



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 31, 2008

Ms. Eileen McPhee
Carls, McDonald & Dalrymple, L.L.P.
Barton Oaks Plaza 2
901 South Mopac Expressway, Suite 500
Austin, Texas 78746

OR2008-14909

Dear Ms. McPhee:

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# 326375.

The City of Georgetown (the "city"), which you represent, received two requests from the same requestor for the indefinite suspension letter and personnel file regarding a named former police officer, and all video and police reports completed by the named former police officer over a specified period of time. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample of information.²

¹Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information that the city holds in its capacity as an employer.

²We 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.

Initially, we note that portions of the submitted video recordings are not responsive to the present request for information because they are not within the requested time period. Accordingly, this ruling will not address such non-responsive information and the city need not release it in response to this request.

We also note that some of the requested information was the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-04686 (2008) and 2008-09704 (2008). In Open Records Letter No. 2008-04686, this office determined, among other things, that the city must withhold the internal departmental file of the named former police officer under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. We have no indication that the law, facts, and circumstances on which the prior ruling was based have changed in regard to the internal departmental file. Therefore, the city must continue to rely on Open Records Letter No. 2008-04686 as a previous determination and withhold the internal departmental file of the named former police officer, which we have marked, in accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). In Open Records Letter No. 2008-09704, this office determined, among other things, that the city (1) may withhold internal affairs investigation II-05-2008 under section 552.108(a)(1) of the Government Code, and (2) must release the portions of the named officer's civil service file previously released to the public pursuant to section 552.007 of the Government Code.³ We have no indication that the law, facts, and circumstances on which the prior ruling was based have changed. Therefore, the city must continue to rely on Open Records Letter No. 2008-09704 as a previous determination and withhold and release the information at issue, which we have marked, in accordance with the prior ruling.⁴ *See id.*

Next, we note that a portion of the remaining information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

³We note the named police officer's civil service file was also ruled upon in Open Records Letter No. 2008-04686. However, that ruling cannot be relied upon as a previous determination for the civil service file because the circumstances on which it was based have changed.

⁴As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information we have marked in Group 2 consists of a completed investigation. Completed investigation information must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the information we have marked in Group 2 under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.130, 552.117, and 552.136, we will consider your arguments under these exceptions for the information subject to section 552.022(a)(1), as well as the remaining information.

We will first address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022(a)(1), as it is potentially the most encompassing. Section 552.103 of the Governmental 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.

Gov't Code § 552.103(a), (c). A governmental body 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 was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that a governmental body’s receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. See Open Records Decision No. 638 at 4 (1996).

The city argues that it reasonably anticipated litigation at the time it received the requests for information on two grounds. First, you inform us, and provide documentation demonstrating, that the city received a notice of claim letter that conforms to the requirements of the Texas Tort Claims Act. You also state the city received the notice of claim prior to its receipt of this request for information. Based on your representations and our review of the submitted documents, we conclude that the city reasonably anticipated litigation pertaining to the notice of claim letter on the date it received the request for information. Second, you explain that the named police officer received discipline from the city’s police department under Local Government Code Chapter 143. You state, and provide documentation showing, that the city received a letter from the attorney for the named former police officer informing it that the officer is appealing the disciplinary action he received pursuant to section 143.057 of the Local Government Code. You explain further that appeals such as the one at issue here are governed by chapter 143 of the Local Government Code. See Local Gov’t Code §§ 143.057, .127-.131. You contend that the civil service appeal in this instance constitutes “litigation,” and you contend that the documents at issue are related to the pending litigation for purposes of section 552.103. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991) (discussing factors used by attorney general in determining whether administrative proceeding not subject to Administrative Procedure Act may be considered to be litigation). Based on your representations and our review of the submitted documents, we conclude that the city reasonably anticipated litigation pertaining to the civil service appeal on the date it received the request for information.

