



September 10, 2002

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2002-5058

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168398.

The Austin Police Department (the "department") received a request for 1) the first page of the offense report regarding the fatal shooting of a named individual, 2) a transcript or taped copy of the dispatcher's call, 3) the employment history of two named department officers, 4) guidelines provided to police cadets and officers regarding the use of deadly force, 5) guidelines for officers in interacting with the mentally ill, and 6) access to an entire file regarding an alleged incident in late 2001 in which a department officer "shot and killed [a] man wielding a box/cutter knife during an altercation." You state that you have released information that is responsive to items one and four of the request and have informed the requestor that the department does not maintain information responsive to item six of the request.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 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 deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that Austin is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's

---

<sup>1</sup>It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to create or prepare new information. *See* Attorney General Opinion JM-672 (1987), H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975).

civil service file that the police department is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the officer's civil service file maintained under section 143.089(a). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See *Id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. See *Id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. See *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied). You indicate that the department maintains the information submitted as item three in its internal file pursuant to section 143.089(g). We therefore conclude that the information submitted as item three is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.

You contend that the information submitted as item five is excepted from disclosure under section 552.103 of the Government Code. Initially, we note that this information includes documents that are subject to section 552.022 of the Government Code, which provides:

(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:

...

(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. Item five includes department policies and procedures that are subject to section 552.022(a)(8). As prescribed by section 552.022, these documents must be released to the requestor unless they are confidential under other law. You assert that the information submitted as item five is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception 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). As you raise no other exception to the disclosure of the policies and procedures, these documents, which we have marked, must be released.

We now address the applicability of section 552.103 for the information in item five that is not subject to section 552.022. Section 552.103 provides in part:

(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 on the date the district received the request for information 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 section 552.103(a).

In this case, you indicate, and have provided documentation evidencing, that litigation was pending or reasonably anticipated between the city, officers of the department, and the mother of the deceased individual on the date the district received this request. You also assert that the information submitted as item five relates to another, unrelated suit that was filed last year and remains pending. We therefore find that you have met the first prong of the section 552.103 test. Furthermore, after reviewing your arguments and the information in item five that is not subject to section 552.022, we agree that this information is related to the pending litigation for purposes of section 552.103(a).

We note that, absent special circumstances, 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 and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section § 552.103(a) ends once litigation has concluded. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You assert that the audio tape and document that you have submitted as item two are excepted from disclosure under section 552.108. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. 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 inform us that the information submitted as item two pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable, and you may withhold item two pursuant to this exception.

To summarize, the department must withhold item three pursuant to section 552.101 in conjunction with section 143.089(g). The marked policies and procedures in item five must be released in accordance with section 552.022(a)(8). The remainder of item five may be withheld under section 552.103(a). You may also withhold item two pursuant to section 552.108(a)(2).

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

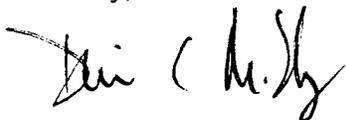
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/seg

Ref: ID# 168398

Enc. Submitted documents

c: Mr. Michael King  
Editor - News/Politics  
The Austin Chronicle  
P.O. Box 49066  
Austin, Texas 78755  
(w/o enclosures)