



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2009

Mr. Kevin W. Cole  
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4101 Wildwood Road  
Austin, Texas 78722

OR2009-16812

Dear Mr. Cole:

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#362425.

The City of Waco (the "city"), which you represent, received a request for time sheets and any and all documents, recordings, emails, memorandums, forms, and other authorized documentation of overtime contracts, including but not limited to overtime schedules pertaining to six named officers during a specified time frame.<sup>1</sup> You state that you do not maintain information responsive to a portion of the request.<sup>2</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note that some of the submitted documents, which we have marked, are not responsive to the instant request for information because they were created after the date that

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<sup>1</sup>The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

<sup>2</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>3</sup>We 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.

the city received the request or do not pertain to any of the named officers. This ruling does not address such non-responsive information and the city need not release it in response to this request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(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 submitted information contains completed park patrol activity and shift activity reports. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. *See 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. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, 552.103 is not other law that makes information confidential for the purposes of section 552.022. Consequently, the completed reports, which we have marked, may not be withheld under section 552.103 of the Government code. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101 and 552.108, we will consider the applicability of these exceptions to the completed reports. Additionally, we will address all of the claimed exceptions for the information not subject to section 552.022.

First, we address your claims for the information not subject to section 552.022. You assert that this information is excepted from disclosure under section 552.103 of the Government Code, which provides in part 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). 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, 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 inform us that the requestor represents city police officers who have been suspended indefinitely by the city. You also inform us these officers have appealed the disciplinary action, and the appeal is still pending. We note that municipal civil service appeals are governed by chapter 143 of the Local Government Code. See Local Gov't Code §§ 143.057, 143.127-143.131. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. Cf. Open Records Decision No. 588 (1991). Thus, we agree litigation was pending on the date the city received the present request for information. You state that an underlying issue in one of the appeals is the officer's off-duty employment. The requested information pertains to the named officers' overtime, or off-duty, employment. Thus, the submitted information is related to the pending litigation. Based on your representations and our review, we conclude section 552.103 is generally applicable to the submitted information. Therefore, we agree that the city may withhold the submitted information, not subject to 552.022, under section 552.103 of the Government Code.<sup>4</sup>

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

With respect to the information subject to 552.022(a)(1), we will address your arguments under sections 552.101 and 552.108 of the Government Code. You assert that this

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

information is excepted from disclosure under 552.101 of the 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 made confidential by other statutes, such as section 143.089 of the Local Government Code. We note 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). The police officer's civil service file must contain specific items, including commendations, periodic evaluations by the officer's supervisor, and documents from the employing department relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code.<sup>5</sup> *See id.* §143.089(a)(1)-(2). In cases in which a police department investigates an 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.* 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, 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 a police officer's employment relationship with the police department and that is maintained in a police department's internal personnel 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. Tex. Attorney Gen.*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied).

You generally assert that the remaining information is confidential under section 143.089(g) of the Local Government Code. However, you have failed to provide any arguments demonstrating that the submitted activity and shift reports are maintained in the named officers' section 143.089(g) files. Further, you state these reports pertain to the named

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<sup>5</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. An oral or written reprimand does not constitute discipline under chapter 143.

officers' overtime employment with the United States Army Corps of Engineers pursuant to a contract with the city. We note that this information appears to be maintained separate and apart from section 143.089(g) files. The city may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of a police officer's departmental file. Accordingly, we find you have failed to demonstrate the remaining information is confidential under section 143.089(g) of the Local Government Code, and it may not be withheld under section 552.101 of the Government Code.

You also assert that the remaining information is excepted from disclosure under 552.108 of the Government Code. Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An 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 is excepted from [required public disclosure] if:

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (b)(2). Generally, subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(b)(2). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, section 552.108(b)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In this instance, you claim that the submitted information is excepted under sections 552.108(a)(1) and (b)(2). You state that the submitted information is related to an ongoing criminal investigation under review by the McLennan County District Attorney's office (the "district attorney"). Thus, we understand you to raise section 552.108(a)(1) for the submitted information. However, you have informed our office that the district attorney

does not object to the release of any information pertaining to the six named officers at issue. Therefore, we conclude that the submitted information would not 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). Thus, you have failed to demonstrate that section 552.108(a)(1) of the Government Code applies to the submitted information, and it may not be withheld on that basis. As you raise no further exceptions to disclosure of the information subject to 552.022(a)(1), it must be released.

In summary, the city may withhold the information not subject to 552.022(a)(1) under section 552.103 of the Government Code. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/eb

Ref: ID# 362425

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)