



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2006

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OR2006-00404

Dear Mr. Casas and Ms. Stephens:

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# 239053.

The City of San Antonio (the "city") received a request for all documentation regarding the city airport police chief (the "police chief"), including former criminal allegations against him. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You inform us the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is

required to maintain, and an internal file that a police department may maintain 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 an officer, it is required by section 143.089(a)(2) 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.¹ *Id.* Information contained in the civil service file generally must be released, unless it is shown that some provision of chapter 552 of the Government Code permits the information to be withheld from public disclosure. *See* Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990).

However, subsection (g) of section 143.089 authorizes city police departments to maintain for their own use a file on a police officer that is separate from the file maintained by the city civil service commission. *Id.* Information that reasonably relates to a police officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must be withheld pursuant to section 552.101 of the Government Code. *See id.*; *see also City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied) (“the legislature intended to deem confidential the information maintained by the . . . department for its own use under subsection (g)”); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under section 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files).

You inform us that the submitted internal affairs file information is maintained in the city police department's (the “department”) file maintained under section 143.089(g). Based on your representations and our review of this information, we agree that some of this information is confidential pursuant to section 143.089(g). Therefore, the city must withhold the submitted internal affairs file information we have marked under section 552.101 of the Government Code.

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

However, upon review, we note that the submitted internal affairs file information contains investigatory records relating to disciplinary action that must be included in the police chief's civil service file. Copies of these records, which we have marked, must be placed, in their entirety, in the civil service commission file regarding the police chief. Local Gov't Code § 143.089(a)(2); *Abbott v. City of Corpus Christi*, 109 S.W.3d at 122 ("the fact that the City's police department chooses to also maintain records on investigations and complaints that result in disciplinary action does not operate to relieve the department of the duty to forward *all* information relating to a sustained disciplinary action to the civil service commission for placement in the subsection (a) personnel file") (emphasis in original).

We note that the city has also submitted a copy of the police chief's civil service file and the city's civil service commission has submitted briefing to this office regarding this file maintained pursuant to section 143.089(a) of the Local Government Code. As noted, records that must be maintained in civil service files are generally subject to release under chapter 552 of the Government Code unless an exception to disclosure applies. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

In that regard, we note effective November 19, 2001, the United States Congress enacted the Aviation and Transportation Security Act ("ATSA"), which created the United States Transportation Security Administration ("TSA"), a new agency within the United States Department of Transportation ("DOT") headed by the Under Secretary of Transportation for Security (the "Under Secretary"). *See* 49 U.S.C. § 114(a), (b)(1). The ATSA provides for the transfer of responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers from the Federal Aviation Administration (the "FAA") Administrator to the Under Secretary as head of the TSA. These responsibilities include carrying out the requirements of chapter 449 of title 49 of the United States Code, which pertain to civil aviation security. *See* 49 U.S.C. § 114(d)(1). On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (HSA), which transferred TSA to the newly established Department of Homeland Security ("DHS"). In connection with that transfer, the HSA transferred TSA's authority concerning sensitive security information ("SSI") under section 40119 of title 49 of the United States Code to section 114(s) of title 49 of the United States Code, and amended section 40119 to vest similar SSI authority in the Secretary of DOT.² Section 114(s) of title 49 now states:

Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides disclosing the information would—

²This ruling does not construe the parallel federal statutes and regulations which apply to the DOT.

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

49 U.S.C. § 114(s). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." *Id.* It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 114(s) to prescribe regulations that prohibit disclosure of information requested under chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 114(s) of title 49, TSA published new interim final regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations and which took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the disclosure of records and information that TSA has determined to be SSI as defined in section 1520.5 of title 49 of the Code of Federal Regulations. 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. 49 CFR § 1520.5(a)(3). Further, section 1520.5 lists sixteen categories of information that constitute SSI, including security inspection or investigative information, and specific details of aviation or maritime transportation security measures, both operational and technical, whether applied by the Federal government or another person. 49 CFR §§ 1520.5(b)(6), (8). Section 1520.9 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, *see* 49 CFR § 1520.7(a), "must take reasonable steps to safeguard SSI . . . from unauthorized disclosure[]" and must "*refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.*" *Id.* § 1520.9(a) (emphasis added).

Based upon the above-described statutory and regulatory scheme, we thus conclude that the decision to release or withhold the marked investigatory records, which must be included in the police chief's civil service file, as well as the other civil service records we have marked, is not for this office or the city to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also Louisiana Pub.*

Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Consequently, we conclude the city may not release these records at this time, and instead must refer the information request to the TSA for its decision concerning disclosure of this information.³

We now address the remaining submitted information maintained in the police chief's civil service file pursuant to section 143.089(a) of the Local Government Code. We begin by noting that much of this information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

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

Gov't Code § 552.022(a)(1), (18). The civil service records at issue include a settlement agreement between the commission and the police chief and completed evaluations of the police chief. All of these records are expressly public under section 552.022.

You claim that the civil service records are excepted from disclosure under section 552.103 of the Government Code. However, this section constitutes a discretionary exception, which is intended to protect the interests of a governmental body, as distinct from exceptions that are intended to protect the interests of third parties or information deemed confidential by law. *See 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. 522 at 4* (1989) (discretionary exceptions in general). Therefore section 552.103 does not constitute other law that makes information confidential for purposes of section 552.022, and the identified settlement agreement and evaluations may not be withheld on that basis.

We turn now to your arguments under section 552.103 of the Government Code for the remaining information in the submitted civil service records that is not subject to section 552.022. Section 552.103 provides in relevant part:

³As our ruling is dispositive of these civil service records, we need not consider your remaining arguments for this particular information.

(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 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You have submitted information to this office showing that, prior to the city's receipt of the request for information, the requestor filed complaints against the city with both the EEOC and the Civil Rights Division of the Texas Workforce Commission. The EEOC generally defers jurisdiction to the Workforce Commission over complaints alleging employment discrimination. The Workforce Commission operates as a federal deferral agency under section 2000e-5 of title 42 of the United States Code. We understand that the complaints at issue are still pending. Based on your representations and our review of the remaining submitted civil service records, we find you have demonstrated that litigation was reasonably

anticipated when the city received the request for information. We also find that the information at issue relates to the anticipated litigation for purposes of section 552.103. Thus, we conclude that you may withhold this remaining submitted information pursuant to section 552.103(a).

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which the opposing party in the anticipated litigation has had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we have marked the submitted information maintained in the department's internal file that is confidential pursuant to section 143.089(g) of the Local Government Code and that must be withheld under section 552.101 of the Government Code. Copies of the investigatory records relating to disciplinary action in the department file must be forwarded to the civil service file for the police chief maintained pursuant to section 143.089(a) of the Local Government Code. We have marked the information in the civil service file, including the marked investigatory records, that must be referred to the TSA for its decision concerning disclosure of this information. The police chief's civil service records that are subject to section 552.022, which we have marked, must be released in accordance with that provision. The remaining civil service records which are not subject to section 552.022, may be withheld under section 552.103 unless the other party to the anticipated litigation has previously had access to them.

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, 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 239053

Enc. Submitted documents

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(w/o enclosures)