



January 13, 2000

Mr. Chris M. Borunda
Assistant City Attorney
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-0145

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131529.

The City of El Paso Fire Department (the “department”) received a request for “copies of all written, video recordings, photographs, voice recordings, type written, microfiche, computer floppy disc, and any other form of information that you currently have on file concerning the ‘Discipline Files’ currently held by Assistant Chief William F. Greggensen that has been gathered during Departmental or Administrative Investigations.” You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code and that some of the information relates to investigations that may result in criminal prosecutions, so may be excepted from disclosure under section 552.101 or 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

You argue that this office should recognize the disciplinary appeal process as a form of litigation under the Public Information Act; however, you also state that the requested information relates to current personnel investigations and that, "[a]t the conclusion of this investigation, disciplinary action may result against City employees and at that time these employees will have the right to appeal any such punishment to a hearing officer." At this time even the imposition of disciplinary action is speculative; therefore, we conclude that the potential for resulting litigation is mere conjecture. You may not withhold any of the requested information under section 552.103.

Next, we address the claim made in Exhibit D that some of the requested information relates to ongoing investigations that either have resulted or may result in criminal charges. Information "held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted" from required public disclosure under section 552.108 of the Government Code, if "release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Because you inform us that some of the requested information pertains to pending criminal cases, we believe that the release of the information "would interfere with the detection, investigation, or prosecution of crime." *Id.* However, you do not tell us which documents pertain to ongoing criminal investigations or prosecutions. Except as provided below, you may withhold only those police department incident reports that relate to ongoing criminal investigations or prosecutions under section 552.108.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*,

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, you must release the basic front page offense and arrest information. We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

The submitted information does contain information made confidential by law. First, you must withhold information under section 552.130 of the Government Code, which excepts information relating to a driver's license issued by an agency of this state. We have marked the driver's license information that you must withhold under section 552.130.

In addition, you must withhold under section 552.117 of the Government Code the home address, home telephone number, social security number, or existence of family members of employees of the department if the employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee made the request for confidentiality under section 552.024 after this request for information was made. We have marked the information as if each employee made a timely request for confidentiality.

The submitted information also includes social security numbers that may be confidential regardless of an election under section 552.117. The social security numbers may be confidential if they were obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(vii); *see* Open Records Decision No. 622 (1994). You must withhold any confidential social security numbers.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 131529

Encl. Submitted documents

cc: Mr. Jorge Sanchez
President - Mexican American Fire Fighters International
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(w/o enclosures)