



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 11, 2009

Ms. Cary Grace  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2009-11158

Dear Ms. Grace:

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# 352645.

The City of Austin and the Austin Police Department (collectively the "city") received two requests for information pertaining to a specified fatal shooting incident. The first request seeks eighteen categories of information, including all telecommunication recordings made by police officers regarding the incident, the personnel file of a named officer involved in the incident, and numerous items pertaining to the investigative file of the incident. The second request seeks only the transcript of telecommunication recordings made by police officers regarding the incident. You state the city does not possess information responsive to category seventeen of the first request.<sup>1</sup> You also state you have released some information responsive to the first request, including all information contained in the named officer's civil service file. You claim the submitted information is excepted from disclosure under

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). We also note the Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decisions Nos. 599 (1992), 534 (1989).

sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you inform us some of the information in Exhibit E was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-08143 (2009). In that ruling, we determined, with the exception of basic information, the city may withhold the information at issue under section 552.108(a)(1) of the Government Code. We conclude that, as we have no indication the law, facts, and circumstances on which this prior ruling was based have changed, the city must continue to rely on this ruling as a previous determination and dispose of the information at issue in accordance with Open Records Letter No. 2009-08143. *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). However, you state additional responsive information has come into existence since Open Records Letter No. 2009-08143 was issued; therefore, we will consider your argument against disclosure of this 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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal; suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. 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

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<sup>2</sup>We assume 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.

were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. 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 are in the 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 may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local 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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state Exhibit A consists of records that are kept in the officer's personnel file maintained under section 143.089(g). We note Exhibit A contains commendations and performance evaluations, which are subject to sections 143.089(a)(1) and 143.089(a)(3). However, you inform us the city has released the information subject to section 143.089(a). Based on your representations and our review of Exhibit A, we agree Exhibit A is confidential and must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses section 773.091 of the Health and Safety Code, which provides in relevant part as follows:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). You state Exhibit B consists of an EMS record maintained by an EMS provider documenting emergency medical services provided to a patient by EMS. Based on your representation and our review, we conclude Exhibit B constitutes an EMS record that is confidential under section 773.091. However, we note, and you acknowledge, that records that are confidential under section 773.091 may be disclosed

to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information." *Id.* §§ 773.092(e)(4), .093. Among the individuals authorized to act on the patient's behalf in providing written consent is a "personal representative" if the patient is deceased. *Id.* Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. Thus, the city must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g). However, the city must release Exhibit B on receipt of proper consent under section 773.093(a). *See id.* §§ 773.092, .093.

You raise section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code for Exhibit C. Section 552.101 also encompasses section 58.007, which makes confidential juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997. The relevant language of section 58.007 reads:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Fam. Code § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Exhibit C contains information relating to juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03(a) (defining juvenile "delinquent conduct" for the purposes of section 58.007). You do not indicate, nor does it appear, that any of the exceptions in section 58.007 apply to the information at issue. Therefore, Exhibit C is confidential pursuant to section 58.007(c) of the Family Code and must be withheld under section 552.101 of the Government Code.

Next, you raise section 552.103 of the Government Code for Exhibit D. Section 552.103 of the Government Code 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.

Gov't Code § 552.103(a), (c). 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 section 552.103(a).

To establish 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. *Id.* 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"). 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).

In this instance, you state that, prior to the city's receipt of the requests, the family of the man fatally shot in the incident at issue hired the first requestor as their attorney. You also state

on or about May 12, 2009, the first requestor left a message to a city attorney giving notice to the city of the family's intention to file suit. Additionally, you inform us that on May 14, 2009, the first requestor wrote the city, stating that his correspondence serves as "full legal notice to the [city] that [it] should not destroy, alter, spoliation [sic] or tamper with any evidence related to" the incident at issue. Based upon your representations and our review of the information at issue, we conclude the city reasonably anticipated litigation on the date that it received the requests for information. Further, you explain the information in Exhibit D is related to the anticipated litigation because it pertains to the fatal shooting incident. Accordingly, the city may withhold Exhibit D under section 552.103 of the Government Code.<sup>3</sup>

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 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).

Finally, you raise section 552.108 of the Government Code for Exhibits E and F. 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[.]" Gov't Code § 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). You state the information in Exhibit E pertains to the ongoing criminal investigation related to the fatal shooting incident at issue. You also state the information in Exhibit F pertains to pending criminal investigations and prosecutions. Based on your representations, we conclude the release of Exhibits E and F 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. Civ. App.—Houston[14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-88. Thus, with the exception of basic information,

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

the city may withhold Exhibits E and F pursuant to section 552.108(a)(1) of the Government Code.

In summary, the city must withhold (1) Exhibit A under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, and (2) Exhibit C under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The city may release Exhibit B only in accordance with sections 773.092 and 773.093 of the Health and Safety Code. Any information in Exhibit B that is subject to section 773.091(g) of the Health and Safety Code must be released to the first requestor. Exhibit D may be withheld under section 552.103 of the Government Code. With the exception of basic information, the city may withhold Exhibits E and F under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 352645

Enc. Submitted documents

c: Requestor  
(w/o enclosures)