



November 26, 2002

Mr. Brad Norton  
Assistant City Attorney  
City of Austin Law Department  
P. O. Box 1088  
Austin, Texas 78767-8845

OR2002-6771

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# 172903.

The Austin Fire Department (the “department”) received a written request for seven categories of information regarding the department’s promotional process for its employees. You state that information responsive to request items 2, 5, and 6 will be released to the requestor, and that the department does not possess any records responsive to request items 4 and 7.<sup>1</sup> You contend, however, that the information you submitted to this office as responsive to request items 1 and 3, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101 and 552.103 of the Government Code.<sup>2</sup>

Request item 3 seeks all records pertaining to “Job analysis completed (and the job analysis itself) for either a specific sworn position or any sworn position to include all ranks (Specialists through Assistant Chief).” We note at the outset that the release of much of

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<sup>1</sup>The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision No. 445 (1986).

<sup>2</sup>In 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 No. 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.

Attachment B, the information you submitted to this office as being responsive to this request, is governed by 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. [Emphasis added.]

Most of the submitted job analysis materials either consist of or are made a part of a "completed report" prepared for the city by an outside consultant. Consequently, these reports are subject to section 552.022(a)(1). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103). Therefore, the department may withhold these reports only if they are made confidential under other law for purposes of section 552.101 of the Government Code or are excepted from disclosure under section 552.108 of the Government Code. You do not argue that either of these exceptions to disclosure apply to these records. We therefore conclude that these reports, including all appendices, must be released to the requestor in their entirety pursuant to section 552.022(a)(1) of the Government Code, with the following qualification.

We note that the job analysis reports are copyright protected. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials where no exception to required public disclosure otherwise applies. Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the department. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2. Consequently, the department must allow the requestor to view the copyrighted information and also allow him to reproduce the material without the department's assistance. It will be the requestor's responsibility to adhere to the federal copyright law.

We now address the extent to which the remaining information you submitted as responsive to request item 3 is protected from public disclosure under the exception you raised for these materials, section 552.103 of the Government Code. A governmental body that raises section 552.103 must provide relevant facts and documents sufficient to establish the

applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information *and* (2) that the requested information is related to the litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You state that prior to the department's receipt of the current records request, a lieutenant with the department filed an administrative appeal with the City of Austin's Civil Service Commission concerning his pass over for promotion. For the purposes of section 552.103(a), litigation includes civil lawsuits, criminal cases, and contested cases under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Open Records Decision No. 588 (1991). In this instance, you state that the information in question relates to pending administrative litigation to which the city and the requestor are parties. You inform us that the pending proceeding is an appeal to a hearing examiner under section 143.057 of the Local Government Code. You assert that discovery and the production of documents related to the appeal should be reviewed and determined by the hearing examiner.

Civil service appeals are governed by chapter 143 of the Local Government Code, rather than the APA. Section 143.057 of the Local Government Code provides that an independent third party hearing examiner has the same duties and powers in hearing an appeal as the Fire Fighters' and Police Officers' Civil Service Commission (the "commission"), including the power to issue subpoenas for the attendance of witnesses and the production of documents. *See* Local Gov't Code § 143.057(f); *see also id.* §§ 143.010 (commission appeal procedure). The affected fire fighter or police officer has the right to be represented by counsel. *See id.* § 143.010(c). The hearing examiner must conduct the hearing fairly and impartially, consider only the evidence submitted at the hearing, and render a just and fair decision. *See id.* § 143.010(g). An appeal under section 143.057 may also be subject to the American Arbitration Association Labor Arbitration Rules, which grant the arbitrator authority to judge the relevance of evidence offered. Thus, discovery takes place, evidence is presented at the hearing, and the independent third party hearing examiner hears and resolves questions of fact. A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* § 143.057(j); *see also id.* § 143.057(c) (decision to appeal to independent third party hearing examiner results in waiver of all rights to appeal to district court except as provided by Local Gov't Code § 143.057(j)). Therefore, the district court does not serve as the forum for resolving the controversy on the basis of evidence; the civil service hearing under section 143.057 serves that purpose. Consequently, we determine that the appeal proceeding constitutes "litigation" for purposes of section 552.103.

You therefore have established that litigation involving the department was pending on the date that the department receive the records request. However, we conclude that you have not established that the job analysis materials not made public under section 552.022 "relate" to the pending appeal proceedings. Consequently, the department must release the remaining portions of Attachment B to the requestor.

You also contend that the information sought in request item 1, fire fighters' Pre-Promotion Questionnaires, are made confidential under section 143.089(g) and thus must be withheld from the public pursuant to section 552.101 of the Government Code.<sup>3</sup> You explain that the

Pre-Promotion Questionnaires are submitted by individual firefighters who are on promotional eligibility lists. The Questionnaires provide information regarding the individual firefighter which the Fire Chief uses in making promotional and/or assignment decisions.

Section 143.089 of the Local Government Code provides for the maintenance of civil service files and what may be kept in those files:

(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:

....

(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* ....

....

(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

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<sup>3</sup>Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

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. [Emphasis added.]

Information that subsections 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in the police department's internal files, as provided in section 143.089(g). This subsection provides:

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. [Emphasis added.]

The department may keep information in these separate, internal files for its own use. Section 143.089(g) makes records kept in the department's internal files confidential. *Cf. City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946. (Tex. App.--Austin 1993, writ denied) (police department files). Because you state that the Pre-Promotion Questionnaires are maintained in the department's internal files, we conclude that the department must withhold these records pursuant to section 143.089(g) in conjunction with section 552.101 of the Government Code.

In summary, the department must withhold the Pre-Promotion Questionnaires from the public. The remaining submitted information must be released in its entirety.

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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/RWP/lmt

Ref: ID# 172903

Enc: Submitted documents

c: Mr. Scott Toupin  
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(w/o enclosures)