



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 28, 1996

Mr. David M. Berman
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR96-0432

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38497.

The City of Balch Springs (the "city"), which you represent, received a request for "the following materials and answers" related to the death of Dennis Alan Browning while Mr. Browning was in the city jail:

1. Detailed police report from 7:30 p.m. to midnight;
2. Names and numbers of other prisoners present that night;
3. Names of people in the building when Dennis was there;
4. Tour and inspection of the facility where he was held;
5. Floor plan of his jail cell, including dimensions;
6. Measurements and illustration of the camera range;
7. Copy of the video/audio tape while Dennis was present;
8. Copies of any photos taken of Dennis before and after death;
9. Copy of press release sent to Surburban Tribune;
10. Dennis's shirt;

11. Paramedics' arrival and departure times;
12. Copy of dispatch log between 7:00 p.m. and 1:00 a.m. Sunday;
13. Copy of 911 tape if called;
14. Medical Examiner's report;
15. Name of officer who discover Dennis dead;
16. Dennis's other pending charges -- was he told? By whom? When?;
17. Location of cot when Dennis arrived and when he left;
18. Is it customary to retrain/handcuff a prisoner under vigil?
19. Is it customary to check a prisoner outside camera range?
20. Why was widow not contacted until after he was removed?

You state that the city will release to the requestor any photographs of the deceased, the city's death report and the forensic death report, and copies of incident reports concerning Mr. Browning for damage to a squad car and terroristic threats and the Mesquite offense report. You claim that some of the requested information does not exist, that some of the requested information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code, and that some of the information is work product and therefore excepted from disclosure. We have considered the exceptions you claimed and have reviewed the documents at issue.

You claim that the city does not have documents that are responsive to request numbers 2, 3, 5, 6, 9, and 11. For example, you claim that the city has arrest reports which would show the information requested in item number 2. You claim that, as the request does not seek inspection or copies of arrest reports, that information is not responsive. We disagree. A governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990) at 8. If the city holds information from which the requested information can be obtained, the city must provide that information to the requestor unless some exception to disclosure applies.

You further claim that request numbers 4, 10, 11, 15, 17, 18, 19, and 20 are not requests for documents and that the city is not required to respond. Chapter 552 of the Government Code does not require a governmental body to answer factual questions. Open Records Decision Nos. 555 (1990), 379 (1983). However, as stated above, if the city has information from which the requested information can be obtained, the city must

provide that information to the requestor, although the city does not have to compile the information in the format requested.

One of the documents that you submitted to this office for review is a custodial death report. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section I of the custodial death report is public. Code Crim. Proc. art. 49.18; Open Records Decision No. 521 (1989). Sections II through V of the report are confidential by law. Therefore, pursuant to article 49.18 of the Code of Criminal Procedure, as applied through section 552.101 of the Government Code, you must withhold sections II through V of the custodial death report. See Open Records Decision No. 521 (1989). However, you may not withhold section I of the report.

The requestor seeks the "medical examiner's report." You state that the city does not have this report, but that the city will release the city's death report and the forensic death report. To the extent that this request encompasses an autopsy, we note that autopsy reports are expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11. If the city did not have possession of this report at the time the request for information was received, the city need not produce it in response to the request at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city 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. See *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. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney, and (2) the governmental body states that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA") or applicable municipal statute or ordinance. You have submitted a letter to this office for review which appears to be a notice of claim under the TTCA or applicable municipal statute or ordinance. Because your request for a decision from this office was made prior to the issuance of Open Records Decision No. 638 (1996), this office will assume that you are representing that the notice letter you received satisfies the requirements of the TTCA or an applicable municipal statute or ordinance. If this assumption is correct, you may withhold the following information under section

552.103(a) of the Government Code as related to the anticipated litigation: the information responsive to request numbers 1,¹ 7, and 13.²

If, however, this assumption is incorrect and you are not representing that the notice letter complies with the TTCA or applicable municipal statute or ordinance, then you have not met your burden of showing that litigation is reasonably anticipated for purposes of section 552.103(a). *See* Open Records Decision No. 638 (1996). If you do not agree with our assumption that the notice letter complies with the TTCA or applicable municipal statute or ordinance, you should seek a reconsideration from this office and at that time re-assert your other previously raised arguments against disclosure.

