



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2011

Mr. Albert Lopez
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14310 Northbrook Drive, Suite 110
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OR2011-16265

Dear Mr. Lopez:

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# 435268.

The Laredo Police Department (the "department"), which you represent, received a request for several categories of information including: (1) employment information pertaining to the requestor's client; (2) internal affairs and training files pertaining to several named officers; (3) "MCT sent messages" for named officers during a specified period of time; (4) specified e-mails and text messages for named officers for a specified period of time; (5) specified GPS records; and (6) information pertaining to a specified incident. You state some of the requested information does not exist.¹ You state you have released some of the requested information with information redacted under section 552.136 of the Government Code.² You claim some of the remaining requested information is not subject to the Act.

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers, bank routing numbers, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15. However, if the department redacted information under section 552.136 of the Government Code pursuant to Open Records Decision No. 684, we note on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in subsections 552.136(a) and (b) without the necessity of seeking a decision from the

You also claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you claim the requested text messages sent from the department issued cellular telephones of specified officers are not subject to the Act. We note the Act is applicable to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision Nos. 558 at 2 (1990), 462 at 4 (1987).

We further note that the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of “public information” in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the department does not possess the information at issue does not take the information outside the scope of the Act. *See* ORD 635 at 6-8. Furthermore, we note information in a

attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov’t Code § 552.136(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 27 (to be codified at Gov’t Code § 552.136(d), (e)). Thus, the statutory amendments to section 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.136(a) and (b) in accordance with section 552.136, not Open Records Decision No. 684.

public official's personal cellular telephone records may be subject to the Act where the public official uses the personal cellular telephone to conduct public business. *See id.* at 6-7 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business).

In this instance, you contend the department does not maintain or have a right of access to the requested text messages. You state that to the extent any responsive text messages exist, they are in the sole possession of AT&T, the department's cellular service provider.³ Pursuant to section 552.303 of the Government Code, we asked the department for a copy of its contract with AT&T and to further explain its position as to why the requested text messages are not subject to the Act.⁴ In response, you state the named officers' cellular telephones are issued and paid for by the department and are to be used in their performance of their official duties. You represent that the department does not know whether the requested text messages relate to the official business of the department because the department does not have copies of the text messages and the officers cannot recall whether the text messages at issue were sent regarding official business or for purely personal matters. You further represent the department has no physical copies of business or personal text messages and has no legal right of access to the requested text messages stored in AT&T facilities.⁵ Based upon your representations, we find this information is not collected, assembled, or maintained for the department or the department does not own or have a right of access to such information. Thus, we conclude the requested text messages are not subject to disclosure under the Act and need not be released to the requestor.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it relates to information created outside the time period specified by the request or was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to this request.

We note the responsive information includes a city ordinance. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See Open Records Decision Nos. 551 at 2-3 (1990) (laws or*

³We note that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. *See Open Records Decision No. 462 at 4-5 (1987)*. We also note a governmental body cannot compromise its obligations under the Act simply by deciding to enter into a contract. *See Open Records Decision Nos. 541 at 4 (1990), 514 at 1 (1988)*.

⁴*See Gov't Code § 552.303(c)-(d)* (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

⁵We note the contract you have provided does not specifically grant or deny access to text data.

ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted city ordinance, which we have marked, must be released.

Next, we note a portion of the responsive information falls within the scope of section 552.022(a)(3) of the Government Code, which provides that information in an account, voucher, or contract relating to receipt or expenditure of public or other funds by a governmental body is subject to required public disclosure unless it is made expressly confidential under "other law." Gov't Code § 552.022(a)(3). You claim the contract at issue is excepted from disclosure under section 552.103 of the Government Code. However, this is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, you may not withhold the contract at issue, which we have marked, under section 552.103 of the Government Code and it must be released.

We now turn to your arguments against disclosure of the responsive 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 made confidential by other statutes, such as section 143.089 of the Local Government Code. You state the City of Laredo is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files for police officers in a civil service city: a civil service file the civil service director is required to maintain and an internal file the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of 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). *See 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 the Act. *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state a portion of the requestor's client's internal affairs file pertains to an investigation of alleged misconduct that is still pending. Thus, you state the investigation has not resulted in disciplinary action and is maintained only in the internal files of the department pursuant to section 143.089(g). You further state the remaining submitted internal affairs files are maintained in the internal files of the department pursuant to section 143.089(g). Upon review, we agree most of the information at issue constitutes internal files maintained by the department for its own use. Thus, the information we have marked is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.⁶ We note that in this instance the requestor is an attorney for one of the officers whose records are at issue and has provided the department with a signed authorization form from his client to release the requested information. However, although section 143.089(e) provides officers a right of access to their own civil service file maintained under section 143.089(a), this office has determined that officers do not have a right to their own internal file maintained by a police department pursuant to section 143.089(g). *See* Open Records Decision No. 650 at 3 (1996) (confidentiality provision of section 143.089(g) contains no exceptions). Thus, because the records at issue are maintained in the department's internal file pursuant to section 143.089(g), the requestor does not have a right of access to his client's records under section 143.089(e).

We also note a portion of the information at issue relates to findings of misconduct pertaining to some of the officers that resulted in disciplinary action. An officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-.052 (suspension and uncompensated duty are "disciplinary action[s]" for purposes of section 143.089(a)(2)). Therefore, this type of information is subject to section 143.089(a) and must be placed in the officers' civil service file, unless the department has already done so.⁷

We further note a portion of the request seeks e-mails sent or received by named officers and law enforcement records pertaining to a specified incident. Thus, these parts of request are

⁶As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

⁷We also note section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

for records that exist separate and apart from the department's internal files. The department may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Thus, the remaining e-mails and law enforcement records contained in the requestor's client's internal affairs file are not confidential under section 143.089(g) of the Local Government Code and may not be withheld under section 552.101 of the Government Code on that basis.

Next, we address your claim for the rest of the submitted information, including the e-mails and law enforcement records contained in the requestor's client's internal affairs file, under section 552.103 of the Government Code. 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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.); ORD 551 at 4. The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See id.*

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See* Open Records Decision No. 336 (1982).

You state, and provide documentation showing, the requestor's client filed an EEOC complaint against the department alleging discrimination and retaliation based on sex and race prior to the date the department received the present request for information. Based on your representation and our review, we agree the department reasonably anticipated litigation on the date the department received the present request for information. Additionally, upon review of the submitted information and consideration of the department's arguments, we find the department has established that the submitted information is related to the EEOC complaint for purposes of section 552.103. As such, we conclude that the department may generally withhold the remaining information under section 552.103 of the Government Code.

We note, however, basic factual information about a crime must be released. *See* Open Records Decision No. 362 (1983). Information normally found on the front page of an offense report is generally considered public and must be released. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex Civ. App.—Houston [14th Dist. 1975, writ ref'd n.r.e.); Open Records Decision No. 127 (1976). Basic information includes the identification and description of the complainant and a detailed description of the offense. *See* ORD 127 at 3-4. With the exception of basic information, the department may withhold the remaining information under section 552.103 of the Government Code.

We note that once the 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 that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the department need not release the requested text messages that are not subject to the Act. The department must release the contract we have marked under section 552.022(a)(3) of the Government Code and the marked city ordinance. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. With the exception of basic information, the department may withhold the remaining responsive information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paige Lay".

Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 435268

Enc. Submitted documents

cc: Requestor
(w/o enclosures)