ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2006-04236A

Dear Mr. Gambrell:

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# 252384.

On April 4, 2006, the Houston Police Department (the "department") received a request for information relating to the shooting of William Ryan Burkhalter. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered the comments from the requestor. *See* Gov't Code § 552.304 (person may submit written comments stating why information should or should not be released).

This office issued Open Records Letter No. 2006-04236 (2006), which concluded that the department may withhold incident report number 100573705 K under section 552.108(a)(2) of the Government Code after release of the basic information pursuant to section 552.108(c). Subsequent to the issuance of this decision, the department submitted additional information and arguments for withholding the supplemental information. In its supplemental brief received by this office on April 25, 2006, the department untimely asserts sections 552.101 and 552.147. *See id.* § 552.301 (governmental body must state exceptions that apply not later than tenth business day after date of receiving written request). However, sections 552.101 and 552.147 are compelling reasons to overcome the presumption of openness resulting from the noncompliance with section 552.301. *See id.* § 552.302

(governmental body's failure to comply with section 552.301 results in legal presumption that information is public); *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); Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law). Thus, we will consider whether the department may withhold the supplemental information submitted as Exhibit 5.

Section 552.101 of the Government Code 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 143.1214 of the Local Government Code. Section 143.1214 provides in relevant 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 a disciplinary action against a fire fighter or police officer to the [civil service] 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) [of the Local Government Code] only if:
>
> > (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). The department states Exhibit 5, consisting of the department's Internal Affairs Division investigatory file, relates to an investigation that did result in disciplinary action. You state that this information is maintained by the department in a departmental file, and that the department has forwarded the documents meeting the requirements of section 143.1214(c) to the officer's personnel file maintained under section 143.089(a). However, you state that Exhibit 5 does not meet all of the conditions of section 143.1214(c) for inclusion in the officer's civil service file. Based on your representations, we conclude that Exhibit 5 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. As our ruling is dispositive, we need not address the department's other assertions.

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,

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHK/sdk

Ref: ID# 252384

Enc. Submitted documents

c: Mr. Kenneth McGuire
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(w/o enclosures)