



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 5, 2003

Ms. Julia M. Vasquez
Senior Assistant City Attorney
City of Wichita Falls
P.O. Box 1431
Wichita Falls, Texas 76307

OR2003-2992

Dear Ms. Vasquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180515.

The City of Wichita Falls (the "city") received a request for the entire internal affairs investigation file regarding a specified complaint against the Wichita Falls Police Department (the "department") and copies of all excessive force complaints filed against the department over the last five years. You state that the city has released a portion of the responsive information to the requestor in response to a previous request for information. However, you claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information at issue consists of medical records or contains information from medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code.¹ Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in

¹Under the rules of statutory construction, a specific statute prevails over a more general statute. Gov't Code § 311.026, *City of Dallas v. Mitchell*, 870 S.W.2d. 21 (Tex. 1994).

Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The information we have marked as subject to the MPA must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004,.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). The information at issue may be released only in accordance with the MPA, and otherwise must be withheld. Open Records Decision No. 598 (1991).

Next, we note that the remaining submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant 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[.]

The submitted information consists of completed reports, evaluations, and investigations which are expressly public under section 552.022(a). You do not claim that the submitted information is excepted under section 552.108. Therefore, you may withhold this information only if it is confidential under other law. Although you argue that the submitted information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and therefore is not "other law" for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, you may not withhold the submitted information under section 552.103. However, as you also raise sections 552.101, 552.117, and 552.130 of the Government Code, we will address those exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a file that must be maintained by the city's civil service

director or his designee and another file that may be maintained by the city's police department for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department takes disciplinary action against a peace officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the peace officer's civil service file maintained under section 143.089(a). Additionally, the peace officer's civil service file must contain any commendation received by the peace officer and the periodic evaluation of the officer by a supervisor. *See* Local Gov't Code § 143.089(a)(1), (3). Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

You state that the submitted information in Exhibits 3 and 4 is "maintained by the [department] for its internal use." Based on your assertion that Exhibits 3 and 4 are maintained in the department's personnel files, we find that Exhibits 3 and 4 are confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

However, we note, and you acknowledge, that some of the information in Exhibit 3 relates to officer misconduct that resulted in disciplinary action as prescribed by chapter 143. *See* Local Gov't Code §§ 143.051-.055 (removal, suspension, demotion, and uncompensated duty). While this type of information may be kept in the department's personnel file, it must also be kept in the civil service personnel file. Local Gov't Code §§ 143.052, .089(a)(2), (3). You state that "[t]he documents related to this officer's discipline, including his indefinite suspension letter and appeal letter, are maintained in his (a) file." As noted above, records maintained in the city's civil service file are subject to disclosure. Therefore, as you make no arguments for withholding the civil service personnel file, we assume it has been released. If not, you must release such information at this time.

In summary, we conclude that: 1) the medical records we have marked may be released only in accordance with the MPA; and 2) you must withhold the remaining submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. As we are able to make this determination, we need not address your remaining arguments.

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 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 180515

Enc: Submitted documents

c: Mr. Steven Florendine
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(w/o enclosures)