



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2004

Mr. Eddie L. Martin
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2004-7108

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207724.

The City of Denton (the "city") received a request for all personnel information regarding a named officer, to include any information pertaining to disciplinary actions against the officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that included among the documents you seek to withhold in Exhibits 1 and 3 are accident report forms that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to

¹We 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 Nos. 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.

a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the city with two of the three pieces of information regarding the traffic accident at issue. Thus, the city must withhold the submitted accident reports, which we have marked, under section 550.065(b) of the Transportation Code.

Next, we will address your argument under section 552.101. 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.* 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. *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 state that the information submitted as Exhibits 1 and 2 is maintained in the police department's file for the department's own use pursuant to section 143.089(g). Based upon your representations and our review of the information, we conclude that the remaining information submitted as Exhibit 1 and all of the information submitted as Exhibit 2 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.²

Next, you inform us that the information submitted as Exhibit 3 is contained in the officer's civil service file. As you acknowledge, and 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 in Exhibit 3.

We note that a portion of the information in Exhibit 3 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, including "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108." *See* Gov't Code § 552.022(a)(1). Exhibit 3 contains completed evaluations that must be released under section 552.022 unless they are expressly made confidential under other law. Section 552.103 of the Government Code, the litigation exception, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 591 at 2 n. 2 (1991); 473 (1987). Therefore, the completed evaluations, which we have marked, may not be withheld under section 552.103. As you have raised no other exceptions to disclosure for this information, it must be released to the requestor.

Next, we address your arguments under section 552.103 for the remaining information in Exhibit 3 not subject to section 552.022. 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.

²As we are able to make this determination, we need not address your arguments under sections 552.103 and 552.117 for this 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 on the date the governmental body received the request for information, 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).

You represent to this office that the requested information relates to a pending criminal prosecution. You indicate that the prosecution was pending when the city received this request for information. You do not inform us, however, that the city is a party to the pending criminal litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney that he or she wants the submitted information withheld from disclosure under section 552.103.

We have received a letter from an Assistant District Attorney for Denton County stating that his office is prosecuting the pending case. The prosecutor objects to the release of the personnel file and disciplinary records of the arresting officer in the investigation which led to the arrest of the individual who is the subject of the pending prosecution. The prosecutor argues that such release would interfere with the prosecution of the case and would circumvent the formal discovery process. Upon review of the remaining information in Exhibit 3, we find that this information relates to the pending criminal litigation. Therefore, based on your representations, the prosecutor's letter, and our review of the information at issue, we conclude that the remaining submitted information in Exhibit 3 is excepted from disclosure at this time under section 552.103 of the Government Code.

In reaching this conclusion under section 552.103, we assume that the opposing party to the criminal case has not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, the submitted accident reports, which we have marked in Exhibits 1 and 3, must be withheld under section 550.065(b) of the Transportation Code. The remaining information in Exhibit 1 and the information in Exhibit 2 must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The

completed evaluations that we have marked in Exhibit 3 must be released to the requestor pursuant to section 552.022(a)(1). The remaining information in Exhibit 3 may be withheld from the requestor under section 552.103.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 207724

Enc. Submitted documents

c: Mr. Chris Raesz
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(w/o enclosures)