



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2004

Mr. Scott A. Durfee
General Counsel
Office of the District Attorney
Harris County District Attorney's Office
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2004-5569

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204030.

The Harris County District Attorney's Office (the "district attorney") received a request for twenty-nine categories of information relating to the district attorney's investigation of Texans for True Mobility and specified periods of time. You state that some of the requested information has been released to the requestor. You claim that portions of the remaining requested information are not subject to the Public Information Act (the "Act"). In the alternative, you claim that this particular information, as well as the remaining requested information, is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

You claim that portions of the information that you submitted to us for review as Appendix C do not constitute "public information" that is subject to the Act. *See Gov't Code*

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

§ 552.002. Section 552.021 of the Government Code provides for public access to “public information.” *See id.* § 552.021. Section 552.002(a) defines “public information” as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, under this provision, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 4 (1995). In addition, section 552.001 states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a). Although you state that the calendar entries at issue in Appendix C are unrelated to governmental business and of no legitimate public interest, we note that the calendar as a whole is information that is collected, assembled, or maintained by the district attorney in connection with the transaction of official district attorney business. Thus, after carefully considering your representations and reviewing the information at issue, we find that this information constitutes public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that because calendar contained entries that were “commission-related,” among other factors, commissioner’s calendar held subject to Act). Accordingly, we conclude that the information at issue in Appendix C is subject to the Act. *See* Gov’t Code § 552.002(a). However, as the district attorney claims in the alternative that this particular information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy, we will address this claim.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes. Information is protected from disclosure by the common-law right to privacy if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. In addition, this office has found that the following types of information are protected from disclosure by the

common-law right to privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Based on our review of your arguments and the information at issue in Appendix C, we have marked the information that the district attorney must withhold pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.²

You also claim that portions of Appendix C are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

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

...

(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] if:

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

Gov't Code § 552.108(a)(1), (b)(1). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. A governmental body that claims an exception to disclosure under either section 552.108(a)(1) or (b)(1) of the Government Code must reasonably explain how and why these subsections are applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You indicate that portions of this particular information pertain to a pending public integrity investigation being conducted

² Because we base our ruling with regard to this particular information on section 552.101 of the Government Code in conjunction with the common-law right to privacy, we need not address your remaining arguments for this information.

by the district attorney. Thus, based on your representation and our review of this particular information, we agree that section 552.108(b)(1) applies to this information. Accordingly, we conclude that the district attorney may withhold the portions of Appendix C, which we have marked, pursuant to section 552.108(b)(1) of the Government Code. We note, however, that the district attorney maintains the discretion to release all or part of this particular information that is not otherwise confidential by law.³ *See* Gov't Code §552.007. However, we also find that the district attorney has failed to adequately demonstrate how or why either section 552.108(a)(1) or (b)(1) is applicable to the remaining portions of the information for which the district attorney claimed these particular exceptions to disclosure. Accordingly, we conclude that the district attorney may not withhold any other portion of Appendix C under either section 552.108(a)(1) or (b)(1) of the Government Code.

In addition, you claim that the portions of Appendix C that are not excepted from disclosure pursuant to either section 552.108(a)(1) or (b)(1) are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.⁴ The common-law informer's privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *see also Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege 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. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege also 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." *See* Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute carrying a civil or criminal penalty. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

Although you indicate that the disclosure of this particular information would reveal the identity of informants, you in no way explain what law was alleged to have been violated here nor indicate whether the violation of such a law carries with it civil or criminal penalties. *See* Open Records Decision No. 279 at 2 (1981). Furthermore, it is not apparent from our review of this particular information what specific law was allegedly violated and whether such a violation carries a civil or criminal penalty. Accordingly, we conclude that

³ Because we base our ruling regarding these particular portions of Appendix C on section 552.108(b)(1) of the Government Code, we need not address your remaining claimed exceptions to disclosure regarding this information.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the common-law informer's privilege. *See* Gov't Code § 552.101.

the district attorney may not withhold any portion of this particular information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege and, thus, must release it to the requestor.

Finally, you claim that the information that you submitted to us for review as Appendix B is excepted from disclosure pursuant to section 552.108(b)(2) of the Government Code. Section 552.108(b) provides in pertinent part:

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] if:

...

(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[.]

Gov't Code § 552.108(b)(2). Section 552.108(b)(2) excepts from disclosure information maintained for internal use in matters relating to law enforcement or prosecution if the information relates to law enforcement only in relation to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108(b)(2) must demonstrate that the information at issue pertains to a criminal case that has concluded in a final result other than conviction or deferred adjudication. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You indicate that Appendix B is associated with a criminal investigation that was closed due to the fact that the investigation revealed no violations of the Texas Election Code. Thus, based on your representations and our review of Appendix B, we agree that section 552.108(b)(2) is applicable to this information. Accordingly, we conclude that the district attorney may withhold Appendix B pursuant to section 552.108(b)(2) of the Government Code. We note, however, that the district attorney maintains the discretion to release all or part of Appendix B that is not otherwise confidential by law.⁵ *See* Gov't Code §552.007.

In summary, the district attorney must withhold the information in Appendix C that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The district attorney may withhold the portions of Appendix C, which we have marked, pursuant to section 552.108(b)(1) of the Government Code. The district attorney may also withhold Appendix B pursuant to section 552.108(b)(2) of the

⁵ Because we base our ruling regarding Appendix B on section 552.108(b)(2) of the Government Code, we need not address your remaining arguments with respect to this particular information.

Government Code. The district attorney must release to the requestor the remaining portions of Appendix C that are at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

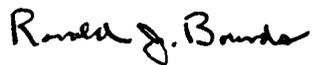
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 204030

Enc. Marked documents

c: Mr. Tom "Smitty" Smith
c/o Scott A. Durfee
Harris County District Attorney's Office
1201 Franklin Street, Suite 600
Houston, Texas 77002
(w/o enclosures)