. In Open Records Decision No. 579 (1990), however, this office specifically held that former section 3(a)(1) does not incorporate the common-law tort of false light privacy. Rather, this provision excepts only private facts in accordance with the *Industrial Foundation* common-law privacy test. See *id.* at 7.

and should not be disclosed. The informer's privilege has been recognized by Texas courts. *Aguilar v. State*, 444 S. W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the underlying rationale for the informer's privilege:

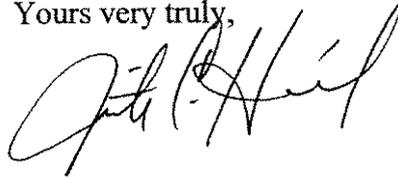
What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance 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.

The informer's privilege protects the identity of persons who report violations of the law. Open Records Decision No. 434 (1986). Although the privilege 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, 279 at 1-2 (1981); *see also* Open Records Decision No. 208 (1978) at 1-2. This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 (1988) at 3; 391 (1983) at 3.

We have examined the information in Exhibit D for which the city seeks the informer's privilege protection. Generally, it contains the PIRG memoranda to the city attorney outlining the allegations, investigations, and outcomes of the closed cases. Many of the investigative files do not even identify the informant other than calling the individual the "complainant" or stating that the PIRG received a call from a city employee. Most of these complaints are anonymous. Thus, the informer's privilege does not apply to these documents. While some of the documents contain information that does not describe conduct that violates the law, the informant suspected the conduct was a violation of the law when reporting the incident to law enforcement officials. Therefore, the informer's privilege will apply to these documents in order to encourage individuals to report possible violations of the law. Open Records Decision No. 515 at 5 (1988). The informer's privilege will not apply when the subject of the information already knows the informer's identity. Open Records Decision No. 208 (1978). Although some of the documents include allegations of criminal wrongdoing to PIRG, there is no identifiable informant; thus, the privilege does not apply. Other documents which identify the informants and which contain allegations of criminal wrongdoing have been marked to indicate that the information identifying the informant should be redacted before these documents are made public. This is the only information excepted by the informer's privilege in conjunction with section 552.101, and all remaining requested information should be released in Exhibit D, except as noted above.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Juanita C. Hernandez  
Special Assistant Attorney General  
Open Government Section

JCH/LRD/rho

Ref.: ID# 22701

Enclosures: Submitted documents

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(w/o enclosures)