



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2004

Ms. Jennifer Barnett
Nichols, Jackson, Dillard, Hager, & Smith, L.L.P.
500 North Akard
Dallas, Texas 75201

OR2004-5221

Dear Ms. Barnett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204185.

The City of Duncanville (the "city"), which you represent, received a request for all information regarding the internal affairs investigation of a named officer. You claim that the submitted 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 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, such as section 143.089 of the Local Government Code. You state that the city 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 civil service file that the civil service director 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 investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission

for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

The submitted documents consist of an internal affairs investigation. You state that this information is maintained in the police department's file pursuant to section 143.089(g). Based upon your representations and our review of the information, we conclude that the submitted information 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. We note, however, that the submitted information relates to officer misconduct that resulted in disciplinary action as prescribed by chapter 143. *See* Local Gov't Code §§ 143.051-.055 (defining types of disciplinary action as removal, suspension, demotion, or uncompensated duty). While this type of information may be kept in the police department's personnel file, it must also be kept in the civil service personnel file. Local Gov't Code §§ 143.052, .089(a)(2), (3). Therefore, the submitted information must be placed in the officer's civil service personnel file. As noted above, records maintained in the city's civil service file are subject to release under chapter 552 of the Government Code unless an exception to disclosure applies. We will therefore address your remaining arguments against disclosure for the information at issue that must be maintained in the officer's civil service file.

Initially, we address your arguments under section 552.103. Section 552.103 of the Government Code 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. *Univ. of Tex. Law Sch. v. Tex. 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).

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"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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). 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You generally assert that litigation is reasonably anticipated because the statute of limitations for an appeal regarding the actions of the Duncanville Police Department has not yet expired. However, you have not provided any evidence that the officer in question has filed or has taken any steps towards filing a lawsuit against the city regarding this matter. *See generally* Open Records Decision No. 452 at 4 (1986) (whether litigation is reasonably anticipated must be determined on case-by-case basis). Accordingly, the city may not withhold the submitted information that is maintained in the civil service file under section 552.103 of the Government Code.

You also claim that section 552.108(b) of the Government Code excepts the information at issue from disclosure. Section 552.108 of the Government Code provides in relevant part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

- (1) release of the internal record would interfere with law enforcement or prosecution of crime; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

This office has concluded that section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for execution). However, generally known policies and techniques may not be withheld under section 552.108(b)(1). *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The city has failed to provide any arguments supporting its claim under section 552.108(b)(1). *See* Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts unless information does so on its face); *see also* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, the city may not withhold the submitted information maintained in the civil service file under section 552.108(b)(1) of the Government Code.

You also contend that the submitted documents are excepted from required public disclosure under section 552.108(b)(2) because the documents "relate to a law enforcement investigation that did not result in conviction or deferred adjudication." A governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal matter that has concluded in a final result other than a conviction or deferred adjudication. The submitted records were created for the sole purpose of conducting an internal affairs investigation. We note, however, that where no criminal investigation or prosecution results from an investigation of a police officer for alleged misconduct, section 552.108 is inapplicable. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.—El Paso 1992, writ denied); Open Records Decision No. 350 (1982). The internal affairs investigation here did not lead to the criminal investigation or prosecution of the police officer. Thus, the submitted information maintained in the civil service file may not be withheld from disclosure under section 552.108(b)(2) of the Government Code.

We note, however, that some of the information in the internal affairs investigation file may be confidential. Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual

assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455(1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 of the Government Code and common law privacy.

Next, we note that the submitted documents include information obtained in the course of conducting a polygraph examination. This information is confidential under section 1703.306 of the Occupations Code. Section 1703.306 provides that “a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination” except to certain categories of people. Because the requestor does not fall within any of the enumerated categories, you must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Lastly, some of the submitted information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

In summary, you must withhold the departmental file under section 143.089(g). As for the civil service file, you must withhold the medical information we have marked under section 552.101 and common law privacy. The information marked under section 1703.306 of the Occupations Code and section 552.117(2) must be withheld. The remaining information must be released.

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 Dep't of Pub. 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 204185

Enc. Submitted documents

c: Mr. A. Payne
Duncanville Police Department
P.O. Box 380280
Duncanville, Texas 75138
(w/o enclosures)