



December 15, 2000

Ms. Cynthia B. Garcia
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2000-4720

Dear Mr. Garcia:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142262.

The City of Fort Worth (the "city") received a request for information pertaining to the investigation regarding a former police detective in regard to a "hogtying incident." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Accordingly, section 552.101 encompasses confidentiality provisions such as section 143.089(g) of the Local Government Code.

Section 143.089 of the Local Government Code sets out rules governing the content and release of two types of personnel files maintained by municipal fire and police departments. The first category is mandatory. "The director or director's designee shall maintain a personnel file on each fire fighter and police officer." Gov't Code § 143.089(a). This mandatory file must contain "any letter, memorandum, or document *relating to*: . . . (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter." Gov't Code § 143.089(a)(2) (emphasis added). Release of information contained in this mandatory file is governed by subsections 143.089(e) and (f) which state:

(e) The fire fighter or police officer is entitled, on request, to a copy of any letter, memorandum, or document placed in the person's personnel file. . . .

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless release of the information is required by law.

Because information contained in this type of file may be released on the basis of other law or the person's consent, this information is not confidential and is therefore subject to the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

The second type of file described in section 143.089 is discretionary. "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" Local Gov't Code § 143.089(g). The information contained in this type of file is confidential. "[T]he 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. . . ." Local Gov't Code § 143.089(g); *see also City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

The city has apparently adopted chapter 143 of the Local Government Code, and, therefore, the city police department is authorized to maintain internal files on its police officers. You argue that the city maintains the information contained in Exhibits C through G pursuant to section 143.089(g). However, as you admit, and as these documents indicate, the information was generated by the employing police department, and it relates to misconduct by a police officer who was indefinitely suspended as a result of her misconduct. Therefore, section 143.089(a)(2) requires the city to place this information in the officer's civil service file. Accordingly, the information contained in Exhibits C through G is not confidential under section 143.089(g).

You explain that the subject officer has appealed the disciplinary decision resulting from the investigation, and argue that Exhibits C through G are confidential pursuant to section 143.089(c) during the pendency of the appeal of the imposed disciplinary action. We disagree. Section 143.089(c) provides for the removal of information from a person's personnel file if the disciplinary action was taken without just cause or if the charge of misconduct was not supported by sufficient evidence.¹ However, this subsection does not

¹Section 143.089(c) provides as follows:

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by Subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by

provide for qualified confidentiality during the pendency of an appeal of imposed disciplinary action. We additionally note that section 143.089(c) indicates that documents relating to a disciplinary action must be maintained in the person's civil service file during the pendency of the commission's review of the appeal. Therefore, because Exhibits C through G must be maintained within the civil service file, they are not confidential under section 143.089. Accordingly, Exhibits C through G are subject to disclosure under the Act.

Having found that Exhibits C and G are subject to the Act, we turn to your argument that the information is excepted under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation was pending or reasonably anticipated on the date the request was received, 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990); Gov't Code § 552.103. The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You explain that the city is involved in litigation that relates to the police officer's misconduct. Moreover, you have submitted a copy of Plaintiff's First Amended Original Complaint, styled *Hernandez v. City of Fort Worth*, No. 4:99-CV-318-Y (N.D. Tex. 2000). It is evident that the requested information is related to the pending litigation. Accordingly, we find that the city has met its burden under section 552.103 and, consequently, it may withhold the requested information under that provision subject to the following discussion.

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 and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Furthermore, we note that Exhibit D contains certain types of information that must be released by statute. For example, Exhibit D contains an autopsy report. Section 11, article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall promptly be delivered to the proper district, county, or criminal district attorney in any case

where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code

Code Crim. Proc. art. 49.25, § 11. Pursuant to section 11, the autopsy report is a public record and must be released to the requestor.

Exhibit D also contains a custodial death report. Article 49.18(b) of the Code of Criminal Procedure requires that law enforcement agencies complete custodial death reports and file those reports with the attorney general, who “shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested party.” In Open Records Decision No. 521 (1989), this office held that under article 49.18(b), in conjunction with a directive issued by the Office of the Attorney General, section one of custodial death reports filed with this office is public information. All remaining portions of the custodial death report, *i.e.* Parts II through V, including all attachments, are deemed privileged under article 49.18(b) and must be withheld from the public. Open Records Decision No. 521 at 5 (1989). Accordingly, the city must withhold all portions of Parts II through V of the custodial death report. However, Part I of the custodial death report is expressly made public under article 49.18(b), and therefore this portion of the custodial death report must be released.

In conclusion, the city must release the autopsy report contained in Exhibit D under section 11, article 49.25 of the Code of Criminal Procedure. The city must also release Part I of the custodial death report contained in Exhibit D under article 49.18(b) of the Code of Criminal Procedure. The city may withhold the remaining information under section 552.103.²

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 governmental body does not comply with it, then both the requestor and the attorney general

²Because section 552.103 is dispositive of this matter, it is not necessary to address your claim regarding section 552.108, except to note that, like section 552.103, section 552.108 does not except information that must be released under section 11, article 49.25 or article 49.18(b) of the Code of Criminal Procedure.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 142262

Encl: Submitted documents

cc: Ms. Barbara Griffin
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(w/o enclosures)