



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 28, 1995

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Legal Affairs Division
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

OR95-525

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 23840.

The Texas Department of Criminal Justice ("TDCJ") received an open records request for ten categories of documents relating to the termination of a certain TDCJ employee. You have submitted for our review as exhibits C, D, and F representative samples of the documents requested in categories (3) through (8) and (10).¹ You contend that section 552.103 of the Government Code excepts from required public disclosure all the requested information. You also contend that sections 552.108 and 552.101 of the Government Code except from disclosure all or portions of the information requested in categories (1), (3), (4), (5), (6), (7), and (8). Finally, you contend that the final judgment and stipulated modification in *Ruiz* protects the documents requested in category (3).

¹You indicate that you have not provided copies of the documents requested in categories (1), (2), and (9) for various reasons. You indicate that no record exists responding to the request in category (9). Therefore, because the Open Records Act does not require a governmental body to make available records that do not exist, Open Records Decision No. 605 (1992) at 2, TDCJ is not required to respond to the request in category (9). You also indicate that the contents of the tape recording requested in category (1) are described in exhibit D and that you have not included the requested personnel file because you claim it is entirely excepted from disclosure by section 552.103. Because we conclude that you may not withhold any of the information under the exceptions you raised, we need not review this information.

We conclude, first, that section 552.103 does not except the requested information from disclosure. Section 552.103(a) excepts from required public disclosure 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 . . . ; and

(2) that the attorney general or the attorney for the political subdivision has determined should be withheld from public inspection.

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 to which the state or political subdivision is or will be a party. Open Records Decision No. 551 (1990). In this instance, you have not made the required showing that litigation is reasonably anticipated. The request letter relates primarily to a pending grievance proceeding, which is not litigation for purposes of section 552.103. Although the letter states that the requestor’s client has been injured by TDCJ’s actions, the requestor does not threaten to pursue any remedy other than the grievance. Therefore, you may not withhold the requested information under section 552.103.

We also disagree with your contention that section 552.108 excepts from disclosure the information requested in categories (1), (3), (4), (5), (6), (7), and (8). Section 552.108(b) excepts from required public disclosure “[a]n 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” This section excepts from public disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 531 (1989) at 2 (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3. You argue that releasing the information requested in these categories would reveal investigation techniques and might result in the harassment and intimidation of witnesses and investigators. However, the information you submitted for review does not reveal any investigation techniques that could be not be observed by the inmates and the person being investigated, nor does it reveal any secrets not known outside the law enforcement community. Furthermore, the records themselves reveal that the employee being investigated already knows the identities of all the witnesses and investigators. We cannot see how releasing this information would unduly interfere with law enforcement. Therefore, you may not withhold this information under section 552.108.

Additionally, the informer’s privilege recognized under sections 552.101 and 552.108 does not protect the information in categories (1) and (3) through (8).

To support your argument that the informer's privilege protects this information, you state that the employee does not know for certain the identity of the "confidential informant." However, the records indicate that the employee knows the identity of the informer. The audio recording requested in category (1) recorded a conversation between the employee and the informer, and the investigators played portions of this recording, including the informer's voice, for the employee. Therefore, you may not withhold categories (1) and (3) through (8) to protect the informer's identity under section 552.108 or section 552.101.

Finally, we conclude that we cannot determine at this time the availability of the information requested in category (3). You contend that this information is sensitive information protected by the *Stipulated Modification of Section II, D and Section II, A of the Amended Decree of the Ruiz Amended Decree*. This office is currently considering in RQ-779 the scope of the judgment and stipulated modification in *Ruiz*. We have severed the documents requested in category (3) from the rest of this file. We will rule on the availability of those documents in light of the ruling in RQ-779.

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,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/rho

Ref.: ID# 23840

Enclosures: Marked documents

cc: Mr. Larry M. Champion
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(w/o enclosures)