



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 26, 1995

Ms. Tracy B. Calabrese  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR95-981

Dear Ms. Calabrese:

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# 25810.

The City of Houston (the "city") has received an open records request for documents relating to investigations completed by the Public Integrity Review Group ("PIRG") since January 1, 1993. You state that PIRG "is an investigatory division of the Houston Police Department ("HPD") that reviews allegations of noncriminal 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 files without exception. You claim, however, that all or part of the remaining files are excepted from required public disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.117 of the Government Code. You have submitted the following for our review: documents marked as Exhibits 1 through 11; documents and a list designated as Addendum A; documents relating to a civil service file; and three files grouped together with an affidavit from Assistant District Attorney Charles A. Noll.

We note that the city's PIRG files have been the subject of several requests to this office. Please refer to ID# 25495, issued as Open Records Letter No. 95-980 (1995) regarding the open records request for documents relating to investigations completed by PIRG since January 1, 1994. We do not address any of the 1994 PIRG files in this ruling as they have been ruled on in Open Records Letter No. 95-980 (1995).

Several documents in Exhibit 11 are duplicates of documents considered under ID# 20732,<sup>1</sup> issued as Open Records Letter No. 95-979 (1995), or are related to the documents considered under that ruling. We have flagged the documents relevant to the other request and have marked them in light of the ruling in Open Records Letter No. 95-979 (1995). We direct you to that ruling for an analysis of our holding.

Furthermore, in Open Records Letter No. 94-053 (1994), this office ruled on a request to the city for, among other things, “[a] list of all completed PIRG investigations in the past two years, including final reports and correspondence related to each.” That request essentially encompassed all completed PIRG investigations from September 29, 1991, through September 29, 1993. A majority of the documents submitted for our review indicate on their face that they were closed between September 29, 1991, and September 29, 1993. However, because you have raised two exceptions that were not considered in Open Records Letter No. 94-053 (1994) and because you claim that some of the information is confidential by law, we will examine those records in this ruling.

We will first address your argument that section 552.117 excepts from disclosure portions of the information you submitted for review. In pertinent part, section 552.117 excepts from disclosure the home addresses and telephone numbers of all peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and the home addresses and telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold any home address or telephone number of a peace officer that appears in the requested documents. In addition, section 552.117 requires you to withhold any home address or telephone number of an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

Next, we address your claim that some of the requested information is confidential by law. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” You have raised several statutes claiming that they make confidential information relating to social security numbers, polygraph examinations, tax forms, identities of juvenile offenders, child abuse investigations, and information from the civil service file of a fire department employee.

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<sup>1</sup>ID# 20732 relates to a request for employee complaints of sexual harassment.

You seek to withhold the W-4 form in Exhibit 9 from required public disclosure under section 552.101 in conjunction with federal law. Title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the city must withhold the W-4 form in Exhibit 9 from required public disclosure under section 552.101 of the Government Code.

You claim that section 552.101 excepts from disclosure social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). We caution, however, that an employer may be required to obtain an employee's social security number under laws that predate October 1, 1990; a social security number obtained under a law that predates October 1, 1990, is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers at issue are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990.<sup>2</sup>

You also assert section 552.101 in conjunction with section 143.1214 of the Local Government Code. This office is currently considering in RQ-688 whether section 143.1214 requires a police department to withhold all documents relating to a criminal investigation of a police officer or fire fighter when the employing department does not sustain the allegations or take any disciplinary action. We have severed the documents at issue from this file. You may withhold these documents pending the outcome of our decision in RQ-688.

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<sup>2</sup>You claim that the social security numbers of employees hired after October 1, 1990 are confidential. We note, however, that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990.

Next we address your claim that section 552.101 in conjunction with article 4413(29cc), V.T.C.S., excepts information relevant to a polygraph examination in Exhibit 8. Section 19A of article 4413(29cc) provides in pertinent part that:

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

Subsection (d), which specifies persons that may obtain information acquired from a polygraph examination, is not applicable to this request. Accordingly, the city must withhold the polygraph examination and any information acquired from the examination contained in Exhibit 8 under section 552.101 of the Government Code in conjunction with article 4413(29cc), section 19A(b), V.T.C.S.

You assert that section 51.14 of the Family Code makes the identities of juvenile offenders in Exhibit 7 confidential. Section 51.14(d) of the Family Code, as amended by Acts 1993, 73d Leg., ch. 461, § 3, at 1852, 1854, provides in pertinent part:

Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records [concerning a child] are not open to public inspection nor may their contents be disclosed to the public . . . .

In Open Records Decision No. 181 (1977) at 2, this office held that police reports which identify juvenile offenders or furnish a basis for their identification are excepted by section 51.14(d). *See also* Open Records Decision No. 394 (1983) at 4 (applicability of section 51.14(d) to "police blotter" and related information). You do not indicate that the offense report at issue here relates to a charges for which any of the juveniles were transferred under section 54.02 of the Family Code to a criminal court for prosecution nor that article 15.27 of the Code of Criminal Procedure applies. Moreover, we understand that none of the exceptions to section 51.14(d) apply here. *See* Fam. Code §§ 51.14(d)(1), (2), (3). Accordingly, we conclude that the information contained in the requested offense report that relates to a juvenile must be withheld from required public disclosure under section 552.101 of the Government Code.

