



November 22, 1999

Mr. Kevin W. Kapitan
Assistant City Attorney
Police Legal Advisor
Fort Worth Police Department
350 West Belknap Street
Fort Worth, Texas 76134

OR99-3346

Dear Mr. Kapitan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129008.

The Fort Worth Police Department (the "department"), received a request for the following:

1. The psychiatric history of a named employee of the department,
2. The psychiatric history of the requestor,
3. Recordings of two 9-1-1 calls,
4. The disciplinary files of a named employee of the department, and
5. The human resources files of a named employee of the department.

You advise the named employee is a former police officer, now retired, who currently works for the department as a "non-peace officer administrative assistant." Regarding items "1" and "2," you advise the department has no responsive information. The Public Information Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). Thus, you need not comply with this portion of the request. You have not submitted the information responsive to item "3" to this office for review. We thus assume you have released that information to the requestor¹. See Gov't Code §§ 552.301, 302. You have provided for our review information that is responsive to items "4" and "5," marked by you as exhibits "B" and "F."

¹You state that because it was the requestor who made the two 9-1-1 calls, he is arguably entitled to access to the recordings pursuant to section 552.023 of the Government Code. This section deals with special access to otherwise confidential information. Thus, you are apparently assuming the two 9-1-1 call recordings are generally confidential. This ruling does not address this assumption. However, we call your attention to Open Records Decision No. 649 (1996) (finding only the originating telephone numbers and addresses obtained from a service supplier, and not the remaining information obtained during the 9-1-1 telephone call, to be confidential under section 772.318 of the Health and Safety Code in conjunction with section 552.101 of the Government Code).

You assert this information, in its entirety, is excepted from required public disclosure under sections 552.101, 552.102, 552.108, 552.117 and 552.119 of the Government Code. We have reviewed the information you have submitted and considered the exceptions you assert.

We understand that the City of Fort Worth is a civil service city under chapter 143 of the Local Government Code. Section 552.101 of the Government Code 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 department is required to maintain as part of the police officer’s civil service file (the “(a)” file), and one that the department may, but is not required to, maintain for its own internal use (the “(g)” file). Local Gov’t Code § 143.089(a), (g). The (a) file must contain certain specified items, including documents relating to any misconduct in those cases where the department took disciplinary action against the peace officer. *Id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the (a) file if the department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *Id.* § 143.089(b), (c). Thus, subsections (a)-(c) limit the contents of the (a) file.

Subsection (g) authorizes but does not require the city police department to maintain for its use a separate and independent, internal personnel file on a peace officer. 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 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 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. 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 at 6 (1990). We note the legislative purpose of section 143.089 as stated by the *City of San Antonio* court:

All parts of section 143.089 are quite obviously designed to work in harmony with each other and in harmony with the disclosure provisions of the [Public Information] Act under the general legislative policy that allegations of misconduct made against a police officer shall not be subject to compelled disclosure under the Act unless they have been substantiated and resulted in disciplinary action.

851 S.W.2d at 949. We thus find chapter 143 contemplates the department to maintain *up to two* personnel files on its police officers. You state: “[a]s to so-called “disciplinary files”, or more appropriately, Civil Service files, the City will make available any extant public record files developed in accordance with Tex. Local Gov’t Code Ch. 143.” We interpret this statement to mean the (a) file has been released to the requestor. We now turn to the information at issue.

You state exhibit “F” consists of “departmental documents [that] were generated by the [City of Fort Worth] Human Resources Department which would constitute . . . 143.089(g) files.” You argue, *inter alia*, that exhibit “F” is made confidential by section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. From your representation as to the documents in exhibit “F,” we assume they are from the (g) file maintained by the department for its internal use. Based on your representation that exhibit “F” consists of the (g) file, we agree the exhibit is confidential and must be withheld. We note, however, that exhibit “F” contains documentation of disciplinary action taken against the named employee while he was a police officer (twenty day suspension without pay). As stated above, where 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 at 6 (1990). We thus assume any documentation of disciplinary action taken against the named employee while he was a police officer was also included in the section 143.089(a) file that has been released to the requestor.

Exhibit “B” consists of a tape recording of an interview of the requestor regarding a complaint of the requestor about an incident involving the named employee². You argue, *inter alia*, that exhibit “B” is made confidential by section 143.089 of the Local Government Code in conjunction with section 552.101 of the Government Code. Our review of exhibit “B” indicates, however, that the incident complained of did not occur when the named

² We note among the documents you have submitted to this office an offense report arising from the incident the subject of exhibit “B.” You did not label or otherwise indicate this offense report to be part of any submitted exhibit, nor have you indicated whether you have withheld the offense report. We assume the offense report is part of exhibit “B.”

employee was a police officer, but rather after he retired and while he was a “non-peace officer administrative assistant.” Section 143.089 of the Local Government Code relates only to fire fighters and police officers. Local Gov’t Code § 143.089(a). We accordingly find section 143.089 of the Local Government Code to be inapplicable to exhibit “B.”

You also assert the applicability of section 552.108 of the Government Code to exhibit “B.” You state the information “has been designated as part of an [Internal Affairs Department] file,” that the information “was captured for the purpose of conducting an investigation into allegations of possible criminal misconduct by the referenced employee,” and that “an inopportune release of this information could seriously interfere with, if not hamper the internal investigation into the matter.” Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication, or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

* * *

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov’t Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law

enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Your statements indicate that the requested information in exhibit "B" is the subject of an ongoing criminal investigation. It appears that a related criminal prosecution may be brought. We accordingly find that you have shown that the release of the requested information would interfere with the detection, investigation or prosecution of crime. *See Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 216 (1978). Thus, we conclude that the requested information in exhibit "B" may be withheld under section 552.108(a)(1).

We note, however, that information normally found on the front page of an offense report is generally considered public. *Houston Chronicle Publ'g 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). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Gov't Code § 552.108(c); *see Houston Chronicle*, 531 S.W.2d at 187; *cf.* Open Records Decision No. 597 (1991) (basic information in an offense report generally may not be withheld under section 552.103); *see also* Open Records Decision No. 127 (1976) (summarizing the types of information deemed public by *Houston Chronicle*).

Because we make a determination under sections 552.101 and 552.108, we need not address your additional arguments against disclosure. 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.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 129008

Encl. Submitted documents

cc: Mr. Riley Cantrell
2300 Sundrop Ct.
Fort Worth, Texas 76108
(w/o enclosures)