



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

February 7, 2003

Mr. Alberto J. Peña  
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310 South St. Mary's Street, Suite 1700  
San Antonio, Texas 78205-3111

OR2003-0852

Dear Mr. Peña:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176151.

The City of Galveston (the "city"), which you represent, received two requests for certain video surveillance tapes of city firefighters. The city also received a request for six categories of information related to the city manager and to records related to a private detective or agency hired to document the activities of city personnel. This requestor subsequently amended his request to specifically exclude city credit card numbers and private cellular telephone numbers of the city manager and city attorney. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, 552.130, and 552.136 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 encompasses information made confidential by statute. You indicate that the city is a civil service city pursuant to chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the maintenance of civil service files and what may be kept in those files:

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<sup>1</sup> The city has submitted no arguments in support of its claim that section 552.108 applies to except any of the requested information. Therefore, you have waived any claim of exception from disclosure under this section of the Government Code. Gov't Code §§ 552.301, .302. Furthermore, because the third requestor has excluded city credit card numbers from his request, the submitted credit card numbers are not responsive to the request and we do not address them in this ruling.

(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 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 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 city fire department may keep information in these separate, internal files for its own use. Section 143.089(g) makes records kept in the police 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).

Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. You represent that the reports you submitted to our office as Exhibits 15 and 17-19, and the videotapes submitted as Exhibits 20, 22, 23, and 25 were prepared by a private firm hired by the city as part of an internal affairs investigation that did not result in any disciplinary action against the involved firefighters as contemplated under chapter 143. Furthermore, you indicate that certain information you have marked within Exhibit 14 relates to firefighters who did not receive disciplinary action as a result of the investigation. Accordingly, we conclude that all of this information which is maintained solely in the fire department's confidential internal file must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

You claim that the videotapes submitted as Exhibits 21 and 24 and certain information you have marked within Exhibits 14 and 16 relate to firefighters who were suspended as a result of the investigation, but that this information is excepted under section 552.103 of the Government Code. However, we note that some of this information is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Section 552.022(a)(1) of the Government Code provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from required disclosure under the Public Information Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. Exhibit 16 is a completed report. Further, the document in Exhibit 14 containing information for which you claim section 552.103 fits into the subsection (3) category for "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Section 552.103, which serves to protect a governmental body's position in litigation, is a discretionary exception and does not make information confidential for 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). Consequently, Exhibit 16 and the information at issue within Exhibit 14 may not be withheld on the basis of section 552.103.

However, Exhibit 16 contains the home address, home telephone number, and social security number of a city employee. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request

for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold the home address, home telephone number, and social security number under section 552.117 on behalf of the employee if he made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the city. The city may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

Furthermore, we note that section 552.130 excepts from public disclosure information relating to a driver's license, license plate, or motor vehicle title or registration issued by an agency of this state. Thus, the city must withhold the Texas license plate numbers it has marked in Exhibit 16 under section 552.130.

We now address your claim in relation to the remaining information for which you argue the litigation exception. 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.*

A governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture” when establishing that litigation is reasonably anticipated. *See* 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.<sup>2</sup> *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

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<sup>2</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You claim that prior to the city's receipt of the requests for information, the city Fire Chief reasonably anticipated that the suspended firefighters would appeal the disciplinary action. Upon review of your arguments and the information you provided, we find that the city has demonstrated that Exhibits 21 and 24 relate to litigation that the city reasonably anticipated on the date of its receipt of the requests for information.<sup>3</sup> 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, if any of the information in Exhibits 21 and 24 has either been obtained from or provided to the opposing parties in pending litigation, it is not excepted from disclosure under section 552.103(a), and must be disclosed.<sup>4</sup> Otherwise, you may withhold this information from disclosure under section 552.103.

We now address your claim under section 552.136 for the remaining responsive information. Section 552.136 makes certain account numbers confidential. It provides, in relevant part, as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We agree that the city must withhold the account numbers it has marked pursuant to section 552.136.

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<sup>3</sup> Civil service appeals are governed by chapter 143 of the Local Government Code. *See* Local Gov't Code § 143.057. This office has determined that such appeal proceedings constitute "litigation" for purposes of section 552.103.

<sup>4</sup> We also note that 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, you must withhold Exhibits 15, 17-20, 22, 23, and 25, and the information you have marked in Exhibit 14 relating to firefighters who did not receive disciplinary action under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. You must withhold the home address, home telephone number, and social security number of a city employee in Exhibit 16 under section 552.117 if he made a timely request for confidentiality under section 552.024. You must withhold the Texas license plate numbers you have marked in Exhibit 16 under section 552.130. You may withhold Exhibits 21 and 24 under section 552.103. You must withhold the account numbers you have marked under section 552.136. The remaining responsive information must be released to the requestor seeking it.

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,



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Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 176151

Enc. Submitted documents

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