



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 9, 1995

Mr. Terrence S. Welch
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201

OR95-263

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32204.

The City of Highland Village received a request for:

Records and documents relating to the sale of a piece of street maintenance machinery in the past six months that involved [an employee] . . . locating and negotiating the sale of said equipment.

Any documents or records in [the employee's] personnel file that document any disciplinary action taken or request for resignation following the sale of the machinery.

You have submitted the requested information for our review and claim that it should be excepted from disclosure by sections 552.101 and 552.103 of the Government Code.

You assert that the information should be excepted under section 552.101 as information protected by the "informer's privilege." The informer's privilege is actually a governmental entity's privilege to withhold from disclosure the identity of those persons who report violations of law. The privilege recognizes the duty of citizens to report violations of law and by preserving their anonymity encourages them to perform that duty. *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege protects the identity of a person who reports a violation or possible violation of law to officials charged with the duty of enforcing the particular law. See Open Records Decision Nos. 515 (1988), 191 (1978). The privilege may protect the informer's identity

and any portion of his statement that may tend to reveal his identity. Open Records Decision No. 515 (1988) at 2. However, protecting the informer's identity and identifying information under the informer's privilege serves no purpose if the subject of the information already knows the informer's identity. Open Records Decision No. 208 (1978) at 1-2. In the records submitted for our review, it is clear that a majority of the statements and the identities of informers have been revealed to the employee accused of wrongdoing through summaries provided in his disciplinary letter. Therefore, you may not withhold the information subject to the informer's privilege.

Additionally, you claim that section 552.103 applies to the requested information. Section 552.103(a) excepts 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 be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *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 (1990) at 4. Once all parties to the litigation have obtained information, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, 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). In this instance, you have made the requisite showing that litigation is anticipated. Therefore, you may withhold any information which has not previously been released.

You note that a tape recording of a tentative settlement between the city and the employee exists. You indicate that the tape is responsive to the open records request. Although you have not submitted the tape for our review, it is clear from your description that the opposing party in the anticipated litigation has been a party to the tentative agreement. Therefore, the city may not withhold the tape under section 552.103. Additionally, any information concerning the identity and statements of informers which was revealed in the tape would not now be excepted from disclosure under section 552.101. You therefore must release the tape.

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LMM/rho

Ref.: ID# 32204

Enclosures: Submitted documents

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(w/o enclosures)