



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 2, 2004

Mr. John T. Patterson  
Assistant City Attorney  
City of Waco  
P. O. Box 2570  
Waco, Texas 76702-2570

OR2004-10193

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213639.

The Waco Police Department (the "department") received six requests from the same requestor for 1) case reports listing a specified department officer as a suspect; 2) criminal cases listing the officer as a suspect; 3) the "public portion" of the officer's personnel file; 4) the officer's "personnel record"; 5) documents relating to the officer's resignation; and 6) "[c]onfirmation that police are investigating [the officer] in a case in which [another specified person] is not the alleged victim." You state that the department is releasing or will release some of the requested information to the requestor. You indicate that some of the requested information does not exist.<sup>1</sup> You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Initially, we note that we previously addressed the information that you have submitted to us for review in this instance as Exhibits 4 and 5 in Open Records Letter No. 2004-10039 (2004). Specifically, we ruled in that decision that the department must withhold the information in Exhibit 6 that we marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and release the remainder of that exhibit. We also ruled in that decision that the department must withhold the types of basic information that we marked in Exhibit 8 pursuant to section 552.101 in conjunction with the common-law right to privacy. In addition, we ruled that with the exception of the remaining basic information in Exhibit 8 that must be released, the department may withhold under section 552.108(a)(1) the information in Exhibit 8 that was not previously released or in existence on the date of the request that was the subject of Open Records Letter No. 2004-6523 (2004). You do not inform us, nor are we aware, of any changes with regard to the law, facts, and circumstances on which Open Records Letter No. 2004-10039 (2004) was based. Accordingly, we conclude that the department must rely on our decision in Open Records Letter No. 2004-10039 (2004) with respect to the information submitted to us in this instance for review as Exhibits 4 and 5. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You claim that the information that you have submitted to us for review as Exhibits 14 and 15 is excepted from disclosure pursuant to section 552.101 in conjunction with section 143.089(g) of the Local Government Code.<sup>2</sup> You state that the City of Waco (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 police officer's civil service file that the civil service director is required to maintain and an internal file that a police department may maintain for its own use. *See* 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 an officer, it 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 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 (no pet.). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051 - .055. Such investigatory records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); *see also* Open Records Decision No. 562 at 6

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

(1990). However, 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. *See City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate that Exhibits 14 and 15 are maintained in the department's internal personnel files for the officer at issue pursuant to section 143.089(g) of the Local Government Code. Based on your representation and our review of these exhibits, we, thus, agree that this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld pursuant to section 552.101 of the Government Code. We note, however, that Exhibit 14 includes periodic evaluations, commendations, and suspensions which we have marked that are required to be placed in the officer's civil service commission personnel file under section 143.089(a) of the Local Government Code. *See* Loc. Gov't Code § 143.089(a). As part of the officer's civil service commission personnel file, this particular information is not excepted from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code and must be released, unless it is otherwise excepted from disclosure. Because we find that portions of this particular marked information are otherwise confidential by law, we will address section 552.101 of the Government Code in conjunction with the common-law right to privacy for this information.

We note that the city maintains a civil service file regarding the officer in question as required by section 143.089(a) of the Local Government Code and the department maintains an internal personnel file for the officer in question as permitted by section 143.089(g) of the Local Government Code. You indicate that you also keep what is essentially a third file on the officer in question which is maintained in the city's Human Resources Department containing information regarding wages and other administrative matters (the "human resources file"). We note that the maintenance of a third file for the officer in question is contrary to the purpose and legislative intent of section 143.089 of the Local Government Code. As noted above, section 143.089 contemplates the existence of only two personnel files concerning a particular police officer. Documents relating to commendations, periodic evaluations by the officer's supervisor, and misconduct that resulted in disciplinary action against the officer under chapter 143 of the Local Government Code must be held in the civil service file and are subject to disclosure under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(a)(1)-(2). Documents that relate to unsustained allegations of misconduct or disciplinary action taken without just cause must be held in the department's confidential section 143.089(g) file.

The maintenance of the human resources file is contrary to the city's election to be governed by chapter 143 of the Local Government Code and to the legislative purpose of section 143.089. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (restricting confidentiality under section 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); *see also* Attorney General

Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files). You do not indicate that the human resources file is maintained in the department's internal personnel file for the officer in question as permitted by section 143.089(g) of the Local Government Code. Thus, we must rule in the alternative. To the extent that this information is maintained in the department's internal personnel file for the officer in question, we conclude that the department must withhold Exhibits 12 and 16 pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, to the extent that this information is not maintained in the department's internal personnel file for the officer in question, it must be placed in the officer's civil service file and released to the requestor, except to the extent that any portion of it is otherwise excepted from disclosure under the Act. In the event that this information is not maintained in the department's internal personnel file for the officer in question, we will address your remaining claimed exceptions to disclosure for this particular information. We will also address the information that is maintained in the officer's civil service file and the information that you have submitted to us for review as Exhibit 11.

