



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2013

Ms. Danielle Folsom  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2013-15703

Dear Ms. Folsom:

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# 498788 (Houston GC No. 20581).

The City of Houston (the "city") received a request for correspondence between the city and the United States Department of Justice (the "DOJ") relating to the Houston Fire Department (the "department") over the last 48 months, excluding right-to-sue letters.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You state the city sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We assume 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, we note some of the submitted information is 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[.]” Gov’t Code § 552.022(a)(1). The information in Exhibit 4B consists of completed investigations by the city’s Office of Inspector General (the “OIG”) that are subject to section 552.022(a)(1) and must be released unless they are either excepted under section 552.108 of the Government Code or are confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold Exhibit 4B under section 552.103. However, you also raise sections 552.101 and 552.136 of the Government Code, which make information confidential under the Act. As such, we will consider your arguments under sections 552.101 and 552.136 for the information in Exhibit 4B.

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. Section 552.101 encompasses section 143.1214 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 provides in relevant part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department’s use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head’s designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director’s designee for inclusion in the fire fighter’s or police officer’s personnel file maintained under Sections 143.089(a)-(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You inform us the information in Exhibit 4B relates to OIG investigations of alleged misconduct by fire fighters. You state some of the investigations involve allegations that were not sustained and no disciplinary action was taken. The requestor is not an employee of another law enforcement agency or fire department or a district or United States attorney's office. You assert the information at issue does not meet the requirements of section 143.1214(c) for inclusion in the fire fighters' civil service personnel files. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). Thus, based on your representations and our review, we conclude the information pertaining to investigations involving allegations of misconduct that were not sustained and no disciplinary action was taken must be withheld under section 552.101 in conjunction with section 143.1214.

You state the remaining investigations pertain to allegations of misconduct that were sustained. You also state the department has forwarded the documents meeting the conditions of section 143.1214(c) to the fire fighters' personnel files maintained under section 143.089(a) of the Local Government Code. However, we note the request was received by the city, which has access to the files maintained under section 143.089(a). *Id.* § 143.089(a). Therefore, the documents responsive to this request that were forwarded to the fire fighters' civil service personnel files may not be withheld under section 552.101 in conjunction with section 143.1214. We understand the information in Exhibit 4B pertaining to investigations involving allegations of misconduct that were sustained does not meet the conditions of section 143.1214(c). Therefore, the city must also withhold this information under section 552.101 in conjunction with section 143.1214.<sup>3</sup>

Section 552.103 of the Government Code 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.

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of Exhibit 4B.

(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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for 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, orig. proceeding); *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 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. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Employment Opportunity Commission (“EEOC”) indicates litigation is reasonably anticipated. *See* Open Records Decisions Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You provide documentation showing department employees filed multiple discrimination claims with the EEOC prior to the date of the city’s receipt of this request for information. You state the complaints are at varying stages of the EEOC investigative process. You further state, and provide documentation showing, that a lawsuit styled *Charles H. Julian v. The City of Houston, Texas*, Cause No. H-12-2973, was pending in the United States District Court, Southern District of Texas, Houston Division, prior to the receipt of the instant request for information. You contend the information at issue is related to the substance of the EEOC complaints and the pending lawsuit. Upon review, we agree the city anticipated litigation and was involved in pending litigation related to the information at issue. Accordingly, the city may withhold Exhibits 2, 3, 4, and 4A under section 552.103 of the Government Code.<sup>4</sup>

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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must withhold the documents in Exhibit 4B under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The city may withhold Exhibits 2, 3, 4, and 4A 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,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/eb

Ref: ID# 498788

Enc. Submitted documents

c: Requestor  
(w/o enclosures)