



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 30, 1998

Colonel Jack L. Slayton
Texas Air National Guard
State Judge Advocate General
Adjutant General's Department
P.O. Box 5218
Austin, Texas 78763-5218

OR98-3267

Dear Colonel Slayton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120731.

The Adjutant General's Department (the "department") received a request for information regarding an investigation of a former member of the Texas State Guard. The requestor is the individual who is the subject of the investigation. You advise that the department does not have information responsive to certain parts of the request. You seek to withhold such responsive information as exists under sections 552.101, 552.108, and 552.111 of the Government Code.

Section 552.108 excepts from required public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(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 . . . if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You advise:

These documents are held by the Texas State Guard, a component of the state military forces [Texas Government Code, Section 431.001(3)] which is investigating with an eye toward prosecution, allegations which have been made against SGM Bowen and another Texas State Guard member. The allegations being investigated constitute potential violations of the Texas Code of Military Justice (Texas Government Code, Chapter 432), which are criminal in nature. The investigation is ongoing, and until the investigation is completed, it is uncertain whether evidence adduced will be sufficient to support a court-martial proceeding.

(Bracketed and parenthetical text yours)

Section 552.108 protects information held by law enforcement agencies that relates to *criminal* investigations and prosecutions. You assert that the Texas State Guard is a law enforcement agency within the meaning of section 552.108, citing Open Records Decisions Nos. 172 (1972) and 320 (1982). However, even assuming that the Texas State Guard is a

law enforcement agency, we do not believe that you have established, nor is it apparent from the material you submitted that the information relates to conduct for which there is a likelihood of criminal prosecution, such that the information's release would "interfere with the detection, investigation, or prosecution of crime" or otherwise fall within the protection of section 552.108. Therefore, you may not withhold the information at issue under section 552.108.

Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

The information for which you claimed the protection of section 552.111 deals, in effect, with personnel matters. It does not, in our opinion, relate to "policymaking functions" such that it would fall within the ambit of section 552.111. Therefore, none of the information you submitted may be withheld under section 552.111.

Section 552.101 protects, *inter alia*, information made confidential by judicial decision. You claim that some of the information you submitted is protected under the informer's privilege. The informer's privilege has been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). 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.]

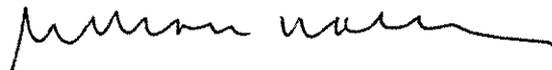
The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285 (1981), 279 (1981); *see also* Open Records Decision No. 208 (1978). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988), 391 (1983).

The informer's privilege, however, does not ordinarily apply to employees reporting to their employers about the job performance of other employees. *See* Open Records Decision No. 515 (1988). Moreover, the privilege does not apply when the informant's identity is known to the party who is the subject of the complaint. *See* Open Records Decision No. 208 (1978). In our opinion, you have not established that any of the information for which you claim the protection of the informer's privilege may be withheld under that exception to disclosure.

We note however, that a portion of the information you submitted is protected from disclosure by common-law privacy. Section 552.101 encompasses common-law privacy protections. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have marked information which must be withheld under common-law privacy. Otherwise, the requested information must be released.

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,



William Walker
Assistant Attorney General
Open Records Division

WMW/rho

Ref.: ID# 120731

Enclosures: Marked documents

cc: Mr. John C. Bowen
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(w/o enclosures)