



June 6, 2000

Ms. Stephanie A. Osburn
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-2209

Dear Ms. Osburn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136203.

The City of El Paso (the "city") received a request for any and all documentation relating to the police department's internal administrative case #CP-98-153, including any internal affairs records. You assert that you have released the requestor's own statements and other documents to the requestor's attorney. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of documents.¹

You assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides 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.

¹In reaching our conclusion here, 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You state that the requested information relates to the appeal of the requestor's ten day suspension. You inform this office that the employee has a right to appeal a suspension to the hearing officer of the civil service commission or the employee may elect to have the matter submitted to arbitration.² You have submitted a copy of the requestor's notice of appeal and election to have the matter submitted to arbitration. You contend that a disciplinary appeal hearing before an arbitrator constitutes litigation for the purposes of section 552.103. This office has determined that a contested case under the Administrative Procedure Act (the "APA"), Government Code chapter 2001, constitutes "litigation." See Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). The appeal procedure at issue is not subject to the APA, but rather to the city's civil service rules and regulations. Accordingly, we conclude that the city has not established that the requested information relates to pending or reasonably anticipated litigation. Therefore, you may not withhold the submitted information under section 552.103.

You also assert that one of the documents contains an entry made by an attorney that is protected under section 552.101 as attorney-work product. Section 552.101 is not the proper exception to claim for attorney-work product. See Open Records Decision No. 575 (1990). Attorney work product is properly claimed under section 552.103 or section 552.111. Open Records Decision No. 647 (1996). A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). We do not believe that you have demonstrated that the document consists of or tends to reveal an attorney's mental processes, conclusions, or legal theories. Accordingly, the city may not withhold the information as attorney work product.

²You have submitted a copy of Article 21 of the Articles of Agreement between the city and the El Paso Municipal Police Officers Association providing for arbitration. Article 21 provides that the same procedures shall be used as in an appeal to the civil service commission.

You also assert that the entry is protected by section 552.107. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing the submitted information, we conclude that the entry does not reveal the attorney's legal opinion or advice. Therefore, you may not withhold the information under section 552.107.

You also assert that the submitted information is excepted from disclosure under section 552.108(b). Section 552.108(b)(2) provides the following:

(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 the requirements of section 552.021 if:

(2) release of the internal record or notation would interfere with law enforcement. . . .

We note, however, that where no criminal investigation or prosecution results from a police department's internal investigation of a police officer for alleged misconduct, section 552.108 is inapplicable to the internal investigation documents. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied); Open Records Decision No. 350 (1982). You have not demonstrated that the police department's internal investigation resulted in the criminal investigation or prosecution of the officer at issue. Thus, the internal investigation documents may not be withheld under section 552.108(b).

Further, you assert that the submitted information is excepted under section 552.111. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ); Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San*

Antonio, 630 S.W.2d 391, 394 (Tex. App.–San Antonio 1982, writ ref'd n.r.e.) (emphasis added). However, an agency's policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See *City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.–Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy); Open Records Decision No. 615 at 5-6 (1993). Because the submitted information pertains to routine personnel matters, the information is not protected under section 552.111. See *City of Garland*, 43 Tex. Sup. Ct. J. at 303.

You also claim that portions of the submitted information are protected under section 552.117. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. We have marked the information which you must withhold under section 552.117(2) of the Government Code. With regard to the requestor's section 552.117(2) information, section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Section 552.117(2) is intended to protect a peace officer's privacy interests. Thus, you may not withhold information that pertains to the requestor under section 552.117(2).³

In conclusion, you may withhold the marked information under section 552.117(2). However, you must release the remaining submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

³We note that you also assert that the highlighted information is excepted from disclosure under section 552.101. Because the highlighted information, except for information pertaining to the requestor, is excepted under section 552.117(2), we need not address the applicability of section 552.101.

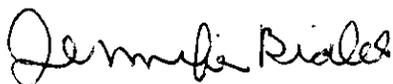
governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/nc

Ref: ID# 136203

Encl. Marked documents

cc: Mr. Armando Aguilar
5232 Roger Maris
El Paso, Texas 79934
(w/o enclosures)