



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 5, 2003

Mr. Brad Norton  
Assistant City Attorney  
City of Austin  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2003-7974

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189835.

The City of Austin (the "city") received two requests for the Internal Affairs file for the 1997 investigation of a named police officer.<sup>1</sup> You argue that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the exceptions found in the Public Information Act (the "Act") do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). In this case, the submitted information includes search warrant affidavits. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b). Therefore, the city must release the search warrant affidavits if the warrants were executed.

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<sup>1</sup>In addition to the Internal Affairs file, the second request for information seeks "[a]ll disciplinary memos . . . and all other records" in the named police officer's file. The information submitted to this office for a ruling is an Internal Affairs file, "IAD Investigation #97-066." We assume that the city has released any other information that is responsive to the second request, to the extent such information existed when the city received the second request. If not, then the city must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

The submitted information also includes arrest warrants with supporting affidavits. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately after the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, 2003 Tex. Sess. Laws Serv. 1631 (to be codified at Crim. Proc. Code art. 15.26). This provision makes the submitted arrest warrants and supporting affidavits expressly public. Therefore, the city must release the arrest warrants and supporting affidavits in their entirety.

Moreover, the 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 a completed investigation which is expressly public under section 552.022(a). You do not claim that the submitted information is excepted under section 552.108.<sup>2</sup> Therefore, you may withhold this information only if the information is confidential under other law. Although you argue that the submitted information is excepted under sections 552.103 and 552.107 of the Government Code, these are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not "other law" making information confidential for purposes of section 552.022(a). *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 No. 677 at 4 (2002) (section 552.107 is not "other law" for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, you may

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<sup>2</sup> Your letter of September 19, 2003, indicates your withdrawal of all arguments under section 552.108 of the Government Code.

not withhold any of the submitted information under section 552.103 or 552.107. However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Additionally, section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision,” and, as such, constitutes “other law” for purposes of section 552.022. Likewise, section 552.117 excepts from disclosure “information that relates to the home address, home telephone number or social security number” of a peace officer, or that reveals whether the peace officer has family members. Consequently, section 552.117 is considered “other law” under section 552.022. Therefore, we will address the submitted information under Rule 503 of the Texas Rules of Evidence and sections 552.101 and 552.117 of the Government Code.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication

transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). After reviewing your arguments and the submitted information, we find that you have not demonstrated the applicability of Rule 503 to any of the submitted information. Therefore, the city may not withhold any of the submitted information under Rule 503 of the Texas Rules of Evidence.

Section 552.101 excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143 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. *See* 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 cases in which a police department investigates a police officer's misconduct and takes disciplinary action against the officer, the police department is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of a 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). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). 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 police department because of its investigation into an officer's misconduct, and the police department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 119, 121. 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 internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

The submitted information contains information relating to several officers who were investigated for misconduct, but who were never disciplined under chapter 143. You inform us that this information is maintained in the police department's internal file pursuant to section 143.089(g), and that none of the information is contained in the police officers' civil service files. Therefore, we conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101. We have marked the information accordingly.

We note, however, that portions of the submitted information relate to the misconduct of the named officer which resulted in disciplinary action as prescribed by chapter 143. *See* Local Gov't Code §§ 143.051-.055 (specifying removal, suspension, demotion, and uncompensated duty). While this type of information may be kept in the police department's internal file, it must also be kept in the civil service personnel file. *See* Local Gov't Code §§ 143.052, .089(a)(2), (3). Because this information must be placed in the city's civil service file, it is subject to disclosure. However, information that is subject to public disclosure may still be excepted from disclosure under the exceptions in chapter 552 of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy.<sup>3</sup> 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. *Indus. Found. v. Tex. 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* included 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. The submitted documents maintained in the civil service file contain information that is highly

