



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 29, 1997

Ms. Lillian Guillen Graham  
Assistant City Attorney  
Office of the City Attorney  
P.O. Box 850137  
Mesquite, Texas 75185-0137

OR97-1959

Dear Ms. Graham:

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# 108214.

The City of Mesquite Police Department (the "department") received a request for eight categories of information described as

- (1) Mesquite Police General and Special Orders;
- (2) MPD Code of Conduct;
- (3) City of Mesquite Personnel Rules and Regulations;
- (4) Patrol SOP and MPD Written Directives;
- (5) Internal Affairs Resume of [a named police officer];
- (6) Personnel Records of [a named police officer];
- (7) Open Records Public Information SOP; and
- (8) Mesquite City Code.

You state that some of the requested records have either already been, or will be, made available to the requestor. You inform us that you asked the requestor to clarify his request which resulted in the withdrawal of his request regarding item number 8. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.119 of the Government Code. We have considered the exception you claim and have reviewed the sample document you have submitted.<sup>1</sup>

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<sup>1</sup>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.

Initially, we note that you indicate that the department is not the custodian of the records contained in items 3 and 6. In this regard, we note that the Open Records Act does not ordinarily require a governmental body to obtain information not in its possession, Open Records Decision Nos. 558 (1990), 518 (1989), or to obtain information from another entity, so long as the entity does not hold the information on behalf of the governmental body, Open Records Decision No. 534 (1989). However, a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision Nos. 561 (1990) at 8, Open Records Decision No. 558 (1990) at 2 (where governmental body has right of access to or ownership of information prepared by outside entity, information is subject to Open Records Act.). Therefore, if the department holds or has a right of access to records from which the requested information in items 3 and 6 can be obtained, it must provide that information to the requestor unless it is otherwise excepted from disclosure.

Section 552.108 excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime,” and “[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.” Gov’t Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Regarding the Police Manual (“manual) information, should this office determine that the entire manual is not excepted from disclosure by section 552.108, then you seek to exempt those portions of the manual which you have marked. We have reviewed the records submitted as responsive to requested items 1, 2, 4, and 7 and agree that you may withhold the portions which you have marked. However, the remaining manual information appears to relate only indirectly to law enforcement or the detection, investigation, or prosecution of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). Therefore, you may not withhold that information under section 552.108.

You also claim that the personnel records of the police officer, including the internal affairs file, are excepted from disclosure by section 552.108. This office has determined that section 552.108 does not protect general personnel information from public disclosure. Open Records Decision No. 562 (1990) at 10 (applying predecessor statute). Moreover, the internal affairs documents submitted to this office appear to relate only indirectly to law enforcement or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (where no criminal investigation or prosecution results from investigation of police officer for alleged misconduct, section 552.108 is inapplicable); Open Records Decision No. 350 (1982). Therefore, we conclude that the department may not withhold the personnel documents submitted in response to items 5 and 6 based on section 552.108 of the 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). Information contained in a police department's internal files is confidential and must not be released.<sup>2</sup> *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). Information contained in civil service files is subject to release under chapter 552 of the Government Code.

We understand that Mesquite is a civil service city under Chapter 143 of the Texas Local Government Code. You represent that the information submitted to this office in response to item 5 is part of the police department's internal personnel file rather than the civil service file. 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*, 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. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. However, in cases in which a police department takes disciplinary action against a police officer, section 143.089(a)(2) mandates that documents relating to "any misconduct by the fire fighter or police officer" must be placed in a police officer's civil service file "if the letter, memorandum, or document is from the employing department and if the misconduct resulted in *disciplinary action by the employing department in accordance with this chapter.*" (Emphasis added.)

Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov't Code §§ 143.051-.055. Accordingly, because it appears that the misconduct here did not result in disciplinary action prescribed by chapter 143, the submitted documents relating to the police officer's misconduct need not be placed in the officer's civil service files. Because the documents you

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<sup>2</sup>We note that a request for information in the internal file must be referred to the civil service director or his designee. Local Gov't Code § 143.089(g).

submitted to us in response to item 5 are properly part of the files maintained by the police department under section 143.089(g), the department must withhold the requested information based on section 552.101 in conjunction with section 143.089 of the Local Government Code.

Section 552.101 also incorporates the doctrine of common-law 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 of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, *writ ref'd n.r.e.*). Consequently, we will consider these two exceptions together.

Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). This office has concluded in the past that common-law privacy does not protect information about the educational training of an applicant or employee; names and addresses of former employers; dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and telephone numbers of character references; and information about job performance. Open Records Decision No. 455 (1987) at 9.

On the other hand, common-law privacy generally protects information about an individual's overall financial status and financial history. Open Records Decision No. 373 (1983) at 3 (background financial information is type of intimate information generally protected under common-law privacy). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. Open Records Decision Nos. 545 (1990), 523 (1989). Thus, for example, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to the state retirement system. *See* Open Records Decision No. 600 (1992). Such information is excepted from disclosure if it relates to a voluntary investment that the employee made in an optional benefits plan offered by the public employer. *Id.*

We have previously determined that information revealing the designation of beneficiaries of insurance and retirement funds is confidential under the right of privacy. *Id.* at 10. Consequently, beneficiary information contained in the requested documents<sup>5</sup> is

excepted from required public disclosure under sections 552.101 and 552.102. However, information revealing that an employee participates in a group insurance plan funded by the city or state or has enrolled persons in addition to himself *is not* excepted from disclosure. *Id.* But, information relating to the employee's choice of carrier and his election of optional coverages *is* excepted from disclosure. *Id.* In addition, direct deposit authorization forms are excepted from disclosure. *Id.* at 11-12. For your convenience, we have marked the types of financial information which must be withheld from public disclosure based on the common-law right to privacy under sections 552.101 and 552.102 of the Government Code.

Section 552.101 also protects from disclosure information which is made confidential under federal law. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9.

Section 552.117(2) excepts from required public disclosure information relating to the home address, home telephone number, and social security number of a "peace officer as defined by article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 5.212, Education Code." Unlike other public employees, a peace officer need not affirmatively claim confidentiality for section 552.117 information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). The department must withhold the peace officer's home address and telephone number from the requestor. Finally, photographs of the police officer contained in the records are protected from disclosure under section 552.119. Open Records Decision No. 502 (1988) (section 552.119 generally prohibits release of peace officers' photographs).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/glg

Ref.: ID# 108214

Enclosures: Marked documents

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(w/o enclosures)