



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2004

Ms. Michele Austin
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-8934A

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197367.

On behalf of the Houston Police Department, you ask this office to examine Open Records Letter No. 2003-8934 (2003). When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. As we have determined that Open Records Letter No. 2003-8934 (2003) is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2003-8934 (2003) and serves as the correct ruling.

The Houston Police Department (the "department") received a request for information relating to four named police officers and a particular incident number, including (1) performance evaluations of the officers; (2) records relating to complaints brought against the officers; (3) the officers' employment applications, resumes, references, prior employment histories, educational background, salary or other monetary compensation history, and job performance evaluations; (4) mobile data terminal transmissions, dispatch tapes and logs, 911 tapes, and call slips relating to the incident number; and (5) booking photos or mug shots relating to the incident number. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the

Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

We first note that the submitted information includes no booking photos or mug shots. We therefore assume that the department has released any information that is responsive to that aspect of the request, to the extent that such information existed when the department received the request. If not, then the department must release any such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We also note that the information submitted as Exhibit 2 is dated subsequent to the date of the department's receipt of the present request for information. Chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information.² Thus, the post-dated information submitted as Exhibit 2 is not responsive to the request. This decision does not address the non-responsive information, and it need not be released.

We next note that the department has not fully complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²*See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

In this instance, the department did not submit some of the representative sample information that it seeks to withhold within the fifteen-business-day period prescribed by section 552.301(e)(1)(D). Therefore, that information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. In this instance, the department contends that the information in question is confidential by law under section 552.101 of the Government Code. Accordingly, we will address the department's section 552.101 claim with regard to all of the information for which it claims that exception.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. You claim that some of the submitted information is confidential under section 143.089(g) of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See Local Gov't Code § 143.089(a), (g)*. The officer's civil service file must contain certain specified items, including commendations and periodic evaluations by the police officer's supervisor. *Id.* § 143.089(a)(1). Records held in the officer's civil service file may not be withheld 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 at 6 (1990)*. Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

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.

Id. § 143.089(g). 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 records contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The court determined that section 143.089(g) made these records confidential. *See City of San Antonio*, 851 S.W.2d at 949 (concluding

that “the legislature intended to deem confidential the information maintained by the . . . police department for its own use under subsection (g)”); *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet. h.) (restricting confidentiality under Local Gov’t Code § 143.089(g) to “information reasonably related to a police officer’s or fire fighter’s employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov’t Code § 143.089(a) and (g) files).

You inform us that the information submitted as Exhibit 3 is contained in a departmental personnel file. You contend that this information is confidential under section 143.089(g). Based on your representation and our review of the information at issue, we conclude that Exhibit 3 is confidential under section 143.089(g) of the Local Government Code and is therefore excepted from disclosure under section 552.101 of the Government Code as information made confidential by law.³

You also raise section 552.101 in conjunction with section 143.1214 of the Local Government Code. Section 143.1214 provides in part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department’s use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head’s designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director’s designee for inclusion in the fire fighter’s or police officer’s personnel file maintained under Sections 143.089(a)–(f) only if:

³We note that Exhibit 3 contains information relating to commendations and evaluations of an officer. We assume that this information also is part of the officer’s civil service file under section 143.089(a) and that the department has referred the requestor to the civil service director or the director’s designee. *See* Local Government Code § 143.089(a), (g).

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You inform us that the information submitted as Exhibits 4 and 5 relates to internal affairs investigations of alleged misconduct by police officers. You state that Exhibit 4 pertains to sustained allegations of misconduct that resulted in disciplinary action.⁴ With regard to Exhibit 4, you inform us that a document meeting the requirements of section 143.1214(c) has been forwarded to the officers' personnel files maintained under section 143.089(a). You state that Exhibit 5 relates to an investigation in which the officers were exonerated of the charges and therefore does not meet the conditions outlined in section 143.1214(c) for inclusion in a section 143.089(a) file. You state that Exhibits 4 and 5 are maintained in the departmental personnel file. You contend that Exhibits 4 and 5 are confidential under section 143.1214. Based on your representations, we conclude that Exhibits 4 and 5 are confidential under section 143.1214 of the Local Government Code and therefore are excepted from disclosure under section 552.101 of the Government Code.

Next, we address your claim under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform us that the information submitted as Exhibits 6a and 6b relates to an open and active criminal investigation and pending prosecution and that the release of this information would interfere with the prosecution of the case. Based on your representation, we find that section 552.108(a)(1) is applicable in this instance. *See Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases).

⁴Chapter 143 of the Local Government Code prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

We note that section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. The department must release basic information, even if this information does not literally appear on the front page of an offense or arrest report. See *Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The department may withhold the remaining contents of Exhibits 6a and 6b under section 552.108(a)(1).

In summary: (1) the department must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) the department must withhold Exhibits 4 and 5 under section 552.101 in conjunction with section 143.1214 of the Local Government Code; and (3) the department may withhold Exhibits 6a and 6b under section 552.108(a)(1), except for the basic information that must be released under section 552.108(c).

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).

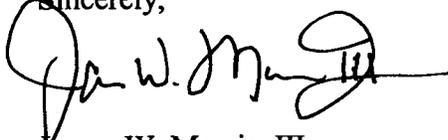
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID#

Enc: Submitted documents

c: Mr. Neal Davis
DeGuerin Dickson & Hennessy
1018 Preston Avenue, Seventh Floor
Houston, Texas 77002
(w/o enclosures)