



March 16, 1999

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

OR99-0732

Dear Mr. Peña:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 122754.

The City of San Antonio (the “city”) received a request for “copies of all documents (including witness statements, memoranda, and reports) relating to any disciplinary action taken against Officer Hector Dominguez.” You contend that the requested documents are excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

First, you contend that all but one of the requested documents are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The city has adopted chapter 143 of the Local Government Code, and, therefore, the city police department is authorized to maintain internal files on its police officers. Information maintained in the police department’s internal files is confidential and must not be released. Local Gov’t Code § 143.089(g); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). However, section 143.089(a) requires the city to maintain separate civil service files on its police officers and to place in those files “any letter, memorandum, or document *relating to* . . . any misconduct by the . . . 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.” Local Gov’t Code § 143.089(a)(2) (emphasis added). Information in the city’s civil service files is subject to required public disclosure unless it is protected by one of the exceptions to disclosure in the Open Records Act. See Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

You inform us that Officer Dominguez’s “agreed suspension” is the requested document that is located in his civil service file. You indicate that all remaining documents relating to the disciplinary suspension are located in the police department’s internal file, and are, therefore, confidential under section 143.089(g). However, because all of the documents at issue relate to the disciplinary suspension, section 143.089(a)(2) requires the city to place copies of them in Officer Dominguez’s civil service file. Therefore, the documents are not confidential under section 143.089(g).

You also argue that the requested documents are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure 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.

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. *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 city must meet both prongs of this test for information to be excepted under 552.103(a).

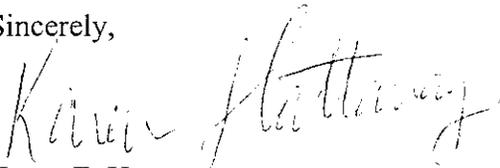
To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably 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.¹ 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance we conclude that the city reasonably anticipates litigation against the requestor’s client. Therefore, with the exception noted below, the city may withhold the requested documents from disclosure pursuant to section 552.103 of the Government Code. We note that if the opposing party in the anticipated litigation has seen or had access to any of the information in these documents, there would be no justification for withholding that information pursuant to section 552.103. Open Records Decision Nos. 349 (1982), 320 (1982). In particular, front page offense report information that the criminal defendant has seen may not be withheld from disclosure under section 552.103. *See* Open Records Decision No. 597 (1991). In addition, the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an 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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

¹In 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).

Ref.: ID# 122754

Enclosures: Submitted documents

cc: Mr. Christopher J. Gale
Law Offices of Gale & Wilson
115 East Travis, Suite 618
San Antonio, Texas 78205
(w/o enclosures)