



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2005

Mr. Brad Norton
Assistant City Attorney
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2005-08901

Dear Mr. Norton:

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# 233335.

The City of Austin (the "city") received a request for various categories of information related to the city's Office of the Police Monitor (the "police monitor") "dating back to [the police monitor's] creation." You state that the city will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You argue that the information you have labeled "Group 1" is excepted from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 143.089(g). We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of

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.

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. *See* 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).² *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 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. *See* 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.³ *See 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).

A qualified civil service municipality may elect under subchapter I of chapter 143 of the Local Government to enter into an agreement with a police association regarding “wages, salaries, rates of pay, hours of work, other terms and conditions of employment, [and] other personnel issues.”⁴ Local Gov't Code § 143.303. When a qualified municipality enters into such an agreement, the agreement “supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, or *other terms and conditions of employment* to the extent of any conflict with the statute” and “preempts any contrary statute, executive order, local ordinance, or rule adopted by the state or a political subdivision or agent of the state including a personnel board, a civil service commission, or a home-rule municipality.” Local

²Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

³We note that section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

⁴Subchapter I of the Local Government Code applies in part to municipalities with a population of 460,000 that operates under a city manager form of government. *See* Local Gov't Code § 143.301. The submitted Agreement indicates that the city is such a qualified municipality.

Gov't Code § 143.307(a), (b) (emphasis added). However, an agreement “may not diminish or qualify any right, benefit, or privilege of any employee under this chapter or other law” unless the change is approved by a majority of the police association. *See id.* § 143.307(c).

You inform us that in April 2004 the city and the Austin Police Association entered into an agreement pursuant to subchapter I, and the agreement remains in effect. *See Agreement Between The City of Austin and The Austin Police Association* (hereinafter the “Agreement”). Article 16 of the Agreement establishes the office of the police monitor and sets forth the confidentiality provisions related to records held by the police monitor. Agreement, Art. 16, §§ 1-2, (8)(a), pp. 30-31, 40. Section 8(a) of Article 16 of the Agreement provides in pertinent part:

Information concerning the administrative review of complaints against officers, including but not limited to Internal Affairs Division files and all contents thereof, are intended solely for the Department's use pursuant to Section 143.089(g) of the Texas Local Government Code (the 143.089(g) file.). All records of the Police Monitor's office that relate to individual case investigations and the APD 143.089(g) file, although same are not APD files or records, shall have the same statutory character in the hands of the Police Monitor, and shall not be disclosed by any person, unless otherwise authorized by law.

Agreement, Art. 16, § 8(a), p. 40. The Agreement applies “to any Independent Investigation whether completed prior to or after the effective date of this Agreement and applies to every position and rank within the Austin Police Department.” Agreement, Art. 16, § 5(c), p. 38. *See also* Agreement, Art. 4, §§ 2 and 3, pp.3-4.

You inform us that the Group 1 documents are maintained in the department's internal files pursuant to section 143.089(g). You state that the Group 1 information consists of the police monitor's records of investigations of city police officers that did not result in disciplinary action. We understand you to represent that all of the Group 1 documents relate to investigations that did not result in disciplinary action under sections 143.051-.055 of the Local Government Code. Based on your representations and our review of the documents at issue, we agree that the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code, and it must be withheld under section 552.101 of the Government Code on that basis.

You argue that the information you have labeled “Group 2” is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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. *University of Tex. Law Sch. v. Texas 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 section 552.103(a).

In this instance, you claim, and provide documentation showing, that the city was involved in several lawsuits on the date it received the instant request.⁵ Further, you indicate that these lawsuits are currently pending. Based upon these representations, we agree that litigation was pending when the city received the request for information. We also find that the submitted information in Group 2 that you assert relates to these pending lawsuits, does, in fact, relate to them.

You also argue that a portion of the Group 2 information relates to anticipated litigation. In order 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice

⁵Specifically, you have provided pleadings in the following cases: (1) *Leslie Warren v. City of Austin, et al*, County Court at Law No. 2, Travis County, Texas, under cause number 285224; (2) *Jessie Lee Owens, et all v. City of Austin Police Department, et al*, United States District Court for the Western District of Texas, Austin Division, under cause number A05CA287-SS; (3) *Rafael Gutierrez v. Police Civil Service Commission and City of Austin, Texas*, 345th District Court, Travis County, Texas, under cause number GN-500449; (4) *Earl Sorrells v. City of Austin*, United States District Court for the Western District of Texas, Austin Division, under cause number A04CA1096LY; and (5) *Debbie Louise Collins v. Samuel Ramirez and City of Austin*, 353rd District Court, Travis County, Texas, under cause number GN100770.

of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You indicate that the city reasonably anticipates litigation relating to the subject of the present request. You state, and provide documentation showing, that the city received two claim letters, and indicate that these letters comply with the notice requirements of the TTCA. Based on our review of the submitted information at issue, we conclude that litigation was reasonably anticipated when the city received the request, and that the information at issue is related to the reasonably anticipated litigation for the purposes of section 552.103. Therefore, the city may generally withhold all of the Group 2 information pursuant to section 552.103 of the Government Code.

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, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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, the Group 1 documents are confidential pursuant to section 143.089(g) of the Local Government Code, and they must be withheld under section 552.101 of the Government Code. The city may withhold all of the Group 2 information pursuant to section 552.103 of the Government Code.

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

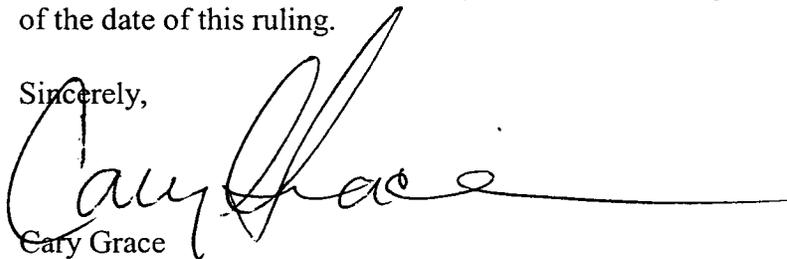
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 233335

Enc. Submitted documents

c: Mr. Austin Dulling
ACLU of Texas, Inc.
P.O. Box 12905
Austin, Texas 78711
(w/o enclosures)