



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 4, 2003

Ms. Julie Gannaway
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2003-1402

Dear Ms. Gannaway:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177381.

The City of Bryan Police Department (the "department") received three requests for information pertaining to an accident that occurred on November 6, 2002. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code, and section 143.089(g) of the Local Government Code. We have considered your arguments and reviewed the representative sample of information submitted to this office.¹

We begin by noting that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested, or representative samples of the information if a voluminous amount was requested. You did not, however, submit to this office a copy or representative samples of the information responsive to the second or third requests, that is, the department's daily log for November 6, 2002, and videotapes recorded by Officer Vincent on the same date.

¹We 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.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Section 552.103, which serves to protect a governmental body's position in litigation, is a discretionary exception and does not provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision Nos. 551 (1990) (section 552.103 does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Furthermore, in the absence of the requested information, this office is unable to determine whether any compelling reason exists that would justify the withholding of any of that information from the requestor. Therefore, pursuant to section 552.302, the information responsive to the second and third requests must be released.

With regard to the first request, you state that you do not have information responsive to the request for the named officer's "activity log" for the date in question or the named officer's notes regarding the accident in question, as the officer is not required to keep an activity log and made no notes regarding the accident. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Next, you state that you do not maintain information responsive to the request for tapes from 9-1-1 dispatched call(s) pertaining to the accident, as the dispatch information is maintained by the 9-1-1 Communications District. Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Public Information Act (the "Act"), if a governmental body owns or has a right of access to the information. *See* Open Records Decision Nos. 462 (1987), 445 (1986); *cf.* Open Records Decision No. 499 (1988).

We note that the Act does not ordinarily require a governmental body to obtain information that is not in its possession. *See* Open Records Decision Nos. 445 (1986), 317 (1982). However, in some instances, the Act does apply to information collected or maintained by third party consultants or contractors of governmental bodies. *See* Open Records Decision No 462 (1987). Where a third body has prepared information on behalf of a governmental

body, the information is subject to the Act, even though it is not in the governmental body's custody. *See* Open Records Decision No. 558 (1990). Moreover, if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to disclosure under the Act. *See* Open Records Decision Nos. 585 (1991), 445 (1986) (information prepared by private entity at request or under direction of city subject to disclosure), 437 (1986) (overruled by Open Records Decision No. 585 (1991) to the extent it suggests that a governmental body can waive its right of access to information gathered on behalf of a governmental body). Although you state that the 9-1-1 Communications District maintains some of the responsive information, you do not address whether the department owns or has a right of access to the information. Thus, to the extent the department either owns or has a right of access to the 9-1-1 tapes at issue, the tapes constitute "public information" under section 552.002 of the Government Code and must be released unless an exception to disclosure applies. As the tapes were not submitted to this office, we have no basis for concluding that any exceptions to disclosure apply, thereby requiring the release of the tapes. However, to the extent the department does not own or have a right of access to the 9-1-1 tapes at issue, we again note that ordinarily, a governmental body is not required to obtain information not in its possession. *See* Open Records Decision No. 518 (1990).

We now address your arguments with regard to the complaints filed against Officer Vincent. We understand that the City of Bryan 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 civil service director is required to maintain as part of the 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).

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; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.--San Antonio 2000, no pet.) (information reasonably relating to officer's employment relationship with department and maintained in the department's internal file pursuant to section 143.089(g) is confidential). 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 that investigation and disciplinary action in the personnel files 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(g) of the Local Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 2 (1990).²

You indicate that the submitted documents are maintained by the department as authorized under section 143.089(g) of the Local Government Code. A review of the submitted information reveals that it does not relate to disciplinary action as defined under chapter 143. *See* Local Gov't Code §§ 143.051-.055 (removal, suspension, demotion, and uncompensated duty). Thus, we conclude that the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. As we are able to make this determination, we need not address your remaining arguments against disclosure.

In summary, the department must release information responsive to the second and third requests for information. Additionally, to the extent the department owns or has a right of access to the 9-1-1 tapes requested, the department must release those tapes. The department must withhold the submitted information under section 143.089(g) of the Local Government Code in conjunction with section 552.101 of the Government Code.

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

² Ordinarily, information maintained in a police officer's civil service personnel file must be released to the public upon request, unless some other provision of chapter 552 of the Government Code permits the civil service to withhold the information. Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990) (construction of Local Gov't Code § 143.089(f) provision requiring release of information as required by law).

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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 177381

Enc: Submitted documents

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