You contend that the highlighted portions of Exhibit 5 are made confidential by section 34.08 of the Family Code. Section 34.08(a) provides that:

(a) Except as provided in Subsections (b) and (c) of this section, the reports, records, and working papers used or developed

in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Subsections (b) and (c) are not applicable to this request. We agree that section 34.08(a) of the Family Code makes the information you have highlighted confidential. This information must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 34.08(a).

You claim that section 552.101 in conjunction with state and federal law excepts certain criminal history record information found in Exhibits 2 and 11. The information submitted to us for review includes information generated by the Texas Crime Information Center ("TCIC"). Some of this information appears to have been derived from the National Crime Information Center ("NCIC"). Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency, such as the Houston Police Department, to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1).

We have examined the information submitted to us for review. We conclude that any criminal history record information data that was generated by the federal government or another state may not be made available to the requestor by the city except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information received from DPS must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.<sup>3</sup>

The city also asserts the informer's privilege in conjunction with section 552.101. The city claims that Exhibits 1 and 6 as well as the list of names and documents grouped together as Addendum A contain the names of informants and should not be disclosed. Texas courts long have recognized the informer's privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex.

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<sup>3</sup>We note that any criminal history information obtained from sources other than the federal government, another state, or DPS is confidential under common-law privacy. Open Records Decision No. 565 (1990) at 10-12.

Crim. App. 1928), and it is a well-established exception under the Open Records Act, Open Records Decision No. 549 (1990) at 4. For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 (1988) at 2-5, 391 (1983). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies 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. [Emphasis added.]

Although the "informer's privilege" aspect of section 552.101 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) at 2; 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.

The informer's privilege does not apply to information that does not describe illegal conduct. Open Records Decision No. 515 (1988) at 5. The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 (1990) at 5. However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 (1978) at 2.

You claim that the informer's privilege excepts from required public disclosure the names of the complainants in Exhibits 1 and 6 as well as Addendum A, and the documents attached thereto. We note that the PIRG files listed in Addendum A include Exhibits 3, 5, 9, 10, and 11. We have examined the documents and agree that the informer's privilege protects some of the complainants' identities. We have marked the names and identifying information that may be withheld under the informer's privilege.<sup>4</sup>

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<sup>4</sup>Unlike other aspects of section 552.101 of the Government Code, the informer's privilege is considered a discretionary exception that a governmental body may choose to assert or waive. *See* Gov't Code § 552.007; Open Records Decision No. 549 (1990). Therefore, the department may choose to release to the public some or all of the requested information with impunity.

However, the following files indicate on their face that the complainant's identity is known to the subject of the communication: PIRG #92-0066, PIRG #93-0021, PIRG #93-0033, PIRG #92-0035, PIRG #93-0028, PIRG #92-0064, PIRG #93-0041, and PIRG #93-0076. Accordingly, you may not withhold the identifying information concerning the complainants in these files. See Open Records Decision No. 202 (1978) at 2. Furthermore, in PIRG file #92-0039, we do not believe that releasing the name of the informant's legal counsel would reveal the identity of the informant. Accordingly, you may withhold only the name and identifying information of the actual complainant.

In PIRG #93-0057, you wish to withhold the name of the supervising employee who reported the complaint to PIRG. However, we do not believe that the supervisor is the informant for the case at issue. The supervising employee identifies a subordinate employee as the source of the allegations of possible criminal wrongdoing. Therefore, you may withhold the name and identifying information of the actual informant.

In Exhibit 6, you wish to withhold the name of a city attorney with the city's legal department who received the initial complaint from an unnamed source. We believe that in this instance the city attorney received an allegation of criminal wrongdoing in his official capacity as an administrative official with a duty of enforcing particular laws. See generally Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 (1981) at 1, 279 (1981) at 1-2. The city attorney then passed the information to PIRG for further investigation. The city attorney was not acting in the role of an ordinary citizen communicating his knowledge of the commission of a crime to law enforcement officials. See *Roviaro*, 353 U.S. at 59. Accordingly, you may not withhold the name of the city attorney. Similarly, you may not withhold the name of the informant in PIRG #92-0057, who is apparently a Metro Police Department employee. We do not believe the informer's privilege protects the identities of public employees who were acting within the scope of their employment when they reported the complaints to PIRG. Cf. *United States v. St. Regis Paper Co.* 328 F.Supp. 660, 665 (W.D. Wis. 1971) (concluding that a public officer may not claim an informer's reward for a service it is his or her official duty to perform).

Section 552.101 also incorporates the doctrine of common-law privacy. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and it is of no legitimate concern to the public. You claim that portions of Exhibits 3, 4, and 10 are excepted from public disclosure under common-law privacy.

