



June 10, 2002

Ms. Julie B. Ross
Karger Key Barnes & Springer, LLP
300 West Third Street, Suite 1700
Fort Worth, Texas 76102

OR2002-3125

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164064.

The City of Belton (the "city"), which you represent, received a request for seven categories of information relating to a named police officer. As responsive to this request you have submitted portions of the Belton Police Department's internal file and of the city's civil service file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. You indicate that the city has adopted Chapter 143 of the Local Government Code and contend that Exhibit 4 is made confidential by section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code provides for the creation of two police personnel files. *See* Local Gov't Code § 143.089 (a), (g). The first file, known as the civil service file, is required. *See* Local Gov't Code § 143.089(a). The civil service file must be maintained by the civil service director or the director's designee and must contain all records of an officer's commendations, misconduct that resulted in disciplinary action under chapter 143, and supervisor evaluations.¹ *See id.* Information contained in the civil service file generally

¹ Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

must be released, unless it is shown that some provision of chapter 552 of the Government Code permits the information to be withheld from public disclosure. *See id.* § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990). The second personnel file is not required but may be maintained by a police department for its own internal use. *See* Local Gov't Code § 143.089(g). Information contained in the internal file is generally confidential and may not be released to the public. *See id.*; *see also City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied) (“the legislature intended to deem confidential the information maintained by the . . . department for its own use under subsection (g)”); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under section 143.089(g) to “information reasonably related to a police officer’s or fire fighter’s employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files).

You inform us that Exhibit 4 contains information from the department’s internal file. Having reviewed the information in Exhibit 4, we conclude that it is information that may properly be maintained in an internal 143.089(g) file and that it is therefore made confidential by subsection 143.089(g). *See* Local Gov’t Code § 143.089(g); *see also City of San Antonio v. Texas Attorney General*, 851 S.W.2d at 949 (provisions of section 143.089 reflect “a legislative policy against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters, except with an individual’s written consent”). Accordingly, the city must withhold Exhibit 4 under section 552.101 of the Government Code.

We turn then to the officer’s civil service file submitted as Exhibit 5. Initially, we note that this exhibit contains a completed evaluation, which is specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(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.

Gov’t Code § 552.022(a)(1). The city must release information that is subject to section 552.022(a), unless the information is expressly confidential under other law. You assert that Exhibit 5 is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived; as such, this section is not other law that makes information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit*

v. Dallas Morning News, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third party rights and may be waived). The completed evaluation in Exhibit 5, which we have marked, must be released.

We now address whether section 552.103 of the Government Code excepts the remainder of Exhibit 5. 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 552.103(a).

You state, and have provided documents evidencing, that the officer whose personnel file is at issue is a co-defendant with the city in four pending lawsuits in District Court and the County Court at Law. You further state that "the documentation requested relates directly to [the named officer's] employment with the City" and that the "pending litigation against the City directly involves [the named officer] and his employment relationship with the City." Based on your statements, we agree that the remainder of Exhibit 5 relates to pending litigation and may be withheld under section 552.103.

Generally, however, 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 anticipated litigation 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).

In summary, the city must withhold Exhibit 4. The completed evaluation in Exhibit 5 must be released, and the remainder of Exhibit 5 may be withheld. As our ruling on these issues is dispositive, we need not address your remaining arguments.

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).

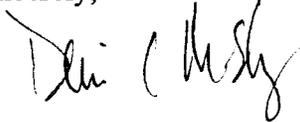
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is written in a cursive style with some loops and flourishes.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 164064

Enc. Submitted documents

c: Mr. Chris Dorbandt
Chris Dorbandt & Associates, PLLC
505 East Huntland Drive, Suite 270
Austin, Texas 78752
(w/o enclosures)