



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2004

Ms. Meredith Ladd
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2004-10227

Dear Ms. Ladd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 214129.

The City of Cockrell Hill (the "city"), which you represent, received a request for (1) a copy of a specified internal affairs investigation, (2) any records documenting the disciplinary recommendations made by the involved officer's chain of command, (3) a copy of the requestor's client's personnel file, and (4) documentation reflecting all discipline rendered by the city for the past five years for a violation of certain Police Department Policy & Procedures. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered correspondence submitted on behalf of the City of Grand Prairie ("Grand Prairie"). See Gov't Code § 552.304 (providing that interested party may submit written comments stating why information should or should not be released).

Initially, we note that you have not submitted copies or a representative sample of the requested personnel information or information reflecting discipline rendered by the city for the past five years for a violation of certain Police Department Policy & Procedures. Further, you do not state that such information does not exist or that you wish to withhold any such information from disclosure. Thus, to the extent responsive information related to these portions of the request existed on the date the city received the request, we assume that

¹We 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.

information has been released to the requestor. If not, the city must release that information at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We now turn to your claim under section 552.103 of the Government Code for the submitted information. Section 552.103 provides in part 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.

Gov't Code § 552.103(a), (c). The governmental body 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. *Univ. of Tex. Law Sch. v. Tex. 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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.² Open Records Decision No. 555 (1990); *see* Open

²In 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).

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 establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you state that the requestor is an attorney who represents an individual who was terminated from the city. You state that the attorney has filed an appeal on behalf of her client pursuant to his termination. However, after reviewing your arguments and the submitted information, we find that you have not demonstrated that the requestor has threatened to sue or taken any objective steps toward litigation related to this appeal. Thus, we find that the city has not adequately demonstrated that it reasonably anticipated litigation on the date that it received this request for information. Accordingly, we conclude that the city may not withhold any portion of the requested information under section 552.103 of the Government Code.³

You also contend that the submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108, in pertinent part, excepts from public disclosure

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [and]

....

(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 . . . if:

....

³We note that Grand Prairie also raises section 552.103 on behalf of the city. However, because we find the city has not established it reasonably anticipated litigation on the date it received this request, we do not consider Grand Prairie’s argument under section 552.103.

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the submitted information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Gov't Code § 552.108(a)(2). Likewise, a governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal matter that has concluded in a final result other than a conviction or deferred adjudication. Gov't Code § 552.108(b)(2).

Section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff's department), 350 at 3-4 (1982). You do not inform us, and the submitted information does not otherwise indicate, that the internal investigation to which the information at issue relates has resulted in any criminal investigation or charge. We therefore conclude that the city has not demonstrated that the information at issue is excepted from disclosure under section 552.108.

We note, however, that the submitted records include law enforcement records of the Grand Prairie Police Department that you inform us were transferred to the city.⁴ Grand Prairie argues that its information is excepted pursuant to subsections 552.108(a)(2) and 552.108(b)(2) of the Government Code. As noted above, a governmental body claiming section 552.108(a)(2) must demonstrate that the submitted information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication, and a governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal matter that has concluded in a final result other than a conviction or deferred adjudication. Gov't Code § 552.108(a)(2), (b)(2). Based on the information provided to this office, we understand that the records Grand Prairie transferred to the city relate to a criminal investigation that did not result in a conviction or deferred adjudication. Accordingly, section 552.108(a)(2) is applicable to the records

⁴We note that information may be transferred between governmental bodies that are subject to the Public Information Act (the "Act") without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989).

transferred from Grand Prairie to the city. *See* Open Records Decision Nos. 474 (1987), 372 (1983).

We note, however, that information normally found on the front page of an incident report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Because the law enforcement interest at issue here belongs to Grand Prairie, the city must consult with Grand Prairie and release the types of information that are considered to be basic information.

We now turn to the remaining submitted documents which were not transferred from Grand Prairie to the city, but rather are records created by the city. Some of this information is excepted under section 552.117 of the Government Code.⁵ Section 552.117(a)(2) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer made an election under section 552.024 for the confidentiality of such information.⁶ Thus, pursuant to section 552.117(a)(2), the department must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of any individual who is a licensed peace officer. We have marked the information that must be withheld under section 552.117(a)(2). We also note that the submitted audio recording contains information that is excepted pursuant to section 552.117(a)(2). The city must also redact any information from the submitted audio recording that reveals the home address, telephone number, social security number, or family member information of the peace officer. However, to the extent that the city does not have the technological capability to redact this information from the audio recording, we conclude that the city must withhold the audio recording from disclosure in its entirety.

We also note that some of the remaining submitted information is excepted from disclosure pursuant to section 552.130 of the Government Code. In relevant part, section 552.130 provides:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

(2) a motor vehicle title or registration issued by an agency of this state[.]

See Gov't Code § 552.130. Therefore, the city must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

In summary, we conclude that the Grand Prairie records we have marked are excepted under section 552.108(a)(2); however, basic information must be released pursuant to section 552.108(c). As for the remaining documents, the city must withhold the information that we have indicated is excepted pursuant to sections 552.117 and 552.130. The remaining information must be released.

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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 214129

Enc. Submitted documents

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(w/o enclosures)