



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2008

Ms. Myra K. Morris
Royston, Rayzor, Vickery & Williams, L.L.P.
1300 Frost Bank Building
802 North Carancahua
Corpus Christi, Texas 78470

OR2008-04211

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 306268.

The 79th Judicial District Attorney (the "district attorney"), which you represent, received a request for: 1) copies of 1099s issued by the district attorney from any forfeiture funds that were given to employees or contract vendors; 2) copies of all W-2 forms issued by Jim Wells County (the "county") from all county funds given to employees and contract vendors; 3) copies of checks issued by the district attorney or the county payable to employees or contract vendors; 4) copies of documents pertaining to above referenced items in possession of a specified certified public accountant, the district attorney, or the county; 5) a list of each disbursement made from the district attorney's forfeiture fund; and 6) copies of checks issued from the district attorney's forfeiture fund. You argue that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments. . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . or offense [.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), aff'd in part, 993 F.2d 1111 (4th Cir. 1993). Therefore, the district attorney must withhold the requested 1099 and W-2 forms pursuant to section 552.101 of the Government Code in conjunction with federal law.

Next, you claim that the identities of the payees in Exhibit D may be withheld pursuant to the common-law informer's privilege. Section 552.101 of the Government Code also encompasses the common-law informer's privilege, which 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 at 3 (1988), 208 at 1-2 (1978). 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 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. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. See Open Records Decision No. 549 at 5 (1990).

You state that a portion of the payees identified in Exhibit D are confidential informants. However, you state that you are unable to make a complete determination regarding which payees are confidential informants and which payees are not. Accordingly, we conclude that the district attorney has failed to demonstrate how the information in Exhibit D reveals the identity of any informer for purposes of the informer's privilege. Thus, the district attorney may not withhold any of the requested information pursuant to section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Next, you indicate the information contained in Exhibit D may be withheld under section 552.108, which provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 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 the requirements of Section 552.021 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). A governmental body claiming section 552.108(a)(1) or section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You assert that release of "the confidential informants' identities, payment schedules, and other information would undermine the entire program." This office has previously determined that, when it can be established from an examination of the facts of a particular case that disclosure of witness identities and statements might subject the witnesses to possible intimidation or harassment, that information may be excepted from disclosure under the predecessor to section 552.108. *E.g.*, Open Records Nos. 329 (1982), 313 (1982), 297 (1981). However, after review of your arguments and the information at issue, we find the district attorney has not established that release of the information at issue would subject any individual to possible intimidation or harassment. Accordingly, the district attorney may not withhold Exhibit D under section 552.108 of the Government Code.

You then argue a portion of the information in Exhibit D must be withheld under section 552.136(b) of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Accordingly, the district attorney must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. However, we find that the district attorney has failed to demonstrate how any portion of the remaining information in Exhibit D constitutes a credit card, debit card, charge card, or access device

number subject to section 552.136. Therefore, the district attorney may not withhold any of the remaining information in Exhibit D pursuant to section 552.136.

In summary, the district attorney must withhold the requested 1099 and W-2 forms pursuant to section 552.101 of the Government Code in conjunction with federal law. The district attorney must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,

C. Chantaplin-McLelland

Chanita Chantaplin-McLelland
Assistant Attorney General
Open Records Division

CC/mcf

Ref: ID# 306268

Enc. Submitted documents

cc: Mr. Armando G. Barrera
Barrera & Barrera
P.O. Drawer 1339
Alice, Texas 78333
(w/o enclosures)