



August 28, 2001

Ms. Karmen Binka
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2001-3803

Dear Ms. Binka:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151243.

The City of San Antonio (the "city") received two requests for the "Commission Record" and the "official record (public record) . . . 201 File" of a named police officer. You inform us that the city will release the officer's information maintained by the Police and Fire Civil Service Commission. You claim that the remaining requested information contained in the officer's 201 personnel file is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, 552.117, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be 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 applies to civil service cities and contemplates two different types of personnel files, one that the civil service director or the director's designee 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 "any letter, memorandum, or document relating to . . . any misconduct [by the officer] if the misconduct resulted in disciplinary action [by the city police department] in accordance with [chapter 143 of the

Local Government Code].” *Id.* § 143.089(a)(2). The (a) file also must contain “any letter, memorandum, or document relating to . . . the periodic evaluation of [the officer] by a supervisor.” *Id.* § 143.089(a)(3). Documents relating to any alleged misconduct or disciplinary action taken must be removed from the (a) file if the city police 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 content of the (a) 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 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 a city police department for its use (a (g) file), and the court 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. As indicated above, however, 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 “any letter, memorandum, or document relating to” the misconduct in the personnel file maintained under section 143.089(a). Such records contained in the (a) file are not confidential under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. 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. However, Subchapter D of chapter 143 of the Local Government outlines the disciplinary actions contemplated by chapter 143 and does not include a written reprimand. Further, this office has determined that a written reprimand is not a disciplinary action under chapter 143 and, therefore, the reprimand must be placed in the confidential department file. *See* Attorney General Opinion JC-0257 (2000).

You represent that the submitted information is from the officer's 201 Human Resources personnel file. You inform us that "[i]n many cases, the information in the Human Resource personnel file on an officer is a combination of information contained in the police department's personnel file and the Fire and Police Civil Service Commission's personnel file." Based upon our review of the submitted information, we find that the records in Attachment VIII consist of information that must be maintained in a police department's internal file, as provided in section 143.089(g). Consequently, the city must withhold the information in Attachment VIII from public disclosure based on section 143.089(g) in conjunction with section 552.101 of the Government Code.

You next contend that the information contained in Attachments III and IV is excepted from disclosure under sections 552.101 and 552.102, and in Attachments V and VI under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Information is protected by the common law right of privacy 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. See *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977); see also Open Records Decision No. 611 at 1 (1992). In prior decisions, this office has determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Thus, a public employee's allocation of part of his or her salary to a voluntary investment program offered by the employer is a personal investment decision, and common law privacy excepts information about the allocation from public disclosure. See Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan), 523 (1989) (information contained in loan files of veterans participating in Veterans Land Board programs), 373 (1983) (information contained in housing rehabilitation grant application files). On the other hand, common law privacy does not except from disclosure information about a transaction that is funded in part by the state or another governmental entity. See, e.g., Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common

law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body). After examining the submitted information, we conclude that the marked financial information is confidential under the common law right of privacy and is, thus, excepted from disclosure under section 552.101 of the Government Code. We find that the remaining information at issue does not satisfy the criteria articulated in *Industrial Foundation*, and is therefore not private.

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. The records in Attachment IV are a part of the 201 file maintained by the city, and are not "records at an educational institution". Section 552.114 is therefore inapplicable to these records.

You claim that the documents in Attachment V are excepted from disclosure pursuant to section 552.122 of the Government Code. Section 552.122 excepts from disclosure test items developed by an educational institution or by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). After reviewing the submitted records, we find that they are not "test items" as contemplated by section 552.122. Therefore, section 552.122 is inapplicable.

The requested records contain information that is excepted from disclosure under section 552.117(2). The city must withhold those portions of the records that reveal the officers' home addresses, home telephone numbers, and social security numbers. The city must also withhold the officers' *former* home addresses and telephone information from disclosure. See Open Records Decision No. 622 (1994). The records also include information about the officer's family members. The city must withhold this information from disclosure under section 552.117(2). We have marked these documents accordingly.

Further, you assert that a birth certificate in Attachment VII is excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115 of the Government Code. However, since the birth certificate at issue does not appear to be held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. The city must, however, withhold the marked information in the birth certificate under section 552.117 of the Government Code.

Finally, we note that the submitted information contains a Texas driver's license number. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

We have marked the Texas driver's license number the city must withhold under section 552.130. The remainder of the submitted information must be released to the requestor.

In summary, the city must withhold the information in Attachment VIII from public disclosure based on section 143.089(g) in conjunction with section 552.101 of the Government Code. The marked financial information is confidential under the common law right of privacy in conjunction with section 552.101 of the Government Code. The city must withhold the marked information under section 552.117, and the Texas driver's license number under section 552.130. The remainder of the submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 151243

Enc. Submitted documents

c: Mr. Javier Chapa
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