



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 21, 2005

Mr. John D. Lestock  
Assistant City Attorney  
City of Paris  
P.O. Box 9037  
Paris, Texas 75461

OR2005-09578

Dear Mr. Lestock:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 234819.

The Paris Police Department (the "department") received a request for the following information:

- 1) "A copy of all items contained within the personnel file of [a named department officer.]"
- 2) "A copy of the sworn complaint that served as a basis for the disciplinary action imposed upon [a department officer] on or about July 27, 2005."
- 3) "A copy of any and all sworn witness statements relative to the completed administrative investigation into the alleged misconduct on the part of [a named department officer.]"
- 4) "A copy of the contents of all personnel files assigned to [a named department officer], including the personnel file maintained by the Director of Personnel . . . and the personnel file maintained by the [department]."

5) “Interdepartmental correspondences, e-mail messages, and memoranda containing information related to or referencing the internal investigation of [a named department officer.]”

6) “Interdepartmental correspondences, e-mail messages, and memoranda containing information related to or referencing the management or supervision of the Crandall Police Department’s Property Room.”

7) “Any and all e-mail message[s] within the past twelve months that contain the name of [a named department officer.]”

You inform us that the department does not have information responsive to request number 6.<sup>1</sup> You claim that some of submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 143.089(g) of the Local Government Code. You state that Paris is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a file that must be maintained by the city’s civil service director or the director’s designee, and another file that may be maintained by the city’s police department for its own use. Local Gov’t Code § 143.089(a), (g). In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against the police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer’s civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

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<sup>1</sup>We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

You have submitted the officer's civil service personnel file for our review. We note that this personnel file contains a Form I-9. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted Form I-9 would be "for purposes other than for enforcement" of the applicable federal law. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the department must withhold the Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. As you raise no exceptions for withholding the remaining information included in the civil service personnel file, it must be released to the requestor.

You have also submitted the officer's departmental file for our review. You state that this departmental file is an internal file as authorized under section 143.089(g) of the Local Government Code. We note, however, that this file includes fingerprints of the requestor's client. The public availability of this information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;
  - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
  - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. These sections are intended to protect the privacy of a living individual to whom a fingerprint or other biometric identifier pertains. *See id.* § 560.002(1)(A). In this instance, the requestor identifies himself as an attorney for the individual to whom the submitted fingerprints pertain. Consequently, we find that the requestor has a right of access to the submitted fingerprint information under section 560.002(1)(A) of the Government Code. Although the department seeks to withhold this fingerprint information, along with the rest of the departmental file, under section 143.089(g) of the Local Government Code, where information falls within both a general and a specific provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex.2000) (“more specific statute controls over the more general”); *Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). In this instance, the statutory provision for access to fingerprint information under section 560.002(1)(A) of the Government Code is more specific than the general protection afforded to information under section 143.089(g). Therefore, the fingerprint information to which the requestor has a right of access may not be withheld from him on the basis of section 143.089(g). Accordingly, the officer’s fingerprint information must be released to the requestor under section 560.002(1)(A). We have marked that information. We agree that the remainder of the departmental file must be withheld under section 552.101 in conjunction with 143.089(g).<sup>2</sup>

Next, we will address your arguments under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant 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 person’s office or employment, is or may be a party.

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<sup>2</sup>We note that the departmental file includes evaluations by the police officer’s supervisors that are required to be placed in the civil service personnel file under section 143.089(a) of the Local Government Code.

(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 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 on the date the request for information is received; 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). A government 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* 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. *See Open Records Decision No. 555* (1990); *see also 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 establish that litigation is reasonably anticipated. *See Open Records Decision No. 361* (1983).

You inform us that the remaining information relates to the suspension of the named police officer for violations of civil service rules. The submitted information indicates that on the same day the department received the request for information, the police officer made a formal written request to the Paris civil service commission for an appeal before a third party hearing examiner to challenge his suspension. We note that municipal civil service appeals, such as the one requested here by the named police officer, are governed by chapter 143 of the Local Government Code. *See Local Gov't Code §§ 143.057, 143.127-143.131*. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf. Open Records Decision No. 588* (1991). As such, we conclude that litigation was reasonably anticipated by the department on the date it received the request for information. We also find that the remaining information is related to the anticipated litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103, and it must be disclosed. In this instance, some of the information you claim is excepted from release under section 552.103 has been provided to the named police officer who is the opposing party in the anticipated litigation; this information may therefore not be withheld under section 552.103. You may withhold the remaining information under section 552.103 to the extent it has not been provided to the opposing party in the pending litigation. We also note that the applicability of section 552.103 ends once the litigation has been concluded.

In summary, the department must withhold the Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The department must release the remainder of the civil service personnel file. The submitted fingerprint information must be released under section 560.002(1)(A) of the Government Code. The department must withhold the remainder of the departmental file under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The department may withhold the remaining information under section 552.103 to the extent it has not been provided to or obtained from the opposing party in the pending litigation.<sup>3</sup>

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

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<sup>3</sup>We note that some of the documents being released contain confidential information belonging to the named officer, which is normally excepted from disclosure under common law privacy and sections 552.117, 552.130, 552.136, and 552.137 of the Government Code. However, the requestor, as the officer's attorney, has a special right of access to this information. Gov't Code § 552.023. If the department receives a future request for this information from an individual other than the requestor or the subject of the information, the department should again seek our decision.

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



James A. Person III  
Assistant Attorney General  
Open Records Division

JAP/sdk

Ref: ID# 234819

Enc. Submitted documents

c: Mr. Vincent Wisely  
Combined Law Enforcement Associations of Texas  
904 Collier, Suite 100  
Fort Worth, Texas 76102  
(w/o enclosures)