



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 7, 2003

Mr. Steven M. Kean
Assistant City Attorney
P.O. Box 2039
Tyler, Texas 75710

OR2003-5512

Dear Mr. Kean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185557.

The City of Tyler (the "city") received a request for five categories of information related to two named officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 deemed confidential by statute. You state that the city has adopted chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against a police

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.

officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).² See *Abbott v. Corpus Christi*, No. 03-02-00785-CV, slip op., 2003 WL 21241652, at *7 (Tex. App.—Austin May 30, 2003, no pet. h.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at *5, *7. Such records are not confidential and are subject to release under the Public Information Act (the “Act”) unless an exception under the Act applies. See *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 948-49 (Tex. App.—Austin 1993, writ denied); see also Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You assert that portions of the submitted information are made confidential by section 143.089(g) because the complaints are those which did not result in disciplinary action as prescribed by chapter 143. See Local Gov't Code §§ 143.051-.055 (removal, suspension, demotion, and uncompensated duty). Based upon your representations and our review of the information at issue, we conclude that the information that we have marked is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.

Furthermore, we note, and you acknowledge, that some of the submitted information relates to officer misconduct that resulted in disciplinary action as prescribed by chapter 143. See *id.* While this type of information may be kept in the police 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). Additionally, you indicate that certain records, which you have marked, are contained in the officer's civil service personnel file. Such records are not made confidential under section 143.089 and thus are subject to release unless an exception to required public disclosure applies. See Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, included among the documents that you state are contained in the officer's civil service personnel file are records that relate to alleged misconduct that did not result in a disciplinary action as contemplated by chapter 143. See Local Gov't Code §§ 143.051-.055. Because the information that you have highlighted in the officer's civil

² Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov't Code §§ 143.051-.055.

service personnel file is not the type of disciplinary action contemplated by chapter 143, this information must be placed in the officer's personnel file and not the civil service file. *See* Attorney General Opinion JC-0257 (2000); *see also* Local Gov't Code §§ 143.089(c). Thus, we have marked the portion of the remaining submitted information that is confidential under section 143.089(g) and must be withheld under section 552.101.

You further argue that a portion of the remaining submitted information consisting of investigation materials in an internal affairs file is excepted from public disclosure under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(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 [required public disclosure] if:

...

(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 [.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) and (b)(2) protect information relating to a concluded criminal investigation that did not result in a conviction or a deferred adjudication.

Included among the information at issue is an offense report, Case No. 98-41235, which states "case closed due to lack of prosecution." We understand you to assert that this offense report relates to a concluded criminal investigation that did not result in a conviction or a

deferred adjudication. Based on your representations and our review of the information at issue, we thus find that section 552.108(a)(2) is applicable to this report.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of this basic information, you may withhold the offense report in Case No. 98-41235 based on section 552.108(a)(2).

You represent to this office that the remaining information at issue also relates to "an investigation that did not result in a conviction or a deferred adjudication." You do not inform us, however, and it does not otherwise appear to this office that this information relates to a criminal investigation. We therefore conclude that the city has not demonstrated that the investigation materials in the internal affairs file are excepted from disclosure under section 552.108. *See* Gov't Code § 552.108(a)(2), (b)(2); *see also Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (stating that statutory predecessor to section 552.108 was not applicable where no criminal investigation or prosecution of police officer resulted from internal affairs investigation); Open Records Decision No. 350 (1982) (stating that statutory predecessor was not applicable to internal affairs investigation file when no criminal charge against police officer results from investigation). Thus, no portion of the remaining submitted information may be withheld under section 552.108 of the Government Code.

Nevertheless, we note that certain information within the materials otherwise marked for release is confidential and excepted from public disclosure. Section 552.117(a)(2) of the Government Code excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of peace officers regardless of whether the officers request confidentiality under section 552.024.³ The city must withhold the information that we have marked under section 552.117(a)(2).⁴

Finally, we note that section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the information in the submitted documents that the city must withhold pursuant to section 552.130.

In summary, information contained in the police department's internal personnel files, which we have marked, is confidential pursuant to section 143.089(g) of the Local Government

³"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

⁴As section 552.117 is dispositive, we do not address your section 552.1175 claim.

Code and must be withheld under section 552.101. We have marked some additional information which must be withheld from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. We have marked the information that the city must withhold under sections 552.117(a)(2) and 552.130 of the Government Code. With the exception of basic information, the city may withhold the offense report in Case No. 98-41235 under section 552.108(a)(2). The remaining 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 185557

Enc. Submitted documents

c: Mr. Kenneth H. Berry, Jr.
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(w/o enclosures)