



May 21, 1999

Ms. Tracy B. Calabrese
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR99-1423

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124977.

The City of Houston (the "city") received a request for seven categories of information concerning the "demolition of all structures carried out under orders of the City of Houston since January 1, 1998," including city procedures, expenses, company bids, emergency demolitions, and contracts. The requestor also seeks any investigations regarding demolitions and specifically an internal investigation concerning a city Fire Department employee. You indicate that you will release most of the requested information. You claim, however, that three categories of responsive documents, submitted to this office as Exhibits 3 - 5, are excepted from required public disclosure by sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the sample documents that you have submitted.¹

You first claim that the material in Exhibit 3 is excepted from disclosure by section 552.103. Section 552.103(a) excepts from disclosure information:

¹In reaching our conclusion here, 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.

- (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).

In this instance, you explain that the city is currently involved in pending litigation. You have submitted a copy of the relevant petition in that cause. *Texas Valla Real Estate II, Inc. v. Brooks and the City of Houston*, No. 98-50325 (80th Judicial District, Harris County, Texas, filed October 26, 1998). After reviewing the submitted materials, we conclude that litigation is pending and that the requested information in Exhibit 3 relates to the pending litigation. *Texas Legal Found.*, 958 S.W.2d at 483; see Open Records Letter No. 98-3311 (1998). The city may, therefore, withhold the materials in Exhibit 3 under section 552.103(a).

Notwithstanding our decision under section 552.103, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

You contend that the documents in Exhibit 4 must be withheld under section 552.101 in conjunction with section 143.1214 of the Local Government Code. You indicate that the complaint against a city fire fighter is currently under investigation and in progress. You state that the city "is unable to determine whether misconduct will be found,

and, whether disciplinary action will result.” You argue that “in the event the allegation is not sustained, and thus no disciplinary action is taken, the investigation must be maintained in an internal departmental file only.” Local Gov’t Code § 143.1214; Open Records Decision No. 642 (1996). Because the investigation is pending, we believe under these circumstances that section 143.089 provides the applicable confidentiality.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Chapter 143 of the Local Government Code sets forth civil service rules for municipal fire and police departments. Local Gov’t Code § 143.002, .101. Subchapter G of that chapter sets forth provisions applicable to municipalities with a population of 1.5 million or more, including the City of Houston. *See* Open Records Decision No. 642 (1990). We believe that the investigation materials are protected from disclosure under section 143.089(g).

Section 143.089 of the Local Government Code provides for the maintenance of a fire fighter or 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 section 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in the fire 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.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court 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. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied) (in construing Local Gov't Code § 143.089 the court found general legislative policy that allegations of misconduct against police officers and fire fighters not be subject to compelled disclosure unless they have been substantiated and resulted in disciplinary action). Again, you assert that the responsive documents are maintained in the Fire Department's internal file. You inform this office that no action has been taken in the investigation; no disciplinary action has been taken because the investigation is pending. Thus, under section 143.089(g), the submitted records in Exhibit 4 are confidential and may not be disclosed at this time.

Finally, you argue that the requested information in Exhibit 5 is excepted from required public disclosure by section 552.108 of the Government Code. The information consists of

the Public Integrity Review Group's investigation into alleged criminal conduct of a city employee.

Section 552.108 of the Government Code provides in 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;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

* * *

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

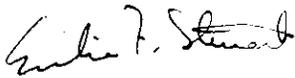
Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You assert that "the investigation did not result in conviction or deferred adjudication." After examining your arguments and the submitted materials, we conclude that you have demonstrated section 552.108(a)(2) is applicable to Exhibit 5. Consequently, with the exception of the information outlined below, you may withhold Exhibit 5 under section 552.108(a)(2).

Information normally found on the front page of an offense report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Gov't Code § 552.108(c); *see* Open

Records Decision No. 127 (1976) (summarizing the types of information deemed public by *Houston Chronicle*).

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,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS/nc

Ref.: ID# 124977

encl: Submitted documents

cc: Mr. Wayne Dolcefino
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(w/o enclosures)