We note that if in the future you assert that section 552.103(a) is applicable on the basis of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA or applicable municipal statute or ordinance.

Section 552.108(a) excepts from disclosure records of law enforcement agencies or prosecutors that deal with criminal investigations and prosecutions. When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts 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.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). 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-446 (1982); Open Records Decision Nos. 444 (1986), 434 (1986). Section 552.108(b) excepts from 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 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.

¹We understand that you either have released or will release the first page of the incident report to the requestor.

²We note that this information is not work product for purposes of the anticipated civil litigation, as it does not appear to have been prepared in anticipation of this civil litigation. However, because this information is related to the anticipated civil litigation, the city may withhold it from disclosure under section 552.103(a). Open Records Decision No. 551 (1990).

You claim that the following items are excepted from disclosure under section 552.108: arrest reports for other prisoners present the night Mr. Browning died and 911 call sheets. We will address each of these items in turn. You claim that the arrest reports for other prisoners who were present when Mr. Browning died are protected from disclosure under section 552.108 because they "are internal records of a law enforcement agency maintained for internal use in matters relating to law enforcement." The only offense report that is enclosed is that of the person arrested after Mr. Browning. If the investigation of that offense is still on-going, the city may withhold only that information that the court in *Houston Chronicle* held was not public during a criminal investigation. We enclose for your information a summary of the type of information that may be withheld under section 552.108(a). The remaining information may not be withheld, regardless of its location. If this investigation has been closed, as the city has not shown how release of the requested information would unduly interfere with law enforcement, the city may not withhold the arrest report under section 552.108. This same conclusion applies to the arrest reports of other persons who were present the night Mr. Browning died.

In response to item number 12, you state that no official dispatch log exists. However, you state that the city maintains 911 call sheets that are assembled after 911 emergency calls are placed to the police department. You claim that these 911 call sheets are excepted from disclosure under section 552.108. You have not shown how the 911 call sheets relate to an on-going criminal investigation nor how release of the 911 call sheets would unduly interfere with law enforcement. Therefore, the city may not withhold the 911 call sheets under section 552.108 of the Government Code.

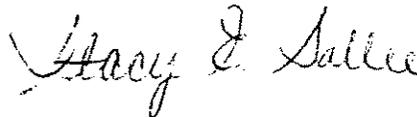
You also claim that the identity of the caller should be withheld under the informer's privilege as incorporated by section 552.101 of the Government Code. The Texas courts have recognized the informer's privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure 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 (1988) at 3, 208 (1978) at 1-2. 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 (1981) at 2 (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 (1990) at 2, 515 (1988) at 4-5. Here, the person who may have cause to resent the informer is deceased. Therefore, as there can be no fear of retaliation from the person informed upon, there is no longer a protectable interest in the identity of the informant. The city may not withhold the informant's identity for the 911 call sheet that was submitted to this office for review.

However, we have concluded that whether the originating phone number on the 911 call sheets is confidential warrants a more thorough analysis than is normally possible in the limited scope of an informal letter. Currently, there is an open records decision pending in our office, RQ# 838, which we believe will be dispositive of this issue. Therefore, we are awaiting the issuance of this decision prior to issuing a ruling pertaining to the originating number on the 911 call sheets. You may withhold the originating numbers on the 911 call sheets pending our ruling in RQ# 838. We will notify you of our ruling regarding this information as expeditiously as possible.

In summary, the city must withhold sections II through V of the custodial death report and the originating numbers on the 911 call sheets and may withhold information responsive to request numbers 1, 7, and 13 under section 552.103(a) if the city is making the representation that the notice of claim complies with the TTCA or applicable municipal statute or ordinance, and may withhold offense reports of other prisoners where the investigation is on-going under section 552.108(a), with the exception of first-page information.

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

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 38497

Enclosures: Submitted documents
Summary of Open Records Decision No. 127 (1976)

cc: Mr. Anthony Browning
428 South St. Augustine Road
Apartment #1016
Dallas, Texas 75217
(w/enclosure - Summary of Open Records Decision No. 127 (1976))