



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 9, 1998

Ms. Sara Fauls
Assistant City Attorney I
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR98-0388

Dear Ms. Fauls:

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# 112387.

The City of Plano Police Department (the "city") received a request for:

any and all memos and/or correspondence that has been circulated pertaining to the Scott Mathus hanging incident on Feb. 11, 1994; the most recent inspection report of the city jail; the names of each of the jail and police officers -- including the supervisor -- on duty the night of the 1994 Scott Mathus hanging incident on Feb. 11, 1994; the personnel records of each of the jail and police officers -- including the supervisor -- on duty at the jail on Feb. 11, 1994, the night of the Scott Mathus hanging incident; a copy of any and all disciplinary action taken against the aforementioned jail and police employees and documentation of any training completed by these aforementioned employees in regard to suicide prevention.

You state that the city has released to the requestor all items except for all memos and correspondence, personnel records and training records. You assert that the unreleased information is excepted from required public disclosure based on sections 552.101, 552.102, 552.103, and 552.111 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code provides for the maintenance of a police civil service file and what may be kept in that file:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

Information that sections 143.089(b) and (c) prohibits from being placed in the civil service file may be maintained in a police department's internal file, as provided in section 143.089(g):

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.

The court in *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), addressed the availability of information that is contained in the department's internal file pursuant to section 143.089(g). The court determined that section 143.089(g) makes confidential any records kept in a department's internal file. You have not marked any of the documents as being section 143.089(g) records. However, if any of the records at issue are section 143.089(g) documents from the police department's internal file, these records are confidential and may not be released. You state that some of the documents at issue are maintained in Officer Harp's departmental file pursuant to section 143.089(g). We therefore conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and may be withheld under section 552.101 but Officer Harp's Civil Service file should be disclosed.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." This office recently issued Open Records Decision No. 647 (1996), holding that a governmental body may withhold information under section 552.111 of the Government Code as attorney work product if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. A review of item one reveals that it was created in anticipation of civil litigation which reveals the strategies of the attorneys in preparation for the trial and consequently, should be withheld under section 552.111.

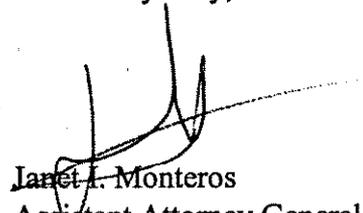
Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. 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. *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 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the litigation in *Linda Jo Espinoza v. City of Plano*, Cause No. 219-1264-94 (District Court of Collin County, 219th Judicial Dist. of Texas, 1994) is, as of the time of the request, still ongoing. You state that the city anticipates that the litigation will continue, as the city has available post trial and appeal remedies. After reviewing the documents concerning "all memos and correspondence and training records," and jailer training records, we conclude that they are related to the litigation. Therefore, the city may

withhold the remaining requested documents under section 552.103.¹ However, we note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for 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 has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We also note that to the extent that records from civil service files were released in discovery, section 552.103 is inapplicable.

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref.: ID# 112387

Enclosures: Submitted documents

cc: Mr. Ben Tinsley
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(w/o enclosures)

¹As we address the issues presented under the foregoing exceptions, we need not address the other exceptions invoked at this time.