You claim that information concerning a family member's illness and treatment in Exhibit 3 is confidential under common-law privacy. We agree. However, the information is confidential only to the extent that it reveals specific illnesses or treatment. Attorney General Opinion JM-229 (1984). For your convenience, we have marked the type of information that must be withheld under common-law privacy.

In Exhibit 4, you have marked as confidential information regarding a public employee's injury while on duty and information regarding the sexual behavior of certain individuals. The mere fact that an injury or illness has occurred is not excepted under common-law privacy. *Id.*; Open Records Decision No. 336 (1982). You may not withhold the reference to the employee's injury. We agree, however, that the references to certain individuals' sexual behavior are intimate and embarrassing and of no legitimate public interest. We have marked the information that must be withheld under common-law privacy.<sup>5</sup>

Exhibit 10 contains references to sexual behavior, illnesses, and certain information involving illegal substances. We agree that the information involving specific illnesses must be withheld under common-law privacy. We have marked this information. We also have marked information involving alleged sexual abuse of a minor. *See* Open Records Decision Nos. 393 (1983) (holding that identities of victims of sexual offense are confidential); 339 (1982) (same). Although the information involving illegal substances may be intimate and embarrassing, there is a legitimate public interest in alleged criminal activity. *See, e.g., Houston Chronicle Publishing 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). Furthermore, such activity would clearly affect the job performance of a public employee. *See* Open Records Decision No. 400 (1983) at 3-5 (legitimate public interest in illegal or improper activities that affect job performance of public employee). You may not withhold this information under common-law privacy.

Next we address your claim that the three files grouped together with an affidavit from Assistant District Attorney Charles A. Noll are excepted from required public disclosure under section 552.108 of the Government Code.

Section 552.108 provides that:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

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<sup>5</sup>Although you did not indicate that you wished to withhold the complainant's name, you have marked this information as confidential. We note that the complainant's identity is known to the accused and therefore may not be withheld under the informer's privilege.

(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 [required public disclosure].

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, any proper custodian of information which relates to the incident may invoke section 552.108. Open Records Decision Nos. 474 (1987), 372 (1983). Certain factual information generally found on the front page of police offense reports, however, is public even during an active investigation. *Houston Chronicle*, 536 S.W.2d 559; Open Records Decision No. 127 (1976) at 3-4 (list of factual information available to the public) (copy enclosed). Accordingly, except for the factual information generally found on the front page of police offense reports, you may withhold under section 552.108 of the Government Code the three files relating to the following causes: "Cause No. 676594, The State of Texas vs. Henry James Williams; Cause No. 672323, The State of Texas vs. Kenneth Jerome Woods and Cause No. 682301, The State of Texas vs. Rodolfo Ramirez."<sup>6</sup>

Next we address your assertion that Exhibit 11 is excepted from required public disclosure under section 552.103 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). However, once information has been obtained by all parties to the litigation, *e.g.*, 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).

The city has submitted the affidavit of Senior Assistant City Attorney Olophius E. Perry stating that "Moses Sorola vs. The City of Houston, Civil Action No. H-93-3531, is currently pending in litigation in the United States District court, Southern District of Texas, Houston Division, Honorable Lynn N. Hughes, U.S. District Judge presiding." Mr. Perry's affidavit does not, however, demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). Accordingly, the city may not withhold

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<sup>6</sup>As we resolve these three files under section 552.108, we need not address the applicability of section 552.103. However, we note that section 552.103 generally cannot be invoked to withhold from required public disclosure the basic information normally found on the front page of an offense report where a defendant has been indicted. See Open Records Decision No. 597 (1991) at 3.

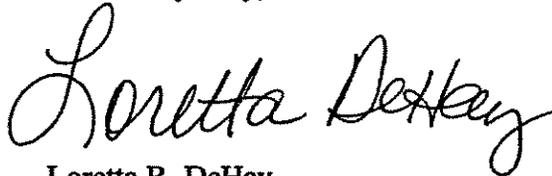
Exhibit 11 under section 552.103. We note, however, that Exhibit 11 does contain information found to be excepted from required public disclosure under section 552.101 as discussed above, for example, criminal history information. We remind the city that the release of information found to be confidential under the Open Records Act is a criminal offense. Gov't Code § 552.352.

You also assert that certain portions of a memorandum contained in Exhibit 11 are excepted from required public disclosure under section 552.111. Section 552.111 excepts "[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 (1993), this office concluded that section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

The memorandum at issue does not concern the policymaking processes of the city. Rather, it relates to a personnel matter. Accordingly, you may not withhold the memorandum under section 552.111.

We note, as stated above, that Exhibit 11 contains information ruled on in Open Records Letter No. 95-979 (1995). We have flagged the relevant documents and have marked them in accordance with this office's ruling in Open Records Letter No. 95-979 (1995). If you have questions about this ruling, please contact this office.

Yours very truly,



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Open Records Division

LRD/LBC/rho

Ref.: ID# 25810

Enclosures: Open Records Decision Nos. 127 (1976)  
Marked documents

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