



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 23, 2017

Mr. Neal Falgoust
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2017-01503

Dear Mr. Falgoust:

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 initial request was originally received by the Open Records Division ("ORD") of this office and assigned ID# 642415 (PIR# 30367 & 12-24197). Due to related litigation involving ORD, preparation of the ruling has been assigned to the Opinion Committee of this office.

You inform us that on October 25, 2016, the City of Austin (the "City") received a request for a copy of the City's Internal Affairs Case Management System ("ICMS") database, which you state is the electronic filing system maintained and used by the Internal Affairs Division of the Austin Police Department (the "Department") as a tool to manage each administrative investigation it conducts of allegations of possible misconduct against individual police officers. You also tell us that on December 12, 2016, the Department received a request for certain documents, including emails to which were attached Internal Affairs history reports from the ICMS database. You inform us that the City and the Department have made a good-faith effort to relate the request to information in its custody. However, you claim that the requested information related to the ICMS database 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 representative sample of information you submitted.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Tex. Att'y Gen. ORD-499 (1988) at 6, ORD-497 (1988) at 4. 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.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOV’T CODE § 552.101. Section 552.101 encompasses information protected by section 143.089 of the Local Government Code. You state the City is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: 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* TEX. LOC. GOV’T CODE § 143.089(a), (g). Under section 143.089(a), 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 police department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)–(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051–.055; *see* Tex. Att’y Gen. Op. No. JC-0257 (2000) (written reprimand is not disciplinary action for purposes of Local Government Code chapter 143). 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 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* TEX. LOC. GOV’T CODE § 143.089(f); Tex. Att’y Gen. ORD-562 (1990) at 6. 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* TEX. LOC. GOV’T CODE § 143.089(b)–(c).

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. *See id.* § 143.089(g). 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 section 143.089(g) made these records confidential. See *City of San Antonio*, 851 S.W.2d at 949; see also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 563 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Government Code section 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Tex. Att'y Gen. Op. No. JC-0257 (2000) at 6–7 (addressing functions of Local Government Code section 143.089(a) and (g) files).

Although you assert that the requested information is maintained in the Department's internal files pursuant to section 143.089(g) of the Local Government Code and should thus be withheld under section 552.101, you do not tell us whether disciplinary action was taken with respect to any given record contained within the representative sample. To the extent that no disciplinary action as defined by chapter 143 of the Local Government Code was taken against an individual officer on a particular complaint, such information is confidential and the City must withhold any ICMS database records pertaining to the complaint against that officer under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

With respect to the remaining information, we consider your 552.101 argument. You state that the City's Civil Service Director and staff in the Civil Service Office do not have access to the ICMS database, nor does any other unit in the Department. You assert that the information is thus maintained solely in the Department's internal files and must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

The threshold question is not who has access to the database but, rather, whether the underlying misconduct documented therein resulted in disciplinary action. See *City of Corpus Christi*, 109 S.W.3d at 122. To the extent a complaint against an officer resulted in disciplinary action taken, we believe the associated records within the ICMS database must be placed in the civil service personnel file maintained under section 143.089(a) and thus may not be withheld under section 552.101 of the Government Code. However, our conclusion is qualified as indicated below.

Section 552.103, the litigation exception, provides in relevant part as follows:

(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.

TEX. GOV'T CODE § 552.103(a), (c). The City has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the request for information is received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding [mand. denied]); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Tex. Att'y Gen. ORD-551 (1990) at 4. The City must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the submitted information is similar in nature to the information that was at issue in a previous request for information, in response to which this office issued Open Records Letter No. 2016-02560 (2016). In Open Records Letter No. 2016-02560, we determined that the Department must release specified categories of information from the ICMS database. In response to Open Records Letter No. 2016-02560, the Department filed a lawsuit against our office challenging the ruling, which is currently pending. *See City of Austin v. Paxton*, No. D-1-GN-16-000955 (345th Dist. Ct., Travis Cty., Tex. Mar. 4, 2016). Thus, we agree that the City has met its burden with regard to the first prong of the section 552.103(a) test.

Several records within the representative sample you submitted pertain to cases in which the Department took disciplinary action against a police officer as contemplated by chapter 143. Open Records Letter No. 2016-02560 was based, in part, on the assumption that such information, while it may be kept in the internal file maintained under section 143.089(g), must also be kept in the civil service personnel file maintained under section 143.089(a). In the lawsuit, the City argues that the ICMS database does not necessarily consist of substantive investigative records that must be placed within the civil service file simply because the records may reference an investigation that may have resulted in discipline. Because the nature of the ICMS database is at issue in the lawsuit, we agree that the remaining information relates to the pending litigation and thus the City may withhold the remaining information pursuant to section 552.103(a).

The applicability of section 552.103(a) ends once the litigation has been concluded. Tex. Att'y Gen. Op. No. MW-575 (1982) at 1; Tex. Att'y Gen. ORD-350 (1982) at 3. At that time, the scope of our ruling regarding your request to withhold the remaining information under section 552.101 in conjunction with section 143.089(g) of the Local Government Code may be modified by the trial court's analysis of the nature of the ICMS database. To the extent the court finds that ICMS database records associated with a complaint that resulted in disciplinary action do not have to be placed in the officer's 143.089(a) civil service personnel file, such records are confidential and the City must withhold them from disclosure under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. To the extent the court finds that such records must be placed in the 143.089(a) civil service personnel file, such records may not be withheld under section 552.101 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, 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,



Becky P. Casares
Assistant Attorney General
Opinion Committee

BPC/sdk

Ref: ID# 642415

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)