



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 24, 1997

Mr. Alberto J. Peña
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR97-2146

Dear Mr. Peña:

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# 109294.

The Office of the City Attorney of the City of San Antonio (the "city") received a request for various information pertaining to the city police department investigation of an incident involving one of its police officers, Officer James Smith, and Mr. Eli Montesinos. You assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.103 and 552.108 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, either constitutional, statutory, or by judicial decision. You raise this exception in conjunction with section 143.089(g) of the Local Government Code, a provision that applies to cities, such as San Antonio, that have voted to adopt chapter 143 of the Local Government Code, and which reads as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

You state that the requested Professional Standards/Internal Affairs investigative report is maintained in Officer Smith's departmental file. We therefore conclude that the internal affairs report the city maintains in Officer Smith's departmental file is deemed confidential by section 143.089(g) of the Local Government Code. Consequently, the city must not release this report to the requestor. Gov't Code § 552.101; see Open Records Decision No. 650 (1996) (citing *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied). You do not state that the city maintains the other requested documents in Officer Smith's departmental file. Thus, we cannot conclude that section 143.089(g) applies to the other information.¹ See Open Records Decision No. 562 (1990) (section 552.101 inapplicable to city civil service commission personnel records).

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You assert that the requested information relates to the case of *Montesinos v. Dillard Dep't Store*, No. 97-CI-00752 (285th Dist. Ct., Bexar County, Tex., filed Jan. 17, 1997). You submit to this office a copy of Plaintiff's Original Petition in this case. James A. Smith is a defendant in this law suit. You inform us that Officer Smith is asserting that he was acting as a San Antonio police officer during the incident, that the city is providing Officer Smith with defense counsel in this litigation and that the officer has asserted official immunity as a defense to the allegations.

¹We assume the requestor was referred to the civil service director for information maintained in the civil service personnel file in accordance with section 143.089(g).

We conclude that, under these circumstances, section 552.103 is applicable to the requested information. *See* Open Records Letter No. 97-1353 (1997). The requested records may be withheld with the following exception.²

The records include a custodial death report. This office has concluded that Part I of a custodial death report is public information in accordance with article 49.18(b) of the Code of criminal Procedure. *See* Open Records Decision No. 521 (1989). Parts II through V of the report are not public information. *See id.* Thus, the city may not withhold Part I of the custodial death report.

In light of our conclusions above, we need not address your section 552.108 claim. We are resolving this matter with this 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 may 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/rho

Ref.: ID# 109294

Enclosures: Submitted documents

cc: Mr. Carlos M. Sada
Consul General of Mexico
127 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)

²If the opposing party in the litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, when section 552.103 is inapplicable, portions of the requested information may be otherwise excepted from public disclosure. *See* Gov't Code §§ 552.117, .119.

