



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Mr. Louis A. Barrow, Jr.
Chief of Police
City of Waxahachie
P.O. Box 338
Waxahachie, Texas 75165

OR95-1505

Dear Chief Barrow:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31979.

The Waxahachie Police Department (the "police department") has received a request for information relating to disciplinary action taken against certain police officers. Specifically, the requestor seeks "to inspect and make copies of the paperwork relating to disciplinary action given Cindy Lindig and Mark Christian in relation to the Juanita Bustamante/typewriter incident." You have submitted the requested information to us for review.¹ You claim that sections 552.101, 552.102, 552.103(a), and 552.108 of the Government Code except the requested information from required public disclosure. We address your arguments in turn.

The City of Waxahachie is governed by chapter 143 of the Local Government Code. You assert section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," in conjunction with section 143.089 of the Local Government Code. Section 143.089(g) provides:

¹You have also submitted two other documents that are not responsive to this request. We do not address whether these two documents are subject to required public disclosure. We note, however, that it appears that the letter to Ms. Bustamante, although not requested here, has been previously released to the media.

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.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by a city police department for its use. The records included in the 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 these records confidential. *City of San Antonio*, 851 S.W.2d at 949. Although subsection (g) permits the department to maintain its own file and prohibits release of any information therein, that subsection requires the department to refer requestors of information to the civil service director.

The *City of San Antonio* court did not comment on the availability of information contained in the police officer's civil service file. In cases in which a police department takes disciplinary action against a police officer, section 143.089(a) requires that the department transfer "any letter, memorandum, or document relating to" the disciplinary action to the city civil service commission. These records may not be withheld under section 552.101 of the Government Code but must be released by the civil service commission under section 143.089(f) of the Local Government Code unless some provision of the Open Records Act or other law permits the commission to withhold the documents. Open Records Decision No. 562 (1990); *see also* Local Gov't Code § 143.089(f). Again, the police department is required to refer any person who requests information maintained in an officer's personnel file to the civil service commission.

The information submitted to us for review indicates that the police officers for which information was requested here were disciplined: one officer was suspended, and another issued a "letter of concern." Section 143.089(a) requires the department to transfer "any letter, memorandum, or document relating to" these disciplinary actions to the city civil service commission. We trust that the police department will refer the requestor to the city civil service commission. These records may not be withheld under section 552.101 of the Government Code but must be released by the civil service commission under section 143.089(f) of the Local Government Code unless some provision of the Open Records Act or other law permits the commission to withhold the documents.

Next, we address your contention that section 552.102 of the Government Code exempts the requested information from required public disclosure. Section 552.102 exempts from disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 of the

Government Code protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications and performance of public employees. See Open Records Decision No. 470 (1987) at 5.

We have examined the records submitted to us for review. They appear to have been generated in connection with the investigation of the typewriter incident that occurred in April 1993. The investigation at issue here is of legitimate public concern. We conclude, therefore, that common-law privacy does not protect the requested records from required public disclosure. Accordingly, the police department may not withhold the records under section 552.102 of the Government Code.

You also contend that the requested records may be withheld under section 552.103 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated and that the requested information relates to that judicial or quasi-judicial proceeding. Open Records Decision No. 555 (1990) at 2. The department has submitted to this office information showing that the former employee has filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against the department. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1. Although you claim that the former employee has filed an EEOC complaint, you have not explained, nor is it apparent after reviewing the documents, how the requested information relates to that complaint. Therefore, the requested information may not be withheld under section 552.103(a).

Finally, we address your contention that section 552.108 of the Government Code exempts the requested information from required public disclosure. Section 552.108 exempts from disclosure "[a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime." When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 exempts from disclosure all information except that generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 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); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly

interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

You do not claim that the requested records are related to an active criminal investigation. Moreover, you have not demonstrated, nor do the submitted documents demonstrate on their face, that releasing the requested information will unduly interfere with law enforcement. Accordingly, the police department may not withhold the requested records under section 552.108 of the Government Code.

In sum, we conclude that the department must refer the requestor to the civil service commission. The requested records may not be withheld under section 552.101 of the Government Code but must be released by the civil service commission under section 143.089(f) of the Local Government Code as no other exception to disclosure is applicable under the Open Records Act.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 31979

Enclosures: Submitted documents

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