



March 11, 2002

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

OR2002-1163

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# 159638.

The Austin Fire Department (the "department") received a request for twelve categories of information regarding the department's Training Academy and the department's hiring decisions for the past five Training Academy classes. You state that you will release information responsive to category ten of this request. You also state that the department does not have any information responsive to category seven of this request.¹ The department received a second request from the same requestor for all information regarding a pending complaint, including the rules and procedures that the department will use in considering this complaint. You state that you will release the applicable portions of the Austin Fire Department Rules and Regulations regarding misconduct. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We 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.

Initially, we note that it appears that you have not submitted any information responsive to categories two and eleven of the first request. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the first request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302.

Next, we note that some of the submitted documents are subject to required public disclosure under section 552.022 of the Government Code, which 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;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures[.]

Gov't Code § 552.022. The submitted documents include completed evaluations, which are subject to section 552.022(a)(1), as well as department policies and procedures, which are subject to section 552.022(a)(8). Furthermore, some of the submitted documents appear to be working papers used to estimate the expenditure of public funds by a governmental body. If the estimates associated with these documents have been completed, the documents are public under section 552.022(a)(5). As prescribed by section 552.022, the documents that are subject to sections 552.022(a)(1) and 552.022(a)(8) must be released to the requestor unless they are confidential under other law. Further, the department may not withhold the documents that are subject to section 552.022(a)(5) of the Government Code, if the estimates associated with these documents have been completed, unless such information is confidential under other law. Section 552.103 is a discretionary exception under the Public

Information Act and is therefore not "other law" that makes the information we have marked confidential. See Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). As you raise no other exception to the disclosure of some of the information that is responsive to the first request and that is subject to section 552.022, such information, which we have marked, must be released.

You claim, however, that some of the information responsive to the first request that is subject to section 552.022 is confidential under section 552.101 of the Government Code. You also claim that the information responsive to the second request is confidential under section 552.101. 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 contemplates two different types of personnel files, one that the civil service director or designee is required to maintain as part of the firefighter's civil service file, and one that a fire department may maintain for its own internal use. See Local Gov't Code § 143.089(a), (g). Section 143.089 of the Local Government Code provides in pertinent part:

(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.

....

(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 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.

Local Gov't Code § 143.089(a), (g) (emphasis added).

Section 143.089(b) of the Local Government Code specifically prohibits information regarding alleged misconduct from being placed in the fire fighter's civil service file "if the employing department determines that there is insufficient evidence to sustain the charge of misconduct." *Id.* §143.089(b). The only information regarding misconduct that is to be placed in the civil service file is that which relates to "misconduct [that] resulted in disciplinary action by the employing department in accordance with [chapter 143]." Local Gov't Code § 143.089(a)(2); *see also* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000).

Information that reasonably relates to a fire fighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.--San Antonio 2000, no pet.); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). You indicate that some of the information responsive to the first request that is subject to section 552.022 consists of personnel records of cadets who graduated from the Training Academy and completed their probationary period. You explain that these cadets are now civil service employees of the City of Austin and that their personnel records are maintained in accordance with section 143.089(g) of the Local Government Code. Thus, we conclude that some of the information responsive to the first request that is subject to section 552.022, which we have marked, is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.³

You also explain that the information responsive to the second request comprises the department's internal affairs file regarding the complaint at issue and that this information is maintained by the department as part of a departmental personnel file maintained for departmental use. As you state that the internal affairs investigation remains pending, we assume that no disciplinary action under chapter 143 has yet resulted against the fire fighter under investigation. Thus, based on your representations and our review of the submitted information, we conclude that the requested internal affairs file, which is responsive to the second request, is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.⁴

We will now address the applicability of section 552.103 of the Government Code to the information that is responsive to the first request and not subject to section 552.022 of the Government Code. Section 552.103 provides as follows:

³Because section 552.101 is dispositive, we need not address your other claims with respect to these documents.

⁴As section 552.101 is dispositive, we need not address your other claims with respect to these documents.

(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 department 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 department 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). Open Records Decision No. 336 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that, prior to the department's receipt of the first request, the requestor's client filed suit against the City of Austin and the department after not being hired by the department and that this case remains pending. You have submitted a copy of the petition in this case. You also state that, prior to the department's receipt of the first request, the requestor's client and another department employee filed complaints with the EEOC alleging discrimination on the part of the department. You have submitted copies of both complaints. After reviewing your arguments and the submitted documents, we conclude that litigation was both pending and reasonably anticipated when the department received the first request for information. We also find that the remaining submitted information that is responsive to the first request is

related to both the pending and anticipated litigation for purposes of section 552.103(a). Therefore, the submitted information that is responsive to the first request and that is not subject to section 552.022 may be withheld from disclosure at this time pursuant to section 552.103.⁵

We note that 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). In addition, the applicability of section 552.103(a) ends once litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize: (1) the department must release the information that is responsive to the first request and that we have marked as being subject to section 552.022 of the Government Code; (2) we have marked the information responsive to the first request that must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (3) the remaining information that is responsive to the first request may be withheld under section 552.103 of the Government Code; and (4) the department must withhold the information responsive to the second request under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code

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

⁵Because section 552.103 is dispositive, we need not address your other claims with respect to these documents.

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 Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 159638

Enc: Marked documents

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(w/o enclosures)