



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2007

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston - Legal Department
P. O. Box 1562
Houston, Texas 77251-1562

OR2007-05250

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# 277664.

The Houston Police Department (the "department") received a request for eight categories of information related to a named police officer, specifically including training records, personnel records, payroll records, personal history statement, records of departmental internal investigations, performance appraisals, computer aided dispatch data for a specified time, and mobile data terminal records for a specified time. You state that the department has no documents responsive to the request for a personal history statement. We note that the 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). You state that the department will release the computer aided dispatch data to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.1175, 552.130, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹We note that in its brief dated March 6, 2007, the department withdrew its assertions of sections 552.103, 552.108, and 552.136 of the Government Code for the information it submitted. Although you also raise sections 552.107, 552.111, 552.117, and 552.119 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Thus, the department has waived its claims under sections 552.107 and 552.111. See Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); see also Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, the department has not demonstrated that any of the submitted information is confidential for purposes of section 552.117 or section 552.119. See Gov't Code §§ 552.301, .302.

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(g) of the Local Government Code. The City of Houston 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 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). *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.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-143.055. Such records are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, information that reasonably relates to an officer’s employment relationship with the department and that is maintained in the 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. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that Exhibit 2 is maintained in the department’s internal file regarding this officer.² Based on this representation, we conclude that Exhibit 2 is confidential under section 143.089(g) of the Local Government Code and, therefore, must be withheld under section 552.101 of the Government Code.³

²We note that section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director’s designee. You state that you have referred the requestor to the City of Houston’s Human Resources Department.

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

Section 552.101 also encompasses 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 disciplinary action against a fire fighter or police officer to the 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) 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). You state that the information in Exhibit 3 relates to an investigation that did not result in disciplinary action. Thus, you indicate that this information is maintained by the department in a departmental file and is not part of the officer's civil service personnel file.

You state that the information in Exhibit 4 relates to an investigation that did result in disciplinary action. You state 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 the information in Exhibit 4 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 the information in Exhibits 3 and 4 is excepted

from disclosure under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.⁴ *See also* Open Records Decision No. 642.

You claim that Exhibit 5 contains information that is 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) the information is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of this test must be established. *Id.* at 681-82. 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: an individual's criminal history when compiled by a governmental body, personal financial information not relating to a financial transaction between an individual and a governmental body, some kinds of medical information or information indicating disabilities or specific illnesses, and identities of victims of sexual abuse. You argue that Exhibit 5 contains criminal history record information that must be withheld on the basis of privacy. However, all of the information in Exhibit 5 pertains to the individuals' current involvement in the criminal justice system, and therefore may not be withheld under section 552.101 in conjunction with common-law privacy. *Cf.* Gov't Code § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal system). We have marked a portion of Exhibit 5 which constitutes information that must be withheld under section 552.101 in conjunction with common-law privacy.

You claim that Exhibit 5 also contains information subject 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." Gov't Code § 552.130. Accordingly, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code.

In summary, the department must withhold the information contained in Exhibit 2 pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must withhold the information in Exhibits 3 and 4 pursuant to section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The department must withhold the information we have

⁴As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

marked in Exhibit 5 under 552.101 in conjunction with common-law privacy. The department must also withhold the Texas motor vehicle record information we have marked under 552.130. 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,

A handwritten signature in cursive script that reads "Jordan Johnson".

Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/eb

Ref: ID# 277664

Enc. Submitted documents

c: Mr. Alexander M. Gurevich
405 Main Street, Suite 900
Houston, Texas 77002
(w/o enclosures)