



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2005

Ms. Christy Drake-Adams  
Bovey, Akers & Bojorquez, LLP  
12325 Hymeadow Drive, Suite 3-200  
Austin, Texas 78750

OR2005-03872

Dear Ms. Drake-Adams:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223368.

The City of Balch Springs (the "city"), which you represent, received a request for certain documents pertaining to a particular police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.1175, and 552.122 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 considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information deemed confidential by statute, 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.).<sup>1</sup> 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).

You state that the records in Exhibit B, C, and D are maintained in the city’s police department’s internal file pursuant to section 143.089(g). You further state that the records in Exhibit C are also contained in the police officer’s civil service file. We note that the requestor does not limit his request to information from the police department’s internal personnel file. Instead, he makes a general request for the officer’s employment application found in Exhibit C.

While we generally agree that the police department’s internal personnel file is confidential under section 143.089(g), we note that the employment application is also maintained separate and apart from the department’s file. The confidentiality afforded by section 143.089 may not be engrafted on other records that exist independently of an officer’s department personnel file. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d at 564-65 (providing that only information that reasonably relates to fire fighter’s or police officer’s employment relationship with department is confidential under section 143.089(g)).

Thus, to the extent the city’s police department maintains the documents in Exhibit C in the department’s internal personnel file, *those documents* are confidential under section 143.089(g) and must be withheld under section 552.101. However, copies of the documents that are maintained in the city’s civil service file are not confidential under section 143.089(g) and may not be withheld on that basis. Exhibits B and D, which you indicate are maintained solely in the department’s personnel file, are confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.<sup>2</sup>

We now turn to your arguments regarding section 552.103 of the Government Code as it applies to the copy of Exhibit C that is held in the civil service file. This section provides as follows:

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<sup>1</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

<sup>2</sup>Because of our ruling on this issue, we need not address your 552.122 argument.

(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.

Gov't Code § 552.103. 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.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 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). 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).

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<sup>3</sup>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).

Having considered your arguments and representations, we find that you have failed to establish that litigation is reasonably anticipated in this instance. *See* ORD 361. Therefore, the information contained in the copy of Exhibit C found in the civil service file may not be withheld under section 552.103.

We next turn to your arguments under section 552.108(b) of the Government Code for the civil service copy of Exhibit C. Section 552.108(b)(1) excepts from disclosure “[a]n 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 if: (1) release of the internal record or notation would interfere with law enforcement or prosecution.” Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 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 determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You assert that the information at issue consists of internal records of the city’s police department the release of which would interfere with law enforcement. However, the records at issue are employment application records. Records of this type were addressed by the court in *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex.App.—Austin 2002, no pet.). The court in that case stated

we may not presume that the Legislature intended to include within the scope of section 552.108, as “information relating to law enforcement,” background and reference information obtained from third parties as part of the City’s application-review process. Were we to interpret section 552.108(b)(1) to include pre-employment background and reference information obtained from third parties, we believe we would be extending beyond permissible bounds the statute’s plain language.

86 S.W.3d at 327. As this language indicates, section 552.108 is generally not applicable to personnel records, and you have not otherwise explained how release of the records at issue would interfere with law enforcement. *See* ORD 562. Therefore, no portion of Exhibit C may be withheld on the basis of section 552.108.

You also assert the civil service copy of Exhibit C is protected under section 552.101 in conjunction with common-law privacy as well as under section 552.102. Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is protected by the common-law right of privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the records in Exhibit C and marked the information that must be withheld under sections 552.101 and 552.102 in conjunction with common-law privacy.

You also contend that some of the submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.<sup>4</sup> You inform us that the police officer whose personnel file is at issue is a licensed peace officer. Therefore, pursuant to section 552.117(a)(2), the city must withhold the listed information regarding this individual. The submitted records also include personal information regarding other individuals who may or may not be peace officers or city employees. Pursuant to section 552.117(a)(2), the city must withhold the listed information for anyone who is a licensed peace officer employed by the city. Pursuant to section 552.117(a)(1), the city must also withhold personal information that pertains to a current or former city employee who made a timely election to keep such information confidential. We have marked the information that must be withheld under section 552.117 if it applies.

We also note that the city may be required to withhold some of the submitted information pursuant to section 552.1175 of the Government Code. Section 552.1175 also applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure and provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The submitted personnel records contain the home addresses and telephone numbers of other individuals. If any of these individuals does not work for the city but is currently a peace officer and elects to restrict access to this information in accordance with section 552.1175, the city must withhold the addresses and telephone numbers we have marked.

In addition, we note that section 552.130 of the Government Code is applicable to the documents in Exhibit C. This section provides in relevant part:

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<sup>4</sup>The term "peace officer" is defined in article 2.12 of the Texas Code of Criminal Procedure.

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Under section 552.130, the city must withhold the marked Texas motor vehicle record information in Exhibit C.

In summary, the information contained in Exhibits B and D is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101. To the extent the information in Exhibit C is maintained in the department's internal personnel file, the information is also confidential and must be withheld under section 552.101. To the extent the information in Exhibit C is maintained in the city's civil service file, the information is not confidential under section 143.089(g) of the Local Government Code and thus may not be withheld under section 552.101 on this basis. Regarding the information in Exhibit C that is maintained in the city's civil service file: we have marked information that must be withheld 1) under sections 552.101 and 552.102 in conjunction with common-law privacy; 2) under section 552.117 if that exception applies; 3) under section 552.1175 if that exception applies; and 4) under section 552.130. The remainder of the documents in Exhibit C that are maintained in the city's civil service file may not be withheld.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



Kazzye W. Martens  
Assistant Attorney General  
Open Records Division

KWM/seg

Ref: ID# 223368

Enc. Submitted documents

c: Mr. Dennis D. Park  
The Coffey Firm  
4700 Airport Freeway, Suite B  
Fort Worth, Texas 76117  
(w/o enclosures)