



June 14, 2001

Ms. Leah Simon Clark
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2001-2531

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148442.

The Waco Police Department (the "department") received a request for information related to a specific Internal Affairs investigation. You state that you have released 161 pages of records. You claim that the remainder of the requested information, submitted as exhibits "3" and "4," is excepted from disclosure under sections 552.101 and 552.117 of the Government Code, and section 143.089(g) of the Local Government Code. We have considered your claims and reviewed the submitted information.

At the outset, we address whether this office has issued a previous determination on the required public disclosure of the requested information under section 143.089 of the Local Government Code. Under section 552.301, generally, a government body must ask this office for a ruling whenever the government body seeks to withhold information responsive to a request. However, where there exists a previous determination, a government body is not required to ask this office for a decision and may instead withhold the information in accordance with the previous determination. The attorney general has identified two types of previous determinations, but only one is relevant here and will be discussed. *See* Open Records Decision No. 673 (2001). That type exists where the law, the facts, and the circumstances on which the ruling was based have not changed, where the requested information is precisely the same information as was addressed in the prior attorney general ruling, where the ruling is addressed to the same governmental body, and where the ruling concludes that the information is or is not excepted from disclosure. *Id.*

You represent that Open Records Letter No. 94-198 (1994) is a previous determination that the department may withhold a police officer's departmental personnel file under section 143.089(g) of the Local Government Code, without the necessity of requesting an Attorney General decision under section 552.301 of the Government Code. After review of Open Records Letter No. 94-198, we conclude that it is not a previous determination as set out in Open Records Decision No. 673 (2001). Therefore, we conclude that the department may not rely on Open Records Letter No. 94-198 as a previous determination to withhold the requested information under section 143.089(g) of the Local Government Code in accordance with that ruling.

We next note that the records at issue contain polygraph examination results. Section 1703.306 of the Occupations Code governs the release of polygraph information and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occupations Code § 1703.306(a), (b). This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a) of section 1703.306 of the Occupations Code. Because we have no indication that the requestor is one of those persons identified in subsection (a), we cannot conclude that the polygraph examination results may be disclosed to the requestor. Therefore, the department must

withhold from disclosure the polygraph examination results we have marked in the submitted documents. Gov't Code § 552.101.

We next address your arguments under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Common law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. After review of the submitted documents, we find that none of the documents is excepted from required public disclosure under common law privacy in conjunction with section 552.101.

We next address your argument under section 143.089(g) of the Local Government Code. You state that the department is not permitted to release the information contained in the department personnel file to this office. Pursuant to section 552.301(e)(1), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(D); *see also* Gov't Code §§ 552.3035 (prohibiting attorney general from disclosing information submitted under section 552.301(e)(1)(D)). Although you have enclosed copies of some of the responsive information, you did not submit to this office copies of the requested information that you wish to withhold from disclosure under section 143.089. You therefore failed to request a decision in accordance with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You have not submitted the information that you wish to withhold under section 143.089(g), so we have no basis for finding it confidential on that basis. Thus, we have no choice but to order the information released per section 552.302. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information.

Finally, we address your argument under section 552.117. You cite to section 552.117(4) of the Government Code, but the language cited in your brief indicates that your intent was to cite to section 552.117(2). Accordingly, you appear to claim that the address of a police officer that was redacted from the requested information prior to its release is excepted under section 552.117(2) of the Government Code. Section 552.117(2) provides that information that relates to the home address, home telephone number, social security number, or family member information of a peace officer as defined in article 2.12 of the Texas Code of Criminal Procedure must be withheld regardless of whether the officer complied with section 552.024 of the Government Code. In Open Records Decision No. 670 (2001), this office concluded that a governmental body need not request an Attorney General decision in order to withhold information falling under section 552.117(2). Therefore, we agree that you must withhold section 552.117(2) information from all of the responsive information and that you need not request a decision from this office to withhold it.

In summary, the department must withhold section 552.117(2) information in accordance with Open Records Decision No. 670 (2001). The department may not withhold exhibits "3" and "4" under common law privacy in conjunction with section 552.101. In addition, because the department failed to comply with section 552.301(e) of the Government Code, we cannot conclude that the department must withhold the officer's personnel file under section 552.101 in conjunction with section 143.089 of the Local Government Code. Lastly, the department must withhold from disclosure the polygraph examination results we have marked in the submitted documents.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/DKB/seg

Ref: ID# 148442

Enc. Marked documents

c: Mr. Robert W. Cotner
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(w/o enclosures)