

Juvenile Law Case Summaries

By
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Attorney General explains informer's privilege exception to Public Information Act [OR2001-4297] (01-4-23).

On September 23, 2001, the Attorney General ruled in a Public Information Act letter that information concerning juvenile police informants is excepted from disclosure. The AG also explained the litigation exception to the Act.

01-4-23. Attorney General Opinion No. OR2001-4297, 2001 WL 1139930 (9/25/01) [Texas Juvenile Law (5th Edition 2000)].

Ms. Cynthia B. Garcia Assistant
City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 152352.

The City of Fort Worth Police Department (the "department") received a request for "[a]ny and all police vice expense reports for the past three years." You indicate that you will release some of the requested information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that much of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law: (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; ... (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body....

Gov't Code § 552.022(a)(1), (3). Thus, the information falling under these categories of information must be released to the public unless it is confidential under other law or also, in the case of the completed reports, if the information is excepted from disclosure under section 552.108. We have marked the types of information subject to section 552.022.

You contend that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. However, sections 552.103 and 552.108 are discretionary exceptions to disclosure and are not considered "other law" for the purpose of section 552.022. You also appear to contend that a portion of the submitted information is protected under the informer's privilege. The informer's privilege, as found in Texas Rule of Evidence 508, is considered "other law" for the purpose of section 552.022. Therefore, we will address your argument that

certain informant information is excepted from disclosure under Rule 508. Furthermore, we will address your argument under section 552.108 of the Government Code for those portions of the documents subject to section 552.022(a)(1). Finally, we will address your arguments under both section 552.103 and 552.108 with respect to the information that is not subject to section 552.022.

First, you contend that the submitted documents contain information concerning juvenile informants who assisted in "minor buys" of tobacco and alcohol. Texas Rule of Evidence 508 provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an informer's identity is confidential under Rule 508 if a governmental body demonstrates that an individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 508(c). Based on your arguments and our review of the submitted information, we agree that the identities of certain individuals are protected under Rule 508 and therefore may be withheld. We have marked the information that is subject to Rule 508.

We next consider your argument under section 552.108 with respect to the information that is either subject to section 552.022(a)(1) or not subject to section 552.022 at all. Section 552.108 provides in relevant part:

(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....

Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). First, you appear to argue that certain portions of the submitted information should be excepted under section 552.108(a)(1) because they relate to "pending cases." However, you do not indicate, nor is it apparent, which portions of the submitted information relate to pending cases. Therefore, we find that you have not adequately demonstrated that the information that is not otherwise subject to section 552.022(a)(3) is excepted from disclosure under section 552.108(a)(1).

You also contend the submitted information is excepted from disclosure under section 552.108(b)(1) because the release of the information "would reveal special investigative techniques currently in use by" the department and reduce the value of those techniques to the department. However, we do not believe you have adequately explained how the release of the information that is not otherwise subject to section 552.022(a)(3) would interfere with law enforcement or prosecution. See *Open Records Decision Nos. 508 at 2 (1988), 252 at 3 (1980), 216 at 4 (1978)*. Therefore, we find that the submitted information may not be withheld under section 552.108(b)(1).

Next, we address your argument under section 552.103 only with respect to the information that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

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 at 4 (1986). 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. [FN1] Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (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). You contend that the information relates to both pending and reasonably anticipated litigation. However, you have not adequately demonstrated that the department is involved in any specific pending or reasonably anticipated litigation. See Open Records Decision Nos. 638 at 4 (1996), 392 at 3 (1983) (litigation exception applies only when litigation involves governmental body claiming the exception). Consequently, we find that you have not met your burden under section 552.103. See ORD 551 at 5, 452 at 4.

[FN1]. In 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).

Finally, you appear to contend that the submitted information is confidential because the information relates to investigations involving minors and sexual offenses. However, you have not indicated, nor is it apparent from the face of the information, that any provision of law that would make the submitted information confidential. Gov't Code § 552.301(e)(1)(A).

In summary, you may withhold the information identifying juvenile informers, which we have marked, under Rule 508 of the Texas Rule of Evidence. However, you must release the remainder of the submitted information.

[Balance of letter dealing with disclosure and appeal procedures is omitted.]

Sincerely,

Nathan E. Bowden
Assistant Attorney General Open Records Division

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