



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2007

Ms. Judith Schitano Rawls
Assistant City Attorney
Beaumont Police Department
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2007-05118

Dear Ms. Rawls:

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# 277365.

The City of Beaumont (the "city") received a request for nine categories of information related to a former police officer, including copies of grievances, promotions, demotions, classes taken, educational information, reprimands, and a copy of the officer's entire employment file. The requestor has specifically excluded the officer's home address and telephone number, as well as his social security number from the request. You state that you will provide the requestor with a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted documents contain information that is excluded by the precise language of the request. The requestor has excluded the officer's home address, telephone number, and social security number from his request. Accordingly, any of this information within the submitted documents is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release that information in response to the request.

¹Although you raise section 552.1175, the proper exception is section 552.117 of the Government Code because section 552.117 applies to information the city maintains as the employer of the former officer.

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 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).² *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* Local 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).

You inform us that the documents contained in Exhibits B and E are related to the named officer. You further state the documents are maintained in the department’s internal files concerning this officer, and are related to misconduct investigations that did not result in disciplinary action. Based on your representations and our review of the information at issue, we agree that the information contained in Exhibit B relates to investigations regarding the named officer that did not result in disciplinary action. We have marked the documents that are confidential pursuant to section 143.089(g) of the Local Government Code and must be

²Chapter 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.

withheld under section 552.101 of the Government Code. We note, however, that the documents contained in Exhibit E relate to the misconduct of the officer that resulted in his termination. Therefore, this information must be maintained in the civil service file pursuant to section 143.089(a)(2), and may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

You also claim that some of the information contained in Exhibit 2 is excepted from disclosure under 552.101 in conjunction with section 143.089(g) of the Local Government Code. Exhibit 2 contains evaluations of the officer that you state are maintained in the city's civil service file. We note that the section 143.089(a) personnel file must contain "any letter, memorandum, or document relating to . . . the periodic evaluation of [the officer] by a supervisor." See Local Gov't Code § 143.089(a)(3). While this information may be kept in the city's internal file, it must also be kept in the civil service personnel file. Local Gov't Code § 143.089(a)(1), (3). Therefore, although evaluations maintained in the city's internal personnel file are confidential under section 143.089(g), the evaluations in the civil service personnel file are not confidential under that provision and may not be withheld under section 552.101 of the Government Code. Therefore, no portion of Exhibit 2 may be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

You claim that the documents contained in Exhibits C and E and a portion of information contained in Exhibit 2, are excepted from disclosure under section 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 city 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 Decision No. 551* at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the officer at issue has been terminated as a result of an internal affairs investigation regarding his misconduct. You also inform us that the officer has made a request for an appeal per the City's Labor Agreement, Article 9, Section 2. 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). You state, and provide documentation showing, that the officer initiated the appeal under the Labor Agreement prior to the date of this request for information. You state that the information at issue is related to the pending appeal. As such, we agree that section 552.103 is applicable to a portion of the information. Accordingly, the city may withhold Exhibits C and E, as well as the information we have marked in Exhibit 2 under section 552.103.

Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. *Open Records Decision Nos. 349* (1982), *320* (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103, and it must be disclosed. We also note that the applicability of section 552.103 ends once the litigation has been concluded.

You claim that some of the information contained in Exhibit 2 may be excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 encompasses the common-law right of privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law 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 the financial transaction between an individual and a governmental body, *see* *Open Records Decision Nos. 600* (1992), *545* (1990); and identities of victims of sexual abuse, *see* *Open Records*

Decision Nos. 440 (1986), 393 (1983), 339 (1982). Accordingly, the city must withhold the information that we have marked under section 552.101 in conjunction with common-law privacy. However, the city has failed to demonstrate how any portion of the remaining information constitutes highly intimate or embarrassing information for purposes of common-law privacy. Therefore, no portion of the remaining information may be withheld on this basis.

You claim that some of the information in Exhibit 2 is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. Thus, the city must withhold the information we have marked pursuant to section 552.117(a)(2).

We note that the remaining information contains information subject to section 552.130 of the Government Code.³ 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.” Gov’t Code § 552.130. Accordingly, the city must withhold the Texas driver’s license number we have marked pursuant to section 552.130 of the Government Code.

In summary, the city must withhold the information in Exhibit B pursuant to section 552.101 in conjunction with section 143.089 of the Local Government Code. With the exception of any information that has previously been provided to the opposing party, the city may withhold Exhibits C and E, as well as the information we have marked in Exhibit 2 pursuant to section 552.103 of the Government Code. The city must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy, the information we have marked under section 552.117 of the Government Code, as well as the Texas driver’s license number we have marked pursuant to 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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 "Jordan Johnson".

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/eb

Ref: ID# 277365

Enc. Submitted documents

c: Mr. Langston Scott Adams
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(w/o enclosures)