



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2011

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-12009

Dear Ms. Chang:

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# 427337 (Houston GC No. 18618).

The City of Houston and the Houston Police Department (collectively the "city") received a request for the policies related to the supervision of on-duty patrol officers, all allegations of sexual misconduct against police department officers during a specified period, certain complaints regarding nighttime patrol officers, and policies related to the investigation of sexual misconduct by police department officers during a specified period. You claim 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 inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-06183 (2011). There, we determined the city's police department may withhold portions of the requested General Orders under section 552.108(b)(1) of the Government Code. You state there has been no change in the law, facts, or circumstances on which the previous ruling was

¹We 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 those records contain substantially different types of information than those submitted to this office.

based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city may continue to rely on Open Records Letter No. 2011-06183 as a previous determination and withhold or release the requested information in accordance with that 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 information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the prior ruling, we will consider your submitted arguments.

Initially, we note the information submitted as Exhibit 2 is subject to section 552.022 of the Government Code, which provides:

(a) . . . 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). Exhibit 2 consists of completed internal affairs reports, which are expressly public under section 552.022(a)(1). Therefore, the city must release the information submitted as Exhibit 2 unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. You do not raise section 552.108 as an exception to disclosure. You seek to withhold this information under section 552.103 of the Government Code; however, this section is a discretionary exception that a governmental body may waive. *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. 551 (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, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022. Thus, the city may not withhold the information submitted as Exhibit 2 under section 552.103 of the Government Code. You also raise section 552.101 of the Government Code for this information. As section 552.101 encompasses statutes that make information confidential, we will consider your arguments under that exception.

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. Section 552.101 encompasses section 143.1214 of the Local Government Code, which provides:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to a disciplinary action against a fire fighter or police officer to the [civil service] director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)–(f) [of the Local Government Code] only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)–(c).² You explain the information submitted as Exhibit 2 pertains to investigations conducted by the city police department's Internal Affairs Division into allegations of misconduct by certain police department officers. You state the requestor is not another law enforcement agency, fire department, or the office of a district or United States attorney. You state some of the information relates to investigations that resulted in disciplinary action against a police officer under chapter 143 of the Local Government Code, and the city's police department has forwarded the documents meeting the requirements of section 143.1214(c) to the appropriate officers' personnel files maintained under section 143.089(a). *See id.* § 143.089(a)–(f). The city must release these documents under section 143.089(a) of the Local Government Code.

However, you explain the information in Exhibit 2 pertains to investigations in which no disciplinary action was taken against the officers involved. Furthermore, although some of

²You inform us the city is a civil service city under Chapter 143 of the Local Government Code.

the information relates to investigations of allegations that were sustained, the information submitted does not meet the conditions of section 143.1214 for inclusion in the officers' civil service files. You indicate all of the information in Exhibit 2 is maintained by the city's police department in its internal files and is not part of those officers' personnel files. Based on your representations and our review of the information, we conclude the information submitted as Exhibit 2 is confidential under section 143.1214(b) of the Local Government Code and the city must withhold it under section 552.101 of the Government Code on that basis.³

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 governmental body has the burden of providing relevant facts and documents to show 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You explain the city is a defendant in a lawsuit styled *Edith Alfaro, et al. v City of Houston and Abraham Joseph*, Cause No. 2011-04174, alleging sexual misconduct by an officer, and that lawsuit is pending in the 125th District Court of Harris County. You state, and provide documentation showing, the plaintiffs in the case allege the city police department's policies contributed to their injuries, and the information at issue is directly related to those claims.

³As our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

Based on your representation and our review of the information at issue, we find the city is involved in pending litigation, and the information submitted as Exhibit 3 is related to that litigation. Accordingly, the city may withhold the information submitted as Exhibit 3 under section 552.103 of the Government Code.

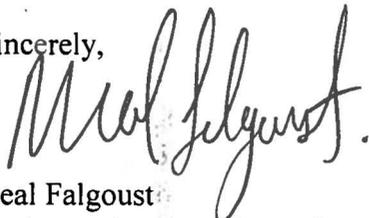
We note, however, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city may continue to rely on Open Records Letter No. 2011-06183 as a previous determination and withhold or release the requested information in accordance with that ruling. The city must release the information forwarded by the city's police department to the officer's civil service file maintained under section 143.089(a) of the Local Government Code. The city must withhold the information maintained in its internal files under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The city may withhold the information submitted as Exhibit 3 under section 552.103 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, 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 427337

Enc. Submitted documents

c: Requestor
(w/o enclosures)