



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2008

Ms. Patricia E. Carls
Carls, McDonald & Darymple, L.L.P.
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OR2008-07146

Dear Ms. Carls:

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# 311113.

The City of Georgetown (the "city"), which you represent, received a request for (1) all complaints, disciplinary actions, and internal communications pertaining to a named former officer; (2) internal reports produced on complaints against the department, all use of force, racial profiling, disciplinary, and consent search reports created during the past ten years; and (3) the disciplinary policies of the Georgetown Police Department (the "department"). You state that you do not have a portion of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.1175, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.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 portions of the requested information are subject to previous rulings issued by this office. This office issued Open Records Letter Nos. 2007-16602 (2007) and 2008-01777 (2008), in which we ruled, in part, that the city must withhold the Georgetown Police Department's (the "department") internal file pertaining to the named officer pursuant to section 552.101 in conjunction with section 143.089(g) of the Local Government Code. Additionally, on May 14, 2008, this office issued Open Records Letter No. 2008-06543 (2008). In that ruling, we held that portions of the submitted information were excepted from disclosure under section 552.101 in conjunction with section 143.089(g) and sections 552.108(a)(1) and 552.108(b)(1) of the Government Code. You do not indicate that the pertinent facts and circumstances have changed since the issuance of the prior rulings. Thus, we determine that the city must continue to rely on our rulings in Open Records Letter Nos. 2007-16602, 2008-01777, and 2008-06543 as previous determinations and withhold or release the information in the current request that is identical to the information previously requested and ruled upon by this office in accordance with those decisions.³ See Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We will address your arguments for the submitted information that was not the subject of any of the previous rulings.

We note that the submitted information includes documents that have been filed with a court. Section 552.022 of the Government Code 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:

...

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes information filed with a court expressly public unless it contains information that is expressly confidential under other law. Although you raise section 552.103 of the Government Code for this information, this exception is discretionary and does not make information confidential. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no

³As our ruling for this information is dispositive, we need not address your arguments against disclosure of this information.

pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Thus, section 552.103 does not constitute other law for the purpose of section 552.022(a)(17). Therefore, the city may not withhold the information we have marked in Group 4 under section 552.103. As you raise no other arguments against disclosure of this information, the city must release the information we have marked in Group 4 in accordance with section 552.022(a)(17) of the Government Code.

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).⁴ *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).

⁴Chapter 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.

You state the information contained in Groups 1, 2, and 3, and portions of the information contained in Groups 4 and 5 are maintained in the departmental 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 must generally withhold the remaining information in Groups 1, 2, and 3, and the information in Groups 4 and 5 that is maintained in departmental files under section 552.101 in conjunction with section 143.089(g). We note that a portion of the information you seek to withhold in Group 4 consists of an "Internal Affairs Control Log." This information is maintained by the city for purposes beyond the evaluation of police department personnel. This information is clearly maintained elsewhere than a police officer's personnel file, and the city may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of departmental files. Accordingly, the city must withhold the information in Groups 1, 2, and 3, and the information in Groups 4 and 5 that are maintained solely in departmental files under section 552.101 in conjunction with section 143.089(g).⁵

Next, 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).

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

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.* 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 ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that a portion of the information in Group 4 pertains to pending litigation. You state that the city is a party to a lawsuit styled, *Shelton v. City of Georgetown*, 1:07-CV-00063-RP. You further state that the information at issue consists of attorney notes and communications pertaining to this pending litigation. Therefore, we find that the information we have marked in Group 4 is related to the pending litigation. Accordingly, except for the information that is subject to section 552.022, the city may withhold the information we have marked in Group 4 under section 552.103 of the Government Code.⁶

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, information that has either been obtained from or provided to the opposing party in the pending litigation 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the remaining submitted information is related to anticipated litigation. You state that the city received a notice of claim in compliance with the TTCA. Further, you state that the city anticipates that a lawsuit will be filed against the city because of information requested and the contents of the notice of claim letter. We note, however, that the city received the notice of claim after it received the present request for information. Upon review, we find that you have failed to demonstrate that the city reasonably anticipated litigation on the date the request was received. Accordingly, the city may not withhold any portion of the remaining information pursuant to section 552.103 of the Government Code.

Next, we address your claim under section 552.108(b)(1) of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

officer safety, and generally undermine police efforts to effectuate the laws of this State.” See *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov’t Code § 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).

To claim section 552.108(b)(1), a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. Gov’t Code §§ 552.108(b)(1), .301; Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. See, e.g., ORD 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).

You state that a portion of the remaining information contained in Group 4 consists of internal records and notations of the department and that release of this information would interfere with law enforcement and crime prevention. However, upon review, we find that you have not demonstrated how or why the release of any of the information at issue would interfere with law enforcement and crime prevention. Therefore, the city has failed to demonstrate how section 552.108(b)(1) is applicable to the information at issue. Accordingly, the city may not withhold the information at issue under section 552.108(b)(1).

We note that a portion of the remaining information in Group 5 is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130 (a)(1), (2). Upon review, we find that the city must withhold the Texas motor vehicle record information we have marked in Group 5 under section 552.130.

We also note that a portion of the remaining information in Group 4 is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. See *id.* § 552.137(c). You do not indicate that the owner of the e-mail address has consented to its release. Therefore, based on your representation and our review, the city must withhold the e-mail address we have marked in Group 4 under section 552.137 of the Government Code.

In summary, the city must continue to rely on Open Record Letter Nos. 2007-16602, 2008-01777, and 2008-06543 as previous determinations and withhold or release the information in the current request that is identical to the information previously requested and ruled upon by this office in accordance with those decisions. The city must withhold the information in Groups 1, 2, and 3 and the information in Groups 4 and 5 that is maintained solely in departmental files under section 552.101 in conjunction with section 143.089(g). With the exception of the information that is subject to section 552.022, the city may withhold information we have marked in Group 4 under section 552.103 of the Government Code. The city must withhold the information we have marked in Group 5 under section 552.130 and the information we have marked in Group 4 under section 552.137 of the Government Code. 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).

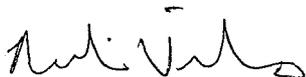
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 311113

Enc. Submitted documents

c: Ms. Debbie Russell
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(w/o enclosures)