



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 20, 2012

Ms. Michelle M. Kretz  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, 3rd Floor  
Fort Worth, Texas 76102

OR2012-13098

Dear Ms. Kretz:

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# 462469 (PIR No. W017454).

The Fort Worth Police Department (the "department") received a request for eight categories of information pertaining to a specified incident, including audio, video, communications, reports, specified internal affairs files, and specified sections of the department's policies and procedures. You state no responsive video exists.<sup>1</sup> You state some information will be released. You further state the department will redact information as permitted by Open Records Letter No. 2011-15641 (2011).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.1175 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information. We have also considered comments received from an interested party. *See*

---

<sup>1</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to 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).

<sup>2</sup>Open Records Letter No. 2011-15641 is a previous determination issued to the department authorizing the department to withhold the originating telephone numbers of 9-1-1 callers furnished to the department by a service supplier established in accordance with chapter 772 of the Health and Safety Code under section 552.101 of the Government Code in conjunction with section 772.118 of the Health and Safety Code, without requesting a decision from this office.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note pages 79-124 of Exhibit C1 consist of completed investigations that are 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 it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" *Id.* § 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception to disclosure that may be waived and does not make information confidential under the Act. *See id.* § 552.007; *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), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, section 552.103 does not make information confidential for the purposes of section 552.022(a)(1), and the completed investigations at pages 79-134 of Exhibit C1 may not be withheld on that basis. However, you also raise sections 552.101 and 552.102 of the Government Code for this information. Because sections 552.101 and 552.102 make information confidential under the Act, we will address their applicability to pages 79-124, along with all of your arguments for the remaining information.

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. We note the City of Fort Worth 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 information in Exhibit C1 is maintained in the department's internal file pursuant to section 143.089(g) and pertains to investigations into alleged misconduct in which no disciplinary action was taken. Upon review, we agree pages 79-134 of Exhibit C1 constitute an internal file maintained by the department for its own use. Thus, this information is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.<sup>3</sup>

You raise section 552.103 of the Government Code for Exhibits C2 and C3 and the remaining information in Exhibit C1. Section 552.103 provides, in relevant 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 applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for

---

<sup>3</sup>Because our ruling is dispositive, we do not address your remaining argument against disclosure of a portion of this information.

information, and (2) the requested information 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. To demonstrate 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). This office has concluded a governmental body’s receipt of a claim letter it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.*

You state the department reasonably anticipates litigation in this instance because the department received a letter containing a notice of injury and claim for damages prior to the date it received the present request for information. You state the claim letter complies with the requirements of the TTCA. Further, you state the submitted information pertains to the subject of the anticipated litigation. Based on your representations, we conclude the remaining information relates to litigation the department reasonably anticipated on the date it received the request for information. Accordingly, section 552.103 generally applies to Exhibits C2 and C3 and the remaining information in Exhibit C1.

We note, however, it appears the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, pages 75-76 of Exhibit C1 must be released. However, the remaining information in Exhibit C1, along with Exhibits C2 and C3, may be withheld under section 552.103 of the Government Code.<sup>4</sup> We note the applicability of section 552.103 also ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

---

<sup>4</sup>Because our ruling as to this information dispositive, we do not address your remaining arguments against disclosure of portions of this information.

In summary, the department must withhold pages 79-134 of Exhibit C1 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, and, with the exception of pages 75-76 of Exhibit C1, which must be released, may withhold Exhibits C2 and C3 and the remaining information in Exhibit C1 under section 552.103 of the Government Code.<sup>5</sup>

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](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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

MHB/som

---

<sup>5</sup>We note the information being released contains the requestor's clients' driver's license numbers and social security numbers. As his clients' authorized representative, the requestor has a right of access under section 552.023 of the Government Code to this information, which would be confidential with respect to the general public. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). However, if the department receives another request for this particular information from a different requestor, we note section 552.147(b) of the Government Code authorizes the department to redact social security numbers without requesting a ruling from this office. In addition, section 552.130 of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the motor vehicle record information, including driver's license numbers, described in subsections 552.130(a)(1) and (a)(3). *See* Gov't Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor).

Ref: ID# 462469

Enc. Submitted documents

c: Requestor  
(w/o enclosures)