



May 16, 2001

Mr. John Steiner
Division Chief
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2001-2025

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147322.

The City of Austin (the "city") received a request for the civil service file and police department file of a named police officer. You claim that the requested police department file is excepted from disclosure under section 143.089 of the Local Government Code and that the requested civil service file is excepted from disclosure under section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We begin by noting that section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although you provided this office with a representative sample of the police officer's civil service file, you did not provide this office with a copy or representative sample of the police officer's police department personnel file.

¹We 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.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted the police department personnel file, we have no basis for determining whether a compelling reason exists for withholding it. Thus, we have no choice but to order the information released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See Gov't Code § 552.352.*

With respect to the submitted information from the police officer's civil service file, we note that some of the 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.

The submitted information contains completed evaluations of the named police officer. Under section 552.022, these evaluations may only be withheld from disclosure if they are confidential under other law or if they are excepted under section 552.108 of the Government Code. You do not assert section 552.108. Furthermore, section 552.103 of the Government Code is a discretionary exception and is not other law for purposes of section 552.022.² Therefore, you must release the completed evaluations contained in the responsive information.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

With respect to the submitted information that is not otherwise expressly public under section 552.022, we address your section 552.103 argument. 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 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 section 552.103(a).

You indicate that the city is currently involved in litigation with the employee whose personnel file is being requested. In support of this contention you have submitted a petition from the case of *Mount v. City of Austin*, No. 95-14287 (261st Dist. Ct., Travis County, Tex.), which indicates that the named police officer is a plaintiff in the suit. The petition further indicates that the plaintiffs, city police officers, are suing the city under sections 141.033 and 143.038 of the Local Government Code for an alleged discrepancy in pay. Based on the information you have provided, we agree that the requested civil service file relates to pending litigation involving the city.

However, we note that once information has been obtained by 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). Here, it appears that at least some, if not all, of the information in the police officer's civil service file has been seen by the police officer, a plaintiff in the pending litigation. To the extent the police officer has seen the information in his civil service file, the information is not excepted from disclosure under section 552.103(a) and 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).

We note that the police officer's personnel file contains information that is generally excepted from disclosure under section 552.117(2) of the Government Code. Under section 552.117(2), the city must withhold the home addresses, home telephone numbers, social security numbers, and family member information of peace officers. However, section 552.117(2) is designed to protect the privacy interests of peace officers. Furthermore, section 552.023 of the Government Code provides that a person or a person's authorized representative has a special right of access to information that would otherwise be protected from disclosure based on the person's privacy interests. Here, you indicate that the requestor is the attorney for the officer whose civil service file is at issue. Therefore, to the extent any documents containing the police officer's home address and telephone number, social security number, and family member information have been seen by the police officer and therefore are not protected under section 552.103, the police officer's home address and telephone number, social security number, and family member information likewise cannot be withheld under section 552.117(2) because the requestor has a special right of access to this information.

In summary, you must release the requested police department personnel file as well as the completed evaluations contained in the requested civil service file. You may withhold the remainder of the civil service file under section 552.103, but only to the extent the police officer has not seen the information in his file. You must release any information in the civil service file that the police officer has already seen.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

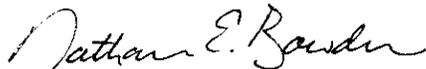
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 147322

Encl: Submitted documents

cc: Mr. Jason R. Nassour
Law Offices of Morris & Florey, L.L.P.
Attorneys at Law
704 West 9th Street
Austin, Texas 78701
(w/o enclosures)