



November 12, 2001

Mr. Stephen R. Alcorn  
Assistant City Attorney  
City of Grand Prairie  
P.O. Box 534045  
Grand Prairie, Texas 75053

OR2001-5243

Dear Mr. Alcorn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154763.

The City of Grand Prairie Police Department (the "department") received two separate requests from different requestors for information concerning the department's administrative investigation of a complaint against a certain police officer.<sup>1</sup> As the two requests encompass all or part of the same responsive information, we address both requests under the identification number listed above. You inform us that the department has released some of the information responsive to the first request, and claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This provision states in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

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<sup>1</sup>The first requestor seeks all documents pertaining to the investigation, whereas the second requestor seeks the complainant's statement.

...

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

Gov't Code § 552.022(a)(1), (13) (emphasis added). We have marked portions of the submitted information which is subject to sections 552.022(a)(1) and section 552.022(a)(13). Therefore, as prescribed by section 552.022, the submitted information must be released to the requestor unless it is confidential under "other law" or excepted from disclosure under section 552.108.

Section 552.101 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. You raise section 143.089 of the Local Government Code, which contemplates two different types of personnel files, one that the civil service director or designee is required to maintain as part of the police officer's civil service file, and one that the city's police department may maintain for its own internal use. See Local Gov't Code § 143.089(a), (g). Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the police officers' civil service] or the director's designee shall maintain a personnel file on each . . . police officer. The personnel file must contain *any letter, memorandum, or document relating to:*

(1) a commendation, congratulation, or honor bestowed on the . . . police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the . . . police officer 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.*

.....

(g) A . . . police department may maintain a personnel file on a . . . 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 . . . 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 . . . police officer's personnel file.

Local Gov't Code § 143.089(a), (g) (emphasis added). 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). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

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, 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. However, as indicated above, in cases in which a police department takes certain 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. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990).

You assert that case files and the investigation file are confidential under sections 143.089(f) and (g). We understand you to represent that the submitted information is maintained by the department pursuant to section 143.089(g). Based upon this representation, we agree that the submitted documents are confidential under section 143.089(g). However, section 143.089(a)(2) requires that *any letter, memorandum, or document relating to the misconduct* be placed in the officer's (a) file. Such records in the (a) file are not excepted from required disclosure under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Thus, the submitted information is properly maintained in the department's civil service personnel file under section 143.089(a) and is not excepted from public disclosure under section 552.101. Requests for information that is maintained under section 143.089(a) should be referred to the civil service director or the director's designee. *See* Local Gov't Code § 143.089(g).

You also contend that the information at issue is confidential "by virtue of privacy laws of the individual officers." Section 552.101 also encompasses the doctrines of common law and constitutional 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, 685 (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* includes 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.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that 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; *see also* Open Records Decision Nos. 470 (1987) (concluding that fact that a person broke out in hives as a result of severe emotional distress is excepted by common law privacy), 455 (1987) (concluding that kinds of prescription drugs a person is taking are protected by common law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/ seizures, or emotional/mental distress is protected by common law privacy).

The constitutional right to privacy protects the interests in (1) independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court; and (2) avoiding disclosure of personal matters. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)); *see* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)).

Upon review of the submitted information, we conclude that none of this information is protected by common law or constitutional privacy. Though some of the information may be embarrassing, we believe there is a legitimate public interest in its disclosure. The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986); *see also* Open Records Decision Nos. 423 (1984) at 2 (scope of public employee privacy is narrow), 208 (1978) (disciplinary action against public employee available to public). Accordingly, the submitted information may not be withheld under section 552.101 and the right of common law or constitutional privacy.

Section 552.108 of the Government Code generally excepts records of a law enforcement agency that deal with crime. Section 552.108 reads, in part, as follows:

(b) An 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 is excepted from the requirements of Section 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
- (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

Gov't Code § 552.108(b)(1), (2). Generally, a governmental body claiming 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), .108(b)(1), .301(e)(1)(A). You contend that the requested information should be excepted under section 552.108 because it constitutes law enforcement records for the department's internal use. However, section 552.108 is inapplicable to a police department's internal administrative investigations that do not involve an investigation of crime. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied); Open Records Decisions Nos. 350, 342, 329 (1982). Here, you state that the submitted information relates to an internal administrative investigation regarding a complaint made against a police officer. You do not indicate how the internal affairs investigation involves an investigation of crime. Therefore, we have no basis for concluding that section 552.108 applies to the requested information. *See id.* Accordingly, we conclude that the department may not withhold the submitted information under section 552.108.

In summary, the submitted information must be withheld by the department under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, the submitted information is also required to be maintained under section 143.089(a) of the Local Government Code. Documents maintained under section 143.089(a) are not excepted from required public disclosure under section 552.101 in conjunction with section 143.089 of the Local Government Code. Requests for information for documents maintained under section 143.089(a), should be referred to the civil service director or the director's designee. The submitted information is not confidential under section 552.101 and the right of common law or constitutional privacy, nor may it be withheld under section 552.108.

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 Dept. 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 Texas Building and Procurement 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,



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/sdk

Ref: ID#154763

Enc: Submitted documents

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