We note that section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the I-9 form that we have marked in Exhibit 12 in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the department may only release the marked I-9 form in Exhibit 12 in compliance with the federal laws and regulations governing the employment verification system.

We also note that sections 560.001, 560.002, and 560.003 of the Government Code govern the public availability of fingerprint information and provide:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. Based on our review of the remaining submitted information, we have marked the fingerprint information in Exhibit 11 that is confidential under chapter 560. It does not appear that the requestor has a right of access to this information under section 560.002. Accordingly, we conclude that the department must withhold this particular marked information pursuant to section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Further, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Information is protected from disclosure by the common-law right of privacy when it (1) is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). We note that this office has found that the following types of information are protected from disclosure by the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987);

and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

We also note that in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment are exactly the types of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *See Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation. *See id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.* Thus, when there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In this instance, we find that none of the submitted documents constitutes an adequate summary of a sexual harassment investigation. However, we have marked portions of the remaining submitted information in Exhibit 13 that identify a victim of alleged sexual harassment. Accordingly, we conclude that the department must withhold this particular information pursuant to section 552.101 in conjunction with the common-law right to privacy. We have also marked portions of Exhibits 12 and 14, as well as other portions of Exhibit 13, that are otherwise excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and that must be withheld from the requestor.

Further, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address and telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.<sup>3</sup> *See Gov't Code*

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<sup>3</sup> Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. *See* Crim. Proc. Code art. 2.12.

§ 552.117(a)(2). Accordingly, we conclude that the department must withhold the information that we have marked in Exhibit 12 pursuant to section 552.117(a)(2) of the Government Code.

We also note that portions of the remaining submitted information that we have marked in Exhibit 11 may be excepted from disclosure pursuant to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

- (1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]
- (2) county jailers as defined by Section 1701.001, Occupations Code[.]
- (3) current or former employees of the Texas Department of Criminal Justice ["TDCJ"] or of the predecessor in function of the department or any division of the department[.]
- (4) commissioned security officers as defined by Section 1702.002, Occupations Code.

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). Accordingly, we conclude that if the information that we have marked in Exhibit 11 under section 552.1175 pertains to an individual listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b), then the department must withhold that information pursuant to section 552.1175 of the Government Code.

Nevertheless, we note that a social security number contained within Exhibit 11 may be excepted from disclosure pursuant to section 552.101 in conjunction with federal law.

The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that were obtained or are 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* Open Records Decision No. 622 (1994). The department has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that this social security number is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the department should ensure that it was not obtained and is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold the Texas motor vehicle information that we have marked in Exhibits 11 and 12 pursuant to section 552.130 of the Government Code.

Finally, we note that a portion of the remaining submitted information in Exhibit 12 that we have marked is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Accordingly, we conclude that the department must withhold this particular marked information pursuant to section 552.136 of the Government Code.<sup>4</sup>

In summary, the department must rely on our decision in Open Records Letter No. 2004-10039 (2004) with respect to the information submitted to us in this instance for review as Exhibits 4 and 5. The department must generally withhold Exhibits 14 and 15 pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, the periodic evaluations, commendations, and suspensions that we have marked in Exhibit 14 must be placed in the officer's civil service commission personnel file under section 143.089(a) of the Local Government Code and, as part of that file, are not excepted from disclosure under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. To the extent that the information in Exhibits 12 and 16 is maintained in the department's internal personnel file for the officer in question, the department must also withhold Exhibits 12 and 16 pursuant to

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<sup>4</sup> As our ruling is dispositive, we need not address your remaining arguments.

section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The department may only release the marked I-9 form in Exhibit 12 in compliance with the federal laws and regulations governing the employment verification system. The department must withhold the marked fingerprint information in Exhibit 11 pursuant to section 552.101 in conjunction with section 560.003 of the Government Code. The department must withhold the information that we have marked in Exhibits 12, 13, and 14 pursuant to section 552.101 in conjunction with the common-law right to privacy. In addition, the department must withhold the information that we have marked in Exhibit 12 pursuant to section 552.117(a)(2) of the Government Code. If the information that we have marked in Exhibit 11 under section 552.1175 pertains to an individual listed in section 552.1175(a) who elects to restrict access to his or her such information in accordance with section 552.1175(b), then the department must withhold that information pursuant to section 552.1175 of the Government Code. Nevertheless, a social security number contained within Exhibit 11 may be confidential under federal law. The department must withhold the Texas motor vehicle information that we have marked in Exhibits 11 and 12 pursuant to section 552.130 of the Government Code. The department must withhold the information that we have marked in Exhibit 12 pursuant to section 552.136 of the Government Code. The department must release the remaining submitted information to the requestor to the extent that it has not already done so.

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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/krl

Ref: ID# 213639

Enc. Marked documents

c: Mr. Peter Walker  
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(w/o enclosures)