



December 28, 2000

Mr. Charles H. Weir  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2000-4857

Dear Mr. Weir:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142199.

The City of San Antonio ("the city") received a request for fourteen categories of information pertaining to an arrest made by the San Antonio Police Department. You indicate that the city does not have any responsive information related to request nos. 2, 7, 8, and 9. You have submitted for our review documents which you assert are responsive to the remainder of the request categories (request nos. 1, 3, 4, 5, 6, 10, 11, 12, and 13). You assert that all of the submitted information is excepted from disclosure under section 552.103 of the Government Code, and in addition, that a specific document (responsive to request no. 1) is also excepted from disclosure under 552.101 of the Government Code.

We will address your section 552.103 argument first. Section 552.103 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.

....

(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.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a 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, 481 (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). The city must meet both prongs of this test for information to be excepted under 552.103(a). Litigation must have been pending or reasonably anticipated on the date the city received the request. Gov't Code §552.103(c).

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not alone establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In support of your contention that litigation is reasonably anticipated in this instance, you have provided for our review a notice of claim received by the city on March 6, 2000. We note that the notice of claim filed by the requestor, an attorney, cites the date and time of the incident, several categories of potential damages, and a dollar amount range for those damages. We have also considered the contents of a letter from the requestor's client to the city. We find in this instance that the city reasonably anticipated litigation on the date the

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<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

city received the request. Upon review we also agree that the information relates to the anticipated litigation. You have therefore adequately demonstrated the requisite showing for the application of section 552.103 and may withhold the submitted information, except as otherwise noted herein.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing party in the anticipated litigation has seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. We have marked with green flags the types of documents that are indicated to have already been made available to the requestor's client, or that came from the requestor or her client. These documents are not excepted by section 552.103 and must be released to the requestor. We have also marked with green flags newspaper clippings. We note that the newspaper clippings, whether or not they relate to the anticipated litigation, constitute information that is within the public domain and, as such, cannot be withheld under section 552.103. In addition, we note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also assert that one of the documents<sup>2</sup> submitted in response to request no.1 is confidential by law pursuant to section 552.101 of the Government Code in conjunction with section 143.089 of the Local 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. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the city's police department is required to maintain as part of the police officer's civil service file, and one that the city's police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) reads 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 [of the civil-service commission] 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.

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<sup>2</sup> This document appears to be a statement given to the Internal Affairs Division of the city's police department by the requestor's client.

Subsection (g) authorizes city police and fire departments to maintain for their own use a file on a police officer or fire fighter that is separate from the file maintained by the city civil service commission. "The department may not release any information contained in the department file to any agency or person," but instead "the department shall refer to the director [of the civil-service commission] 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." Local Gov't Code § 143.089(g); *see City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 952 (Tex. App.--Austin, 1993, writ denied).

The court in *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), addressed the availability of information that is contained in a department's internal file maintained pursuant to section 143.089(g). The court determined that section 143.089(g) makes confidential any records kept in a department's internal file. You represent that the document at issue is maintained by the city's police department in its departmental file. We therefore agree that the requested information is confidential pursuant to section 143.089(g) and must be withheld from disclosure under section 552.101 of the Government Code.

Finally, we address two additional issues raised by the requestor: 1) the timeliness of the city's request for ruling; and, 2) a special right of access to the statement supplied to the city's police department by her client. We first address the issue of timeliness. Under section 552.301(b) of the Public Information Act, a governmental body must make a request for ruling within 10 *business days* of receipt of a public information request, if it considers any of the requested information excepted from public disclosure. The documents submitted by the city indicate that the public information request was received by the city on September 22, 2000. The city's request for ruling was dated October 6, 2000 – which is within the 10 business day period mandated by section 552.301(b). The city's request for ruling was therefore timely.

With respect to the second issue, a requestor may have a special right of access to information which is otherwise confidential. Section 552.023 in relevant part states:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

We note that section 552.023(b) provides that a governmental body “may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.” In this instance, the requested information is confidential under section 143.089(g) of the Local Government Code for reasons other than the protection of the privacy interests of the *requestor*. In addition, this office has interpreted section 143.089 to grant a right of access only to the information in the personnel file maintained in section 143.089(a). See Open Records Decision No. 650 at 3 (1996) (the confidentiality provision of section 143.089(g) contains no exceptions).

In summary, with the exception of the documents we have marked with green flags, we conclude that the submitted information is excepted from disclosure under section 552.103 of the Government Code. In addition, the statement contained in the documents responsive to request no. 1 is also excepted from disclosure under section 552.101 of the Government Code in conjunction with subsection 143.089(g) of the Local Government Code.

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 have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

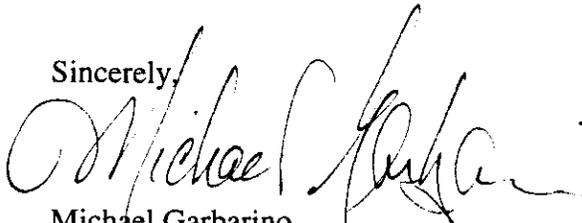
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/db/seg

Ref: ID# 142199

Encl. Submitted information

cc: Ms. Susan Barilich  
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(w/o enclosures)