



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2007

Mr. Les Moore
Police Legal Advisor
Irving Police Department
305 North O'Connor Road
Irving, Texas 75061

OR2007-04298

Dear Mr. Moore:

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 #276088.

The Irving Police Department (the "department") received a request for all information from the personnel file of a specified officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have redacted information from the submitted documents that you seek to withhold. The department is not required to submit social security numbers to this office pursuant to section 552.147, and we note that a government body may withhold a peace officer's home address and telephone number, personal cellular phone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. See Open Records Decision No. 670 (2001); Gov't Code § 552.147(b). However, you have also redacted information that is not subject to section 552.147 or section 552.117(a)(2). As we are able in this instance to ascertain the nature of the information that you have redacted, we will determine whether it is excepted from public disclosure. In the future, however, the department should refrain from redacting any information, other than the types mentioned above, that it submits to this office in seeking an open records ruling. Failure to comply with

section 552.301 will result in the information being presumed public under section 552.302. See Gov't Code §§ 552.301(e)(1)(D), .302.

We next note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

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[.]

Gov't Code § 552.022(a)(1). The training and personnel records you submitted to this office include completed evaluations. The department must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. You claim that this information is subject to sections 552.101, 552.103, and 552.108 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly 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); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the department may not withhold the completed evaluations pursuant to section 552.103 of the Government Code. However, as information subject to section 552.022(a)(1) may be withheld under sections 552.101 and 552.108, we will consider your arguments under these exceptions.

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 143.089 of the Local Government Code. The City of Irving 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 a city's 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 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).¹ *Abbott v. City of 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.* Such records are subject to release under chapter 552 of the Government Code. *See* Loc. Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer’s alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov’t Code § 143.089(b). Information that reasonably relates to a police 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. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.--San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

Based on your representations and our review, we have marked the information subject to section 143.089(g) of the Local Government Code. This information is confidential under section 552.101 of the Government Code.² However, we note that some of the remaining information relates to charges of misconduct that resulted in disciplinary action of the officer at issue. Additionally, we note that the remaining information contains evaluations and commendations. Therefore, this information is subject to section 143.089(a)(2), and may not be withheld under section 143.089(g)

We now address your arguments for the information found in the officer’s civil service file. You assert section 552.108 of the Government Code. Section 552.108(a)(1) excepts from 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.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that section 552.108(a)(1) is generally not applicable to a law

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

enforcement agency's personnel records. *See City of Fort Worth*, 86 S.W.3d 320, *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). However, you state that the information at issue pertains to an open investigation by the Dallas County District Attorney's office. You further assert that release of these documents would interfere with this pending criminal prosecution. Based upon this representation, we find that the department has demonstrated the applicability of section 552.108(a)(1) to the information we have marked, and it may be withheld from public disclosure.³ *See generally 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). However, the department has failed to demonstrate how any portion of the remaining information pertains to the ongoing investigation by the District Attorney's office, or would otherwise interfere with law enforcement. Therefore, none of the remaining information may be withheld on this basis.

You also raise 552.103 of the Governmental Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

. . .

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

You inform us that the officer at issue has been suspended. You also inform us that the officer has made a request for an appeal before a third party hearing examiner to challenge his suspension. We note that municipal civil service appeals, such as the one requested here by the named officer, are governed by chapter 143 of the Local Government Code. See Local Gov't Code §§ 143.057, 143.127-143.131. This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. Cf. Open Records Decision No. 588 (1991). As such, we conclude that litigation involving the department was pending on the date it received the request for information. However, you have failed to demonstrate how any of the remaining information is related to the pending litigation. Accordingly, no portion of the remaining information may be withheld on this basis.

We note that a portion of the remaining information is confidential under common-law privacy.⁴ Section 552.101 encompasses the doctrine of common-law privacy, which 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). 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. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical

⁴The Office of the Attorney General will raise a mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

handicaps). We have marked the information that is protected by common-law privacy and must be withheld under section 552.101.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We have marked the information in the remaining submitted documents that the department must withhold under section 552.117(a)(2).

Section 552.130 of the Government Code 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." Gov't Code § 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas motor vehicle record information we have marked.

In summary, the department must withhold the information we have marked under section 143.089 of the Local Government Code, in conjunction with section 552.101 of the Government Code. The department may withhold the information we have marked under section 552.108 of the Government Code. The department must withhold the information marked under section 552.101 of the Government Code in conjunction with common-law privacy. Finally, the department must withhold the information marked under section 552.117 of the Government Code, as well as the information marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eb

Ref: ID# 276088

Enc. Submitted documents

c: Mr. Rehan Hyder
KDFW Fox 4 News
c/o Irving Police Department
350 North O'Connor Road
Irving, Texas 75061
(w/o enclosures)