



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2006

Mr. Nathan C. Barrow
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2006-03295

Dear Mr. Barrow:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 245513.

The City of Fort Worth (the "city") received a request for the outgoing e-mails of seven Fort Worth Police Department (the "department") officers on specified dates. The city subsequently received an additional request from the same requestor for the "Civil Service Disciplinary" information of three additional officers. You inform us that, in accordance with the city's e-mail retention policy, some responsive information no longer exists.¹ You also inform us that some of the requested information has been released to the requestor. However, you claim that portions of the information responsive to the first request are excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.137 of the Government Code. You also claim that portions of the information responsive to the second request are excepted from disclosure under section 552.101. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

business day after the date of receiving 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). You inform us that the city received the first request for information on November 30, 2005. However, the city did not request a decision from this office or submit any information until January 24, 2006. Thus, with regard to the first request for information, you failed to meet the deadlines prescribed by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you raise sections 552.107 and 552.108 of the Government Code and rule 503 of the Texas Rules of Evidence for the information responsive to the first request, these exceptions and this privilege are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 or rule 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 586 (1991) (governmental body may waive predecessor to section 552.108), 522 at 4 (1989) (discretionary exceptions in general). *But see* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 can provide compelling reason under section 552.302). Accordingly, the city may not withhold the information that is responsive to the first request pursuant to these sections or rule. However, because the applicability of sections 552.101 and 552.137 of the Government Code can each provide compelling reasons to withhold information, we will address the applicability of these exceptions to the information at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, 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 police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates an officer's misconduct and takes disciplinary action against the 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 officer's civil service file maintained under section 143.089(a). *Abboit 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 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 120, 122. Such records are subject to release under the Act. *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. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that portions of the submitted information pertain to complaints that did not result in disciplinary action against the police officers at issue. Further, you state that the information at issue is maintained in the department's internal files pursuant to section 143.089(g). We note that there is not a right of access for the requestor to obtain information in a section 143.089(g) file. We therefore conclude that information you have marked is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.

Section 552.101 also encompasses section 1703.306(b) of the Occupations Code, which provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." You state, and the documents reflect, that a portion of the submitted information was acquired from a polygraph examination. You inform us that the requestor is not a person authorized to receive such information under section 1703.306(a). *See* Occ. Code § 1703.306(a). Based on your representations and our review, we agree that some of the information you have marked is confidential under section 1703.306(b). We have marked the information that must be withheld under section 552.101 on this basis.

Section 552.101 also encompasses the common law right to privacy. Information is protected from disclosure by the common law right to privacy when (1) it is highly intimate or 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, 685 (Tex. 1976). 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. *Id.* at 683. Information may also be withheld under section 552.101 in conjunction with common law privacy upon a showing of "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

In this instance, you inform us that a portion of the submitted information relates to undercover department narcotics officers. You state that the identities of these officers "are kept secret to protect them and their families." Thus, we understand you to argue that the public release of these individuals' identifying information would cause them to face an imminent threat of physical danger and threaten undercover operations. Accordingly, we conclude that the identifying information of the undercover officers is excepted from disclosure under section 552.101 in conjunction with the "special circumstances" aspect of common law privacy. *See* Open Records Decision No. 169 (1977).

You also raise section 552.137 of the Government Code for e-mail addresses that you have marked. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue in the submitted information are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses you have marked and the additional e-mail addresses that we have marked in accordance with section 552.137 unless the city receives consent for their release.

In summary, the city must withhold the submitted information that you have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The polygraph examination information that you have marked must be withheld under section 552.101 in conjunction with section 1703.306(t) of the Occupations Code. The identifying information of undercover narcotics officers must be withheld under section 552.101 in conjunction with the "special circumstances" aspect of common law privacy. Finally, e-mail addresses that you have marked and the additional e-mails that we have marked must be withheld under section 552.137 of the Government Code unless the

city receives consent for their release. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/jh

Ref: ID# 245513

Enc. Submitted documents

c: Ms. Alana Baxter
c/o Mr. Nathan C. Barrow
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102
(w/o enclosures)