



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 6, 1998

Mr. Wm. J. McGowan, II
McGowan & McGowan, P.C.
P.O. Box 71
Brownfield, Texas 79316-0071

OR98-0033

Dear Mr. McGowan:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111620.

The City of Brownfield (the "city"), which you represent, received a request for "any documents concerning the recent three-day suspension in August of Police Chief Bill Avera." You claim that the requested documents are excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. These documents include letters from the City Manager to the Chief of Police and the City Manager's investigation notes. We have considered the exceptions you claim and have reviewed the documents at issue.

The City Manager's investigation notes reveal the names of members of the Brownfield Police Department who provided information to the City Manager during his investigation of the Chief of Police. You claim that these names are excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. The informer's privilege, incorporated into the Open Records Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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. It is not apparent from the submitted information, and you have not asserted, that the Chief of Police was accused of violating a criminal or civil statute. Therefore, the informer's privilege is not applicable in this situation. We conclude that the city may not withhold the submitted documents from disclosure under section 552.101 in conjunction with the informer's privilege.

Next, you claim that the submitted documents are excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy because the documents "contain information that would be inflammatory, embarrassing, personal and degrading to the Chief of Police." For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. This office has consistently held that information relating to a public employee's job performance is of legitimate public interest and is not protected by the common-law right to privacy. See, e.g., Open Records Decision No. 473 (1987) (release of public employee's performance evaluation does not violate employee's common-law right to privacy even if evaluation is poor and highly subjective), 470 (1987) (public employee's job performance does not generally constitute his private affairs). Having reviewed the submitted documents, we conclude that they are not excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy.

We note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). In addition, in Open Records Decision No. 579 (1990), the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common-law tort of false-light privacy, overruling prior decisions to the contrary. Open Records Decision No. 579 (1990) at 3-8. Thus, the truth or falsity of information is not relevant under the Open Records Act.

You also contend that the requested documents are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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.

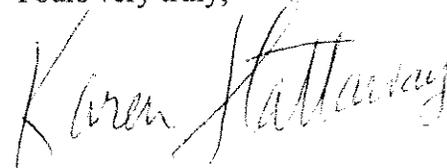
To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that a potential opposing party hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. Having considered the circumstances presented, we conclude that the city does not reasonably anticipate litigation against the Chief of Police at this time. Therefore, the city may not withhold the requested documents from disclosure under section 552.103(a).

Finally, you claim that the requested documents constitute work product. A governmental body may withhold attorney work product from disclosure under sections 552.103 and 552.111 of the Government Code if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 (1996) at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You have not established that the submitted documents meet this two-pronged test. Thus, the documents are not excepted from disclosure as attorney work product. We conclude that the city must release the documents to the requestor.

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 111620

Enclosures: Submitted documents

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