



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 14, 2016

Ms. Judi S. Rawls
Police Administrative Legal Counsel
Beaumont Police Department
P.O. Box 3827
Beaumont, Texas 77704

OR2016-15978

Dear Ms. Hickman:

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# 618645 (OR Nos. 04-47, 04-48, 04-49, and 04-50).

The City of Beaumont and Beaumont Police Department (collectively the "city") received four requests from two different requestors for information related to two specified arrests, information related to complaints against city police officers, and policies and procedures for the city's police department. You state you have released some information to the requestors. You further state the city does not have information responsive to a portion of the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.1175, 552.130, and 552.147 of the Government Code. Additionally, you state you have notified the officers involved in the submitted information of their right to submit comments to this office why some of the submitted information should not be released.² See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

¹The 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).

²As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

Initially, we note the information we have marked is not responsive to the instant requests because it was created after the date the requests were received. The city need not release nonresponsive information in response to these requests, and this ruling will not address that information.

Next, you state a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-06190 (2015). In that ruling, we determined the city's police department may rely on certain prior rulings as previous determinations, may withhold certain additional information under section 552.108(b)(1) of the Government Code, and must release the remaining information. You state the law, facts, and circumstances on which the prior ruling was based have not changed. Thus, the city may continue to rely on Open Records Letter No. 2015-06190 as a previous determination and withhold or release the information that is identical to the information at issue in the prior ruling 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in 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 unless made confidential under this chapter or 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). We find the submitted information includes completed internal affairs investigations, use of force reports, and IA Pro use of force printouts that are subject to section 552.022(a)(1). The city must release this information unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information subject to section 552.022(a)(1) of the Government Code may not be withheld under section 552.103 of the Government Code. However, you raise sections 552.101, 552.1175, and 552.130 of the Government Code for this information. These exceptions make information confidential under the Act. Accordingly, we will consider

the applicability of these exceptions to the information subject to section 552.022(a)(1) of the Government Code. We will also consider your argument under section 552.108 of the Government Code for the information subject to section 552.022(a)(1) of the Government Code. Finally, we will consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

First, we will consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code. Section 552.103 of the Government Code 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 governmental body has the burden of providing relevant facts and documents to show section 552.103 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, 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure 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.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code, or an applicable municipal ordinance.

You state, and provide documentation demonstrating, the city received a notice-of-claim letter that complies with the requirements of the TTCA prior to receiving the requests for

information. Thus, we find the city reasonably anticipated litigation when it received the requests for information. You assert, and we agree, the information not subject to section 552.022 is related to the anticipated litigation for purposes of section 552.103(a). We note the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *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); Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). This office has determined section 552.103 does not except from release basic information about a crime. *See* Open Records Decision No. 362 at 2 (1983). Thus, with the exception of basic information, the city may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103(a) of the Government Code.³

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

Section 552.101 of the Government Code excepts from public 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 143.089 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). Under section 143.089(a), 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; *see* Attorney General Opinion JC-0257 (2000) (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). 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,

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information, except to note section 552.108 of the Government Code does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c).

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 police 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, a document relating to a police officer’s alleged misconduct may not be placed in his civil service 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 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, 949 (Tex. App.—Austin 1993, writ denied).

You state the remaining information you have marked, including the information you have marked in the submitted use of force reports and IA Pro use of force printouts, are maintained in the city’s internal files pursuant to section 143.089(g). You explain none of the incidents at issue in this information resulted in disciplinary action against the officers. We note use of force reports were the subject of prior litigation between the city and this office. *See City of Beaumont v. Abbott*, No. D-1-GV-07-002630 (345th Dist. Ct., Travis County, Tex., Oct. 26, 2010). As part of the subsequent settlement agreement, the parties agreed the use of force reports and IA Pro printouts were not confidential under section 143.089(g) in their entirety. Instead, the parties agreed that only portions of the reports and printouts were confidential under this section. *See id.* (IA Pro printouts, as redacted by this office, subject to disclosure). Based on your representations and our review, we conclude the remaining responsive information you have marked is confidential under section 143.089(g) and the city must withhold that information under section 552.101 of the Government Code.⁴

Section 552.108(a)(1) of the Government Code 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(a)(1) must 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 section 552.108 is generally not applicable to internal personnel records that are purely administrative in nature and that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to

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

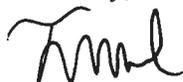
section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, you state the remaining portions of the use of force reports and IA Pro printouts pertain to an active criminal investigation or prosecution. Based on your representation, we conclude the release of the information at issue 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) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to this information. Accordingly, the city may withhold the remaining portions of the use of force reports and IA Pro printouts under section 552.108(a)(1) of the Government Code.

In summary, the city may continue to rely on Open Records Letter No. 2015-06190 as a previous determination and withhold or release the information that is identical to the information at issue in the prior ruling in accordance with that ruling. With the exception of basic information, which must be released, the city may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103(a) of the Government Code. The city must withhold the remaining responsive information you have marked as confidential under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city may withhold the remaining portions of the use of force reports and IA Pro printouts 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.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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 618645

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)