



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2013

Ms. Linda Pemberton  
Paralegal  
City of Killeen  
P.O. Box 1329  
Killeen, Texas 76540-1329

OR2013-14728

Dear Ms. Pemberton:

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# 497137 (City ID# W010849).

The Killeen Police Department (the "department") received a request for nineteen categories of information pertaining to two named department officers. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information appears to have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2009-02077 (2009). In Open Records Letter 2009-02077 we determined the department must withhold certain information: (1) under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) under sections 552.117(a)(2), 552.130, and 552.140 of the Government Code. We also determined the department must release the remaining information at issue. You now raise section 552.103 of the Government Code for some of the submitted information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by

law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.103, this section does not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent any portion of the submitted information was released in accordance with Open Records Letter No. 2009-02077, the department may not now withhold such information under section 552.103. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2009-02077 was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release any identical responsive information in accordance with that ruling. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not identical to information that was subject to Open Records Letter No. 2009-02077, we will consider your arguments under sections 552.101 and 552.103 of the Government Code.

Section 552.101 of the Government Code excepts “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. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code.<sup>1</sup> Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* 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 any instance 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 *et seq.* 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

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<sup>1</sup>You inform us that the department is a civil service department under chapter 143 of the Local Government Code.

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. 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 are in the 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 may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

*Id.* § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made the records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You state the information submitted as Attachment D is held in a file maintained by the department under section 143.089(g). Based on your representations and our review of the information at issue, we conclude Attachment D is confidential under section 143.089(g) of

the Local Government Code and must be withheld on that basis under section 552.101 of the Government Code.

We note portions of the remaining information are subject to section 552.022 of the Government Code. This section provides, in pertinent 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 unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining information contains completed evaluations that are subject to section 552.022(a)(1). The department must release the completed evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You raise section 552.103 of the Government Code for this information.. As noted above, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; ORDs 665 at 2 n.5, 663. Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.103 of the Government Code. As no further exceptions to disclosure have been raised for this information, it must be released. However, we will consider your argument under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). See Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. Open Records Decision No. 638 (1996).

You state, and submit supporting documentation showing, the department received a claim letter from the requestor prior to receiving the present request for information. You state the claim letter complies with the TTCA. Based upon these representations and our review, we conclude the department anticipated litigation at the time the department received the present request. We also agree the information at issue is related to the anticipated litigation for the purposes of section 552.103. Accordingly, we conclude the department may withhold the remaining information in Attachment E, which is not subject to section 552.022, under section 552.103.

We note 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 must continue to rely on Open Records Letter No. 2009-02077 as a previous determination and withhold or release any identical responsive information in accordance with that ruling. The department must withhold Attachment D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must release the information subject to

section 552.022(a)(1) of the Government Code. The department may withhold the remaining information in Attachment E under section 552.103 of the Government Code. However, to the extent any portion of the information in Attachment E was released in accordance with Open Records Letter No. 2009-02077, the department may not now withhold such 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/tch

Ref: ID# 497137

Enc. Submitted documents

c: Requestor  
(w/o enclosures)