



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 8, 1996

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR96-0004

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 26890.

The City of Dallas (the "city"), through its police department, has received a request for information relating to the investigations of two former police officers who were convicted of criminal conduct. Specifically, the requestor seeks:

1. A 47 minute, uncut version of former Chief Rathburn's instructional video tape of Positive Discipline Course.
2. The complete investigation files, both criminal and the internal affairs investigation, of Officers Swany Davenport and Randy Harris.
3. The complete personnel files of Officers Swany Davenport and Randy Harris.
4. Copy of all grievances filed by Officer Michael Harrison.
5. Copy of all disciplinary proceedings against Officer Michael Harrison.
6. A copy of the legal bulletin or roll call training on random or selective searches done on employees explaining how and when you can do them.
7. The job description and pay scale for a Civilian Technician 8.

8. A copy of the transfers of Michael Harrison from Southeast to Property Room, Property Room to Central Patrol, Central Patrol to Professional Standards.

You advise us that the city has made much of the requested information available to the requestor. You object, however, to releasing the information sought in requests 2 and 3 above. You have submitted a representative sample of this information to us for review and claim that sections 552.101, 552.103, 552.108, 552.117, and 552.119 of the Government Code except it from required public disclosure.¹

We understand that Dallas is a civil service city under the Texas Local Government Code. Accordingly, the items in request number 3, the officers' personnel files, and some of the items that are responsive to request number 2 may be excepted from disclosure under section 143.089 of the Local Government Code. Section 143.089 of the Local Government Code works in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) provides:

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 Gen., 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 city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken.

¹In reaching our conclusion here, we assume that 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.

The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

We are unable to determine whether the documents you submitted to us for review are part of the files maintained by the police department under section 143.089(g). If they are, the city must withhold the information requested in request number 3.² Similarly, if any internal affairs investigation sought in request number 2 did not result in disciplinary action being taken, and these documents are part of the section 143.089(g) files, the city must withhold these investigations. However, if any internal affairs investigation did result in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a).

We now address your other claims in the event that the documents submitted to this office for review are not part of the police officers' section 143.089(g) files. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You advise us that former officers Davenport and Harris were convicted of "criminal behavior" and that their criminal cases are currently on appeal. You claim that the submitted information relates to the on-going criminal prosecution of these persons. However, you have not explained what the "criminal behavior" is, nor how the requested information is related to that "criminal behavior." The records submitted to this office do not show what the criminal behavior is nor is it clear how the information would relate to a criminal prosecution. Therefore, we conclude that the city has not met its burden of establishing how the requested information is related to ongoing litigation. Consequently, the city may not withhold the requested information under section 552.103.

You also contend that section 552.108 of the Government Code excepts the investigation files because they "reveal who incriminated Davenport and Harris and the surveillance techniques used by the Dallas Police Department in conducting the

²We also note that section 143.089(g) requires a police department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

investigations of these two officers.” Section 552.108(b) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution” This section excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 531 (1989) at 2 (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3.

We conclude that the city has not explained how the submitted information would unduly interfere with law enforcement nor does the submitted information supply that explanation on its face. Therefore, the city may not withhold the investigative files under section 552.108(b).

You contend that information in the former officers’ personnel files is excepted from disclosure under sections 552.117, 552.119, and 552.101 of the Government Code. Section 552.117 excepts from required public disclosure information relating to the home telephone number and home address of a peace officer as defined by article 2.12 of the Code of Criminal Procedure.³ From the information submitted, we cannot determine whether the former city police officers are currently “peace officers” as defined by article 2.12. If the former officers are currently peace officers within the definition set forth in article 2.12, you must withhold their home addresses and home telephone numbers.⁴ However, if the former city police officers are not currently peace officers as defined by article 2.12 of the Code of Criminal Procedure, then you must release this information to the requestor unless the former officers made the election provided for in section 552.024 of the Government Code.⁵ If the former officers are no longer peace officers but made the election under section 552.024 that their home addresses and home telephone numbers remain confidential, the city must withhold that information.

³We note that section 552.117 was amended in the last legislative session. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 9, 1995 Tex. Sess. Law Serv. 5127, 5132 (Vernon) (to be codified as Gov’t Code § 552.117). This amendment applies only to requests received by a governmental body on or after September 1, 1995. *Id.* § 26, 1995 Tex. Sess. Law Serv. at 5142. Therefore, the amended section does not apply to this request.

⁴This applies to the officers’ home addresses and home telephone numbers wherever they appear.

⁵We note that section 552.024(a) was amended in the last legislative session. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 5, 1995 Tex. Sess. Law Serv. 5127, 5130 (Vernon) (to be codified as Gov’t Code § 552.024(a)). This amendment applies only to requests received by a governmental body on or after September 1, 1995. *Id.* § 26, 1995 Tex. Sess. Law Serv. at 5142. Therefore, the amended section does not apply to this request.

Section 552.119 of the Government Code prohibits the release of a photograph that depicts a peace officer as defined by article 2.12 of the Code of Criminal Procedure except in certain circumstances. There is a photograph of a former police officer in the submitted personnel file. Unless the peace officer has given his consent to release of the photograph or one of the exceptions set forth in section 552.119 applies, the city must withhold the photograph.

A psychological evaluation is contained in the personnel file submitted to this office for review. This information is confidential under section 611.002 of the Health and Safety Code. Section 611.002 of the Health and Safety Code provides in pertinent part:

(a) Communications between a patient and a professional,⁶ and records of the identity, diagnosis, *evaluation*, or treatment of a patient that are created or maintained by a professional, are confidential. [Emphasis added; footnote added.]

The psychological evaluation you have submitted to this office falls within the scope of section 611.002(a) and therefore is excepted from public disclosure pursuant to section 552.101 of the Government Code. The city must withhold this record. We have marked it for your convenience.

We cannot determine whether some information submitted to this office consists of communications between a patient and a professional, or are records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional under section 611.002. However, we note that if these documents meet this definition, the city must withhold them. If they do not meet this definition, the city may not withhold these documents under section 622.002. We have marked the documents for your convenience.

You next claim that section 552.101 excepts from disclosure criminal history report information ("CHRI"). CHRI is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084. Therefore, the city must withhold CHRI about the former officers from the requestor under section 552.101.

⁶Section 611.001 of the Health and Safety Code defines "professional" in part as "a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder."

Section 552.101 also excepts from disclosure information protected by common-law or constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.101 also excepts information that is confidential under constitutional or common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress); 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982), and the results of psychological and IQ tests, Open Records Decision No. 600

(1992). We have reviewed the documents submitted for our consideration and have marked the information that must be withheld under constitutional or common-law privacy.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Enclosed: Marked documents

Ref.: ID# 26890

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