



December 21, 2001

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2001-6071

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156720.

The City of Austin Civil Service Commission (the "city") received a request for "disciplinary documentation" relating to four named employees of the Austin Police Department. You state that the city will release information that relates to one of these individuals. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the representative samples of information you submitted.¹

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D): Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(8), (10), (13), (17), (18). The city must release the submitted information that is subject to section 552.022(a), unless that information is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. *See also 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived). We have marked the types of information that are subject to section 552.022. The city may not withhold this information under section 552.103.

With respect to the rest of the submitted information, we address your claim under section 552.103. This exception provides in part:

(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). A governmental body that raises section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for the information *and* (2) that the requested information is related to the litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

For the purposes of section 552.103(a), litigation includes civil lawsuits, criminal cases, and contested cases under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Open Records Decision No. 588 (1991). In this instance, you state that the information in question relates to pending administrative litigation to which the city and the requestor are parties. You indicate, and the submitted scheduling notice also reflects, that the pending proceeding is an appeal to a hearing examiner under section 143.057 of the Local Government Code.² You assert that discovery and the production of documents related to the appeal should be reviewed and determined by the hearing examiner.

Civil service appeals are governed by chapter 143 of the Local Government Code, rather than the APA. Section 143.057 of the Local Government Code provides that an independent third party hearing examiner has the same duties and powers in hearing an appeal as the Fire Fighters' and Police Officers' Civil Service Commission (the "commission"), including the power to issue subpoenas for the attendance of witnesses and the production of documents. *See* Local Gov't Code § 143.057(f); *see also id.* §§ 143.010 (commission appeal procedure). The affected fire fighter or police officer has the right to be represented by counsel. *See id.* § 143.010(c). The hearing examiner must conduct the hearing fairly and impartially, consider only the evidence submitted at the hearing, and render a just and fair decision. *See id.* § 143.010(g). An appeal under section 143.057 may also be subject to the American Arbitration Association Labor Arbitration Rules, which grant the arbitrator authority to judge

²We assume that the city is a civil service municipality under chapter 143 of the Local Government Code.

the relevance of evidence offered. Thus, discovery takes place, evidence is presented at the hearing, and the independent third party hearing examiner hears and resolves questions of fact. A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion or other unlawful means. *Id.* § 143.057(j); *see also id.* § 143.057(c) (decision to appeal to independent third party hearing examiner results in waiver of all rights to appeal to district court except as provided by Local Gov't Code § 143.057(j)). Therefore, the district court does not serve as the forum for resolving the controversy on the basis of evidence; the civil service hearing under section 143.057 serves that purpose.

Based on these considerations, we find that the applicable procedures under chapter 143 of the Local Government Code and, if also applicable, the arbitration rules should govern the release of information that relates to an appeal under section 143.057. We also find that the information at issue relates to the pending appeal. We therefore conclude that the city may withhold the remaining requested information at this time under section 552.103. In reaching this conclusion, we assume that none of this information has been made available to the opposing party to the pending appeal. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain the information through the discovery process. *See Open Records Decision No. 551 at 4-5 (1990)*. If the opposing party has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982)*.

In summary, some of the submitted information is subject to section 552.022 of the Government Code and thus may not be withheld under section 552.103. The city must release that information. The city may withhold the remaining information at this time under section 552.103.

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).

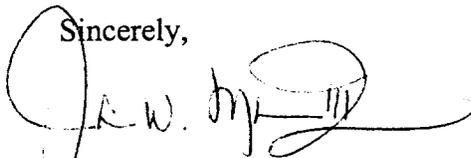
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 156720

Enc: Submitted documents

c: Mr. Timothy D. Enlow
P.O. Box 664
Pflugerville, Texas 78691-0664
(w/o enclosures)