



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2008

Ms. Eileen McPhee
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Austin, Texas 78746

OR2008-06543

Dear Ms. McPhee:

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# 310124.

The City of Georgetown (the "city"), which you represent, received a request for eighteen categories of information pertaining to a named former officer and Georgetown Police Department (the "department") policies and procedures. You state that the city does not have information responsive to portions of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted, a portion of which is a representative sample.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

²We 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.

Initially, you state that a portion of the requested information is the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2007-16602 (2007) and 2008-01777 (2008). These rulings held, in relevant part, that the city must withhold information contained in the named officer's departmental file under section 552.101 in conjunction with section 143.089(g). However, in this instance, the requestor requests investigations, disciplinary actions, complaints, notes, and incident reports pertaining to the named officer, rather than the officer's entire personnel file. Because the present request specifically seeks incident reports, the relevant facts have changed since the issuance of Open Records Letter Nos. 2007-16602 and 2008-01777. Therefore, we conclude that the city may not rely on those rulings as previous determinations in this instance. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Therefore, we will address your arguments for this information, along with the remaining information.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part the following:

(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[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed report and performance evaluations. Section 552.022(a)(1) makes this information expressly public. Therefore, the city may withhold this information, which we have marked, only to the extent it is made confidential under other law or is subject to section 552.108. Although the city raises section 552.103 of the Government Code for this information, this exception is discretionary and does not make information confidential. *See, e.g., 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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the city may not withhold the information subject to section 552.022 of the Government Code pursuant to section 552.103. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.117, 552.1175, 552.130, and 552.136, we will consider your arguments regarding these sections for the information that is subject to section 552.022, as well as the remaining information not subject to section 552.022.

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

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).³ *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 id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). 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 not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the information contained in Groups 1-B and 18 is contained in the department's personnel files of department officers and that this information is maintained under section 143.089(g). Based on your representations and our review, we determine that the city may generally withhold the information in Groups 1-B and 18 under section 552.101 in conjunction with section 143.089(g).⁴ However, we note that the requestor specifically

³Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

requests incident reports in category 1. While these reports may be maintained in the named officer's personnel file, they are also law enforcement records maintained independently of the police officer's personnel file. The city may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of a police officer's departmental file. Accordingly, the submitted incident reports in Group 1-B are not confidential under section 143.089 of the Local Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

You claim section 552.103 of the Government Code for the remaining information. Section 552.103 provides:

(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 city 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 city 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. *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). 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 Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act, Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

In this instance, you state that the request for information "was sent by a law firm and is worded exactly as a request for production would be," and that "the information requested taken as a whole indicates that it is being requested in relation to a civil suit." Although you have provided our office with a notice of claim letter, the city received this letter after the date the request for information was received. Therefore, upon review, we find that you have failed to demonstrate that the city reasonably anticipated litigation on the date the request was received. Therefore, the city may not withhold any portion of the remaining information under section 552.103.

You also claim section 552.108 for the remaining information, including the incident reports contained in Group 1-B that are not confidential under section 143.089(g). Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would

interfere with on-going law enforcement and prosecution efforts in general. You state that the requested information relates to an ongoing criminal investigation. Upon review, we find that section 552.108(a)(1) is applicable to Groups 1-A, 14, 15, 16, 17, and the remaining information contained in Group 1-B. However, based on our review of the remaining information, we are unable to determine, nor have you explained, how release of department policies and procedures would interfere with the ongoing criminal investigation. Therefore, we find that you have failed to demonstrate the applicability of section 552.108(a)(1) to Groups 3, 4, 5, 7, 8, 9, 10, 11, and 12 and they may not be withheld on that basis.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Therefore, with the exception of basic information, the city may withhold Groups 1A, 14, 15, 16, 17 and the remaining information contained in Group 1-B under section 552.108(a)(1).⁵

Next, this office has stated that under the statutory predecessor to section 552.108(b)(1), a governmental body may withhold information that would reveal law enforcement techniques or procedures. See, e.g., Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (predecessor to section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Generally known policies and techniques may not be withheld under section 552.108. See, e.g., Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known).

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state that release of the information contained in Groups 4, 7, 8, 10, and 12 would give an advantage to individuals being arrested. Further, you state that the information at issue consists of "highly specific guidelines for peace officers confronted by violence or threatened violence." Based on your representations and our review, we find that the city may withhold the information we have marked in Group 4 under section 552.108(b)(1). We note, however, that portions of the remaining information pertain to commonly known investigative procedures and techniques. Further, you have not demonstrated how release of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, you have failed to demonstrate how subsection 552.108(b)(1) is applicable to any portion of the remaining information. Accordingly, we conclude that the city may not withhold any of the remaining information under section 552.108(b)(1).

In summary, with the exception of the submitted incident reports in Group 1-B, the city must withhold Groups 1-B and 18 under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. With the exception of basic information, the city may withhold the Groups 1-A, 14, 15, 16, 17, and the remaining information contained in Group 1-B under section 552.108(a)(1). The city also may withhold the information we have marked in Group 4 under section 552.108(b)(1). 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 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).

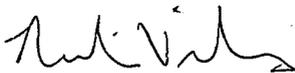
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 310124

Enc. Submitted documents

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