



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 4, 2008

Mr. C. Patrick Phillips  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2008-02929

Dear Mr. Phillips:

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# 303690.

The City of Fort Worth, the Fort Worth Police Department, and the Fort Worth Fire Department (collectively the "city") received a request for several categories of information regarding a named officer, the requestor's client, a specified location, and specific police department rules and policies. You state that the city is releasing some responsive information to the requestor. You state that the city will redact certain Texas motor vehicle record information pursuant to the previous determinations issued to the city in Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). In addition, you state that the city has redacted social security numbers pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact social security number without necessity of requesting decision from this office under the Act). We note that you have also redacted personal information of a peace officer pursuant to section 552.117(a)(2) of the Government Code. The previous determination issued in Open Records Decision No. 670 (2001) authorizes the city to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of

requesting an attorney general decision.<sup>1</sup> See Open Records Decision No. 670 at 6. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.111, and 552.136 of the Government Code and protected under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received by the city. The city need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, you note the submitted information includes peace officer's accident reports completed pursuant to chapter 550 of the Transportation Code. See Transp. Code § 550.064 (Texas Peace Officer's Accident Report form). Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. See *id.* § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three items of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. See *id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has not provided the city with two of the three specified items of information regarding these accidents. Therefore, the city must withhold the accident reports we have marked pursuant to section 550.065(b) of the Transportation Code.

Next, we note that the submitted information in Exhibit C-1 consists of a completed internal affairs investigation that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). Sections 552.103 and 552.111 are discretionary exceptions to disclosure and, as such, are not other law that makes information confidential for the purposes of section 552.022. See *id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; Open Records Decision Nos. 677 at 10, 470 at 7 (1987). Therefore, the city may not withhold any of the information contained in the completed investigation under section 552.103 or section 552.111. The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. See *In re City of*

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<sup>1</sup>We note that section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

*Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider whether the city may withhold any of the information in the completed investigation under rule 503 or rule 192.5. In addition, you also claim that this information is subject to section 552.101 of the Government Code. Because section 552.101 constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the information in Exhibit C-1. We will also address your arguments for the information not subject to section 552.022.

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 exception encompasses information that other statutes make confidential, such as section 143.089 of the Local Government Code. We understand that the city of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code 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 the 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).<sup>2</sup> *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 internal file pursuant to section 143.089 (g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

In this case, you state that the information in Exhibit C-1 and the highlighted information in Exhibit F pertains to investigations of alleged misconduct that did not result in any discipline against the named officer. We understand you to represent that the information in Exhibit C-1 and portions of the information in Exhibit F are maintained in the named police officer’s departmental personnel file. Upon review, we conclude that the information in Exhibit C-1 and the information we have marked in Exhibit F is confidential pursuant to section 143.089(g) and must be withheld under section 552.101. We note, however, that the

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<sup>2</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See *id.* §§ 143.051-.055.

remaining information in Exhibit F consists solely of periodic evaluations of the named officer. The evaluations are from the officer's civil service file maintained under section 143.089(a). Nevertheless, you contend that the highlighted portions of the evaluations are confidential under section 143.089(g) because it references records maintained in the officer's internal department section 143.089(g) file. We disagree. Periodic evaluations of officers are properly maintained in the section 143.089(a) civil service file. Local Gov't Code § 143.089(a)(3) (stating that an officer's civil service file must contain any letter, memorandum, or document related to the periodic evaluation of the officer by a supervisor). Further, the fact that the evaluations at issue reference information that is contained in the officer's confidential section 143.089(g) file does not make the evaluations or any portion of their contents confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from the statutory structure), 478 at 2 (1987) (stating that as a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Accordingly, no portion of the remaining submitted evaluations is confidential under section 143.089(g). Thus, the city must withhold the information we have marked under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. However, the city must release the submitted evaluations in their entirety.

Next, the submitted information contains fingerprints. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). Accordingly, the city must withhold the fingerprints we have marked in Exhibit J under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

We note that the submitted information in Exhibit E contains the specified officer's L-3 (Declaration of Psychological and Emotional Health) form, which is required by the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 provides as follows:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education] may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

...

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). We have marked the declaration in Exhibit E that is confidential under section 1701.306 of the Occupations Code, and must be withheld under section 552.101 of the Government Code.

Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218 and 772.318 of the Health and Safety Code are applicable to emergency 911 districts established in accordance with chapter 772. See Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 911 callers that are furnished by a 911 service provider confidential. *Id.* at 2. Section 772.118 applies to an emergency communications district for a county with a population of more than two million. Section 772.218 applies to an emergency communications district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communications district for a county with a population of more than 20,000.

You state that the city is part of an emergency communications district established under section 772.218. You explain that the information you have highlighted was furnished by a 911 service provider. We note, however, that you have also marked 911 callers' names in addition to addresses and telephone numbers on the CAD records. We note that only the originating addresses and telephone numbers of 911 callers on the CAD records are confidential under chapter 772 of the Health and Safety Code. Accordingly, the city may not withhold the callers' names under section 552.101 on this basis. We further note that the general location of a call described by the 911 dispatcher is not protected under section 772.218. Only the specific address provided by a 911 service provider is confidential under chapter 772. Consequently, the city must only withhold the originating addresses and telephone numbers of 911 callers in Exhibit G under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it

generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with chapter 411, subchapter F. However, section 411.081(b) allows a police department to disclose to the public CHRI "that is related to the offense for which a person is involved in the criminal justice system." *Id.* § 411.081(b). We note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *Id.* § 411.082(2)(B) (definition of CHRI does not include driving record information). Therefore, we have marked CHRI in Exhibit E-2 that the city must withhold under section 552.101 in conjunction with federal law and chapter of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if: (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Therefore, the city must withhold the personal financial information we have marked in Exhibit E-1 under section 552.101 in conjunction with common-law privacy. Upon review, we determine that none of the remaining submitted information is confidential under section 552.101 of the Government Code in conjunction with common-law privacy.

We now address your section 552.103 arguments for the responsive information in Exhibit C. Section 552.103 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 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 governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See 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.). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Open Records Decision No. 551 at 4 (1990).

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

In this instance, you claim that the requestor's client has threatened, on several occasions, to pursue civil claims against the city for alleged assault by the named officer. The submitted

information also reveals that the city has received a notice of claim letter for damages related to this alleged incident prior to the receipt of this request. Upon review of your arguments and the submitted documents at issue, and based on the totality of the circumstances, we agree that the city reasonably anticipated litigation on the date it received the present request for information. Furthermore, we find that the responsive information in Exhibit C is related to the anticipated litigation. Accordingly, the city may withhold this information in Exhibit C under section 552.103.

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320(1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex.App.—Waco 1997, no writ). Moreover, because the client may elect to waive the

privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain that the submitted information in Exhibit D consists of confidential communications between city attorneys, city consultants, and city employees. Further, you assert that the communications were made for the purpose of facilitating the rendition of legal services. Based on your representations and our review, we find that the submitted information in Exhibit D consists of privileged attorney-client communications that the city may withhold under section 552.107 of the Government Code.

We note that a portion of the remaining submitted information is subject to section 552.130 of the Government Code. This section excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. The city must withhold the driver's license we have marked in Exhibit H under section 552.130 of the Government Code.

Finally, you claim that some of the remaining information is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Accordingly, the city must withhold the policy numbers we have marked under section 552.136. However, we find that the city has failed to demonstrate how any portion of the remaining information you have highlighted in Exhibit H constitutes a credit card, debit card, charge card, or access device number subject to section 552.136. We therefore conclude that the city may not withhold any of the remaining submitted information in Exhibit H pursuant to section 552.136.

In summary, the city must withhold the accident reports we have marked pursuant to section 550.065(b) of the Transportation Code. The city must withhold Exhibits C-1 and the information we have marked in Exhibit F under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The information we have marked must be also be withheld under section 552.101 in conjunction with sections 560.003 of the Government Code, 1701.306 of the Occupations Code, chapter 411 of the Government Code, and the doctrine of common-law privacy. The city must only withhold the originating addresses and telephone numbers of 911 callers in Exhibit G under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code. The responsive information in Exhibit C may be withheld under section 552.103 of the Government Code. The city may withhold Exhibit D under section 552.107 of the Government

Code. The information we have marked under sections 552.130 and 552.136 of the Government Code must also be withheld. The remaining responsive information must be released to the requestor. As our ruling is dispositive, we do not address your remaining arguments.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/eeg

Ref: ID# 303690

Enc. Submitted documents

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