



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 9, 2014

Mr. James Kopp  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2014-05832

Dear Mr. Kopp:

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# 519144 (COSA File Nos. W023370-011514, W024781, W024805-022414).

The City of San Antonio (the "city") received three requests from two requestors for information related to case number 14009612. You state the city has no information responsive to items four, five, and six of the third request.<sup>1</sup> You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information, portions of which you state consist of representative samples.<sup>3</sup> We have also received and considered comments submitted by the first requestor. *See Gov't Code* § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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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).

<sup>2</sup>We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See Gov't Code* § 552.147(b).

<sup>3</sup>We assume the representative samples of records submitted to this office are 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 the submitted information contains peace officers' Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") identification numbers. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCLEOSE identification number is a unique computer-generated number assigned to peace officers for identification in the commissioner's electronic database, and may be used as an access device number on the TCLEOSE website. Accordingly, we find the officers' TCLEOSE identification numbers in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, the TCLEOSE identification numbers are not subject to the Act and need not be released to the requestor.

Next, we note one of the submitted records, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request.

You inform us the city previously released some of the submitted information to a member of the public.<sup>4</sup> You now seek to withhold this information under sections 552.103 and 552.108 of the Government Code. Where a governmental body has voluntarily released information to any member of the public, such information may not subsequently be withheld unless the release of the information is specifically prohibited by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. Sections 552.103 and 552.108 do not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the city may not now withhold any of this information on those grounds.

You further assert the member of the public had a special right of access pursuant to section 552.023 of the Government Code to information that was otherwise private because he was the authorized representative of the involved person. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information

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<sup>4</sup>The city states the first seven minutes of disc 3/4 was shown to the involved person's physician.

relating to person and protected from public disclosure by laws intended to protect that person's privacy interests); *see id.* § 552.229 (consent to release information under special right of access). The prior release of the information at issue to an individual with a right of access does not prohibit the city from subsequently withholding information on privacy grounds. Because section 552.101 of the Government Code protects personal privacy interests, we will address your arguments under this section for the information previously released.

We note the submitted information includes completed reports, evaluations, and investigations subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). The city must release the information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1).

You seek to withhold the completed reports, evaluations, and investigations under section 552.103 of the Government Code.<sup>5</sup> However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORD 665 at 2 n.5. Therefore, the completed reports, evaluations, and investigations may not be withheld under section 552.103 of the Government Code. You claim some of the completed reports and investigations are excepted from disclosure under section 552.108 of the Government Code.<sup>6</sup> As information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under section 552.108 for the information at issue. We note some of the records subject to section 552.022 contain information subject to sections 552.101 and 552.130 of the Government Code, which make information confidential under the Act.<sup>7</sup> Thus, we will address the applicability of these sections to the information subject to section 552.022. We will also address your arguments under sections 552.101

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<sup>5</sup>The video recordings, which are responsive to all three of the requests, are part of a completed investigation. The 9-1-1 audio recording is responsive to item three of the third request and is part of a completed investigation. The completed reports are responsive to the second request and to items two, three, seven, eight, nine, fifteen, and sixteen of the third request. The completed evaluations and remaining investigations are included in the officers' personnel files, items ten through thirteen of the third request.

<sup>6</sup>The city raises section 552.108 as an exception to disclosure of the dash-cam videos, the 9-1-1 audio recording, and the completed reports, which are responsive to the second request and items one, two, three, seven, eight, and nine of the third request.

<sup>7</sup>The Office of the Attorney General will raise a mandatory exception such as section 552.130 of the Government Code on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and 552.103 of the Government Code for the remaining information not subject to section 552.022.

We next address your claim under section 552.103 of the Government Code for the information responsive to the second and third requests that is not subject to section 552.022(a)(1). Section 552.103 provides, in relevant 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.

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(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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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. *Id.* 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 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 assert the information at issue relates to litigation reasonably anticipated by the city. We note the second request for information also serves as a claim letter in which the requestor states he is an attorney whose client sustained injuries due to the allegedly negligent or intentional acts of the city in the process of detaining the client. You affirmatively state the notice of claim meets the requirements of the TTCA. Based on your representations and our review, we find the city reasonably anticipated litigation on the dates the second and third requests were received. Further, we find the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Accordingly, the city may withhold the information responsive to the second and third requests that is not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code.

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

You state the remaining information you have marked under section 552.108 pertains to an investigation that concluded in a result other than conviction or deferred adjudication.<sup>8</sup> Based upon your representation and our review, we find the city has demonstrated the remaining marked information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). Thus, with the exception of basic information, which must be

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<sup>8</sup>The city claims section 552.108 as an exception to disclosure of the remainder of the dash-cam videos and the completed reports responsive to the second request and items two, three, seven, eight, and nine of the third request.

released, the city may withhold the remaining information you have marked under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 143.089 of the Local Government Code. We understand 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, including one that must be maintained as part of the officer’s civil service file and another 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 any instance in which the police department took disciplinary action against the officer under chapter 143 of the Local Government Code. *See id.* § 143.089(a)(1)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* § 143.051 *et seq.* 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). *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). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer’s civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov’t Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department’s use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director’s

designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

*Id.* § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to the file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined section 143.089(g) made the records confidential. See *City of San Antonio*, 851 S.W.2d at 949; see also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You indicate some of the remaining information subject to section 552.022 is contained in the personnel files of the named officers that the city's police department maintains pursuant to section 143.089(g).<sup>9</sup> We note, however, the information at issue includes periodic evaluations. In this instance, the request was received by the city, which has access to the files maintained under subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Thus, the periodic evaluations must be maintained in the officers' civil service files pursuant to subsection 143.089(a)(3), and may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the completed investigations in the officers' personnel files under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Additionally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the*

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<sup>9</sup>The officers' personnel files are responsive to items ten, eleven, twelve, and thirteen of the third request.

*Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. This office has noted, however, the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. Although the previously released portion of the dash-cam video and other portions of the use of force investigations may be highly intimate or embarrassing, we find there is a legitimate public interest in this information because it directly relates to the use of force investigations and the personal injury claim. Therefore, the city may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130(a)(1). Accordingly, the city must withhold the driver's license information we have marked in the completed reports responsive to items fifteen and sixteen of the third request under section 552.130 of the Government Code.<sup>10</sup>

To summarize: The officers' TCLEOSE identification numbers are not subject to the Act and need not be released to the requestor. The city may withhold the information responsive to the second and third requests that is not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code. With the exception of basic information and the information previously released on disc 3/4, the city may withhold the information you have marked under section 552.108(a)(2) of the Government Code. Except for the periodic evaluations, which must be maintained in the officers' civil service files pursuant to subsection 143.089(a)(3) of the Local Government Code, the city must withhold

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<sup>10</sup>We note section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

the remaining information in the officers' personnel files under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the driver's license information we have marked in the completed reports responsive to items fifteen and sixteen of the third request under section 552.130 of the Government Code. The city must release basic information, the information previously released on disc 3/4, and the remaining information in the completed reports responsive to items fifteen and sixteen of the third request.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 519144

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)