You assert that the information not subject to section 552.022 is excepted from disclosure under section 552.103. You have submitted an affidavit that explains the information at issue is related to the anticipated litigation based on the notice of claim letter because the city

expects the plaintiff to "raise claims against the [c]ity . . . based on the theories of negligent hiring and respondeat superior." The affidavit further explains that "at issue will be the background, training, supervision and conduct of the officers involved in the [incident on which the claims are based] as well as the [c]ity's police department's policies regarding: hiring, training, crime investigation techniques and supervision of its officers." In addition, the named police officer is listed as witness in the notice of claim letter. You explain that the information at issue is also related to the anticipated litigation based on the civil service appeal because this information is the subject of the civil service appeal. Based upon your representations and our review of the information at issue, we find that section 552.103 is generally applicable to the information not subject to section 552.022, which we have marked.

We note, however, that the opposing party in the anticipated litigation may have seen or had access to some of the information the information we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to the information we have marked, it is not protected by section 552.103 and may not be withheld on that basis. To the extent the opposing party has not seen or had access to the information we have marked, the city may withhold it under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We now address your arguments for the information subject to section 552.022 as well as the remaining 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." Gov't Code § 552.101. This section encompasses information protected by other statutes. Chapter 411 of the Government Code deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or the Texas Crime Information Center. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.08. Upon review of the remaining information, we find that a portion of it contains criminal history information that is

confidential under chapter 411. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

You assert that the information you have marked is subject to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § § 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that section 552.108 is generally not applicable to information relating to an internal administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

In this instance, the information you have marked consists of records of a specific internal affairs investigation. However, you explain that the submitted internal affairs records pertain to a criminal investigation and prosecution, and you state that the officer named in the present request is a witness in this prosecution. You state that release of the information you have marked could affect this officer’s credibility and trustworthiness as a witness, and you inform this office that the Williamson County District Attorney (the “district attorney”) objects to such a release because it would interfere with the district attorney’s criminal prosecution. Based on these representations and our review, we conclude that the release of the information you have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Thus, we find that the city may withhold the information you have marked under section 552.108(a)(1).

Section 552.117(a)(1) of the Government Code 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. Gov’t Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employees made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the

request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the city must withhold the personal information we have indicated on one of the submitted audio recordings, if the employee at issue timely elected confidentiality under section 552.024 of the Government Code. If this individual did not make a proper election under section 552.024, then the information we have indicated may not be withheld under section 552.117(a)(1).

Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Accordingly, the city must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code. The city must also withhold the Texas motor vehicle information contained in the digital video recording we have marked. If the city is unable to redact the portions of the marked digital video recording that reveal Texas motor vehicle information, then the city must withhold the marked digital video recording in its entirety pursuant to section 552.130. *See* Open Records Decision No. 364 (1983) (a video recording may be withheld in its entirety if difficulty of editing confidential information is too great).

Section 552.136 of the Government Code provides that "[n]otwithstanding 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. The city must withhold the information we have marked under section 552.136.

In summary, the city must rely on Open Records Letter No. 2008-04686 as a previous determination and withhold the internal departmental file of the named police officer under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. In accordance with Open Records Letter No. 2008-09704, the city (1) may withhold internal affairs investigation II-05-2008 under section 552.108(a)(1) of the Government Code and (2) must release the portions of the named officer's civil service file previously released to the public pursuant to section 552.007 of the Government Code. To the extent the opposing party has not seen or had access to the information we have marked under section 552.103, the city may withhold it under section 552.103 of the Government Code. The city may withhold the information you have marked under section 552.108(a)(1). The city must withhold the information we have marked pursuant to section 552.101 of the Government code in conjunction with chapter 411 of the Government Code and federal law. If the employee at issue timely elected confidentiality under section 552.024 of the Government Code, you must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the Texas motor vehicle record information we have marked, and the Texas motor vehicle record information on the marked digital video recording, pursuant to section 552.130 of the Government Code. If the city is unable to redact the portions of the submitted video recording subject to

section 552.130, then the city must withhold the marked digital video recording in its entirety on the basis of section 552.130. The city must withhold the information we have marked under section 552.136 of the Government Code. The remaining responsive 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

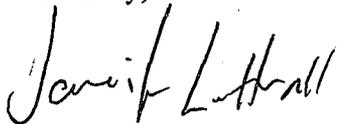
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 326375

Enc. Submitted documents

c: Ms. Isadora Vail
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(w/o enclosures)