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<sup>3</sup> We note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Additionally, in Open Records Decision No. 579, the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common law tort of false-light privacy, overruling prior decisions to the contrary. Open Records Decision No. 579 at 3-8 (1990). Thus, the truth or falsity of information is not relevant under the Public Information Act. Therefore, a governmental body may not withhold information from disclosure merely because its release might place an individual in a false light. *See* Open Records Decision No. 579 (1990).

intimate or embarrassing and is not of legitimate concern to the public. Therefore, the city must withhold this information, which we have marked, under section 552.101.<sup>4</sup>

Section 552.101 encompasses confidentiality provisions contained in the Family Code. Prior to its repeal by the Seventy-fourth Legislature, section 51.14(d) of the Family Code provided for the confidentiality of juvenile law enforcement records. Law enforcement records pertaining to conduct occurring before January 1, 1996 are governed by the former section 51.14(d), which was continued in effect for that purpose. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2591 (Vernon).

Some of the records in the civil service file concern juvenile conduct that occurred prior to January 1, 1996. Therefore, the records are confidential under the former section 51.14(d) of the Family Code and must be withheld from disclosure pursuant to section 552.101 of the Government Code.

Included in the documents maintained in the civil service file are polygraph results. Texas law generally prohibits the public disclosure of the results of polygraph examinations. *See* Occ. Code § 1703.306. None of the exceptions allowing disclosure under section 1703.306 appear to apply; therefore, the polygraph results, which we have marked, must be withheld.

You also assert section 552.117 as an exception to disclosure of the submitted information.<sup>5</sup> Section 552.117(a)(2) excepts from disclosure “information that relates to the home address, home telephone number or social security number” of a peace officer, or that reveals whether the peace officer has family members. The civil service file contains information that is excepted from disclosure under section 552.117(a)(2). The city must withhold those portions of the file that reveal the officers’ home addresses, home telephone numbers, and social security numbers, or that reveal whether the officers have family members. The city must also withhold the officers’ former home addresses and telephone numbers from disclosure. *See* Open Records Decision No. 622 (1994). We have marked the information accordingly.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision

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<sup>4</sup> You inform us that one officer wishes to waive his privacy rights under section 552.101. However, information about this officer is confidential under section 143.089(g); therefore, we need not consider whether this information is also protected by common law privacy.

<sup>5</sup> In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding “(a)” to the relevant language of this provision. *See* Act of May 30, 2003, 78<sup>th</sup> Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov’t Code § 552.117).

No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of former officials or employees, including former peace officers, who made a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for this information was made. For those former employees who timely elected to keep their personal information confidential, the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. We have marked information that must be withheld if these employees timely elected under section 552.024. However, the city may not withhold this information under section 552.117(a)(1) if these employees did not make a timely election to keep the information confidential.

We note the presence of social security numbers in the civil service file. For those former peace officers who did not timely elect to keep their personal information confidential under section 552.024, social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the submitted information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, the documents maintained in the civil service file contain information confidential under section 552.130. 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; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold all Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130. We have marked the types of information that are excepted from disclosure under section 552.130 of the Government Code.

In summary, the city must release search warrant affidavits if executed, and must release all arrest warrants and supporting affidavits. The city must withhold the submitted information we have marked as confidential under section 143.089(g). For information required to be maintained in the civil service file under section 143.089(a), all information protected by common law privacy must be withheld under section 552.101 of the Government Code. The city must withhold polygraph results under section 1703.306 of the Occupations Code. Additionally, certain personal information must be withheld under section 552.117(a)(2) for current police officers, and under section 552.117(a)(1) for those former officers who timely elected confidentiality under section 552.024 of the Government Code. For those officers who did not timely elect under section 552.024, federal law may make certain social security numbers confidential. Lastly, the city must withhold the types of information we have marked under section 552.130 of the Government Code. All remaining information maintained in the civil service file must be released.<sup>6</sup>

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).

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<sup>6</sup> Because we are able to reach this result, we need not address your arguments under section 552.1175 of the Government Code.

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 R. Rutland  
Assistant Attorney General  
Open Records Division

HRR/sdk

Ref: ID# 189835

Enc: Submitted documents

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