



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 7, 1996

Ms. Y. Qiyamah Taylor
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR96-1405

Dear Ms. Taylor:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 40771.

The City of Houston (the "city") received a request for a copy of the "files maintained by the City of Houston Police Department, Internal Affairs Department of the Houston Police Department, and the City of Houston Fire Department" relating to the death of an individual while in police custody. You assert that the requested information may be withheld from public disclosure pursuant to sections 552.101 and 552.103 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The documents submitted to this office for review are comprised of a custodial death report, attachments to that report, and photographs of the deceased. You state that "the Internal Affairs Department's documents requested are maintained in the Houston Police Department's departmental file [of the officer who was investigated in this death] and is not part of the policeman's civil service personnel file."¹ You assert that the Internal Affairs Department's documents, therefore, are excepted from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

¹We note that you do not indicate which documents submitted to this office for review are part of the Internal Affairs Department's documents.

We note, initially, that the custodial death report and its attachments are governed by section 49.18 of the Code of Criminal Procedure. Article 49.18 provides in subsection (b):

If a person dies while in the custody of a peace officer or if a prisoner dies while confined in a jail or prison, the director of the law enforcement agency of which the officer is a member or of the facility in which the prisoner was confined shall investigate the death and file a written report of the cause of death with the attorney general no later than the 20th day after the date on which the person in custody or the prisoner died. The director shall make a good faith effort to obtain all facts relevant to the death and include those facts in the report. The attorney general shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested person. (Emphasis added.)

After subsection (b) became effective, this office issued a directive about custodial death reports to the directors of jails, correctional facilities, and law enforcement agencies providing, in part, that Part I of the form will be available to the public and that Parts II through V will be classified as privileged. Open Records Decision No. 521 (1989) at 5. In addition, Part V of the report provides for the compilation and submission of supplementary information which, when compiled and attached to the custodial death report, becomes part of the report and may also be withheld from public disclosure. *Id.* at 7. Therefore, pursuant to article 49.18 of the Code of Criminal Procedure, as applied through section 552.101 of the Government Code, you must withhold Parts II through V of the custodial death report and all attachments. However, Part I of the report is public information which may not be withheld from the requestor, regardless of whether the custodial death report is maintained in the officer's personnel file maintained under section 143.089(g) of the Local Government Code.

We note that the photographs of the deceased, however, were not attached to the custodial death report. In the event that these photographs are maintained in the officer's personnel file maintained under section 143.089(g) of the Local Government Code, we must address whether this section excepts these photographs from required public disclosure. Section 143.089(g) of the Local Government Code provides:

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.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 916 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *Id.* at 949. Therefore, information (other than the custodial death report) maintained by the City of Houston Police Department which relates to an investigation that does not result in disciplinary action must be withheld from required public disclosure under section 552.101 of the act in conjunction with section 143.089(g) of the Local Government Code.² However, if the internal affairs investigation did result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a) and must be released by the civil service commission under section 143.089(f) of the Local Government Code. Therefore, if these photographs are maintained in the officer's personnel file maintained under section 143.089(g) of the Local Government Code, the city must withhold the photographs of the deceased from public disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

You also assert that all of the information requested may be withheld under section 552.103 of the Government Code. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.³ Thus, under section 552.103(a), a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated and that (2) the requested information relates to that litigation. *See 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 (1990) at 4.

²We note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

³Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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 (1986) at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. You claim that litigation is reasonably anticipated because a claim has been filed against the city by an attorney. You do not, however, represent that the claim is in compliance with the notice requirements of the Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance. See Open Records Decision No. 638 (1996) (fact that governmental body received claim letter that it represents to this office to be in compliance with notice requirements of Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance shows that litigation is reasonably anticipated). We note that the attorney has not threatened to sue the city. See Open Records Decision No. 361 (1983) at 2. We conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated and may not rely upon section 552.103 as a basis for withholding the requested information.⁴

In conclusion, you must release to the requestor all information requested with the exception of Parts II through V of the custodial death report, the attachments to that report, and any information maintained in the officer's personnel file maintained under section 143.089(g) of the Local Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 40771

⁴We note that if, in the future, you assert that section 552.103(a) is applicable on the basis of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA or applicable municipal statute or ordinance, or otherwise establish that section 552.103 applies.

Enclosures: Submitted documents

cc: Mr. Ronald C. Muller
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(w/o enclosures)