



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2007

Mr. Norman Ray Giles
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1200 Smith Street, Suite 1400
Houston, Texas 77002

OR2007-13664

Dear Mr. Giles:

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# 292088.

The Pasadena Police Department (the "department"), which you represent, received requests from two requestors. The first requestor requested thirty categories of information generally pertaining to the death of a named individual while in police custody (the "first request"). The second requestor, who represents the estate of the deceased individual, requested specified information pertaining to the same incident (the "second request"). You state that the department does not have some of the requested information. You state that information responsive to categories 1-3, 7, 10, and 15 of the first request has been provided to the first requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the first requestor. *See*

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. We also note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The department indicates that there is no information responsive to categories 4-5, 13-15, 21, 23, 25, and 29 of the first request. We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We also note that the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. See Open Records Decision No. 561 at 8 (1990). We assume the department has made a good faith effort to do so; therefore, we assume that, to the extent any additional types of responsive information existed when the department received the request for information, you have released it to the requestor. If not, then you must do so immediately. See Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

You assert that the request for category 30 of the first request was withdrawn by operation of law because the department sent the requestor a cost estimate pertaining to this information and the requestor “has not timely authorized payment of the costs associated with fulfilling his request.” See Gov't Code §§ 552.2615(a), 552.263(f). However, we have examined the cost estimate upon which your representation is based and have determined that it does not comply with the provisions of section 552.2615 of the Act. Accordingly, we conclude the requestor's public information request for category 30 of the first request has not been withdrawn by operation of law because the requestor has not received a cost estimate that complies with section 552.2615 for providing this information. See *id.* § 552.2615. We will, therefore, address your argument against disclosure of this information under the Act.

We must next address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. See *id.* § 552.301(e)(1)(D). The department received the request for category 20 of the first request on August 14, 2007, but did not submit information responsive to this category until September 6, 2007. Thus, the department failed to comply with the procedural requirements mandated by section 552.301 for this information.

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 requested information is public and must be released unless the governmental body

demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103 and 552.108 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). In failing to comply with section 552.301, the department has waived its claims under sections 552.103 and 552.108 for this information. However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See* ORD 586 at 3. Because the department also asserts section 552.108 on behalf of the Harris County District Attorney's Office (the "district attorney"), we will address your claim under this exception for this information.

You assert that some of the submitted information is excepted under 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." 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), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). But section 552.108 is generally not applicable to an internal administrative investigation involving a law enforcement officer that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). On the other hand, section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement agency that it wishes to have the information withheld.

You inform us that information responsive to categories 6, 8-9, 11-12, and 16-20 of the first request and all of the information responsive to the second request pertain to the arrest and

subsequent death of an individual in custody. The submitted information indicates that the department is conducting an internal administrative investigation of this incident. The department may not withhold information pertaining to its own internal investigation under section 552.108. However, the district attorney, in correspondence that you have submitted to this office, objects to the release of this information because it would interfere with the district attorney's criminal investigation of this incident. Based on this representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e., 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). You also assert that the offense reports responsive to categories 22, 26, and 27 of the first request pertain to pending criminal investigations. Accordingly, we agree that release of this information would also interfere with the detection, investigation, or prosecution of crime. See *id.*

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. Thus, with the exception of the basic front-page offense and arrest information, the department may withhold the submitted information responsive to categories 6, 8-9, 11-12, 16-20, 22, and 26-27 of the first request and all of the information responsive to the second request under section 552.108(a)(1).

You assert that the submitted information responsive to categories 24, 28, and 30 of the first request is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that the City of Pasadena 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).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

²Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov't Code §§ 143.051-143.055.

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 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. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform us that the submitted information responsive to categories 24, 28, and 30 of the first request is maintained in the police department's internal files concerning the named officers pursuant to section 143.089(g). We therefore conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101. We note, however, that some of this information pertains to internal administrative investigations of the officers for misconduct that resulted in disciplinary action under chapter 143. An officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-143.052 (suspension is "disciplinary action" for purposes of section 143.089(a)(2)). Therefore, this information also is subject to section 143.089(a)(2). Consequently, the information pertaining the investigations that resulted in disciplinary action must also be placed in the officers' civil service files, and the requestor must be referred to the civil service director or director's designee in accordance with section 143.089(g). The information in the departmental files is confidential under section 143.089(g) and must be withheld from disclosure under section 552.101 of the Government Code.

To conclude, with the exception of the basic front-page offense and arrest information, the department may withhold the submitted information responsive to categories 6, 8-9, 11-12, 16-20, 22, and 26-27 of the first request and all of the information responsive to the second request under section 552.108 of the Government Code.³ The department must withhold the submitted information responsive to categories 24, 28, and 30 of the first request under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. As our ruling is dispositive, we do not address your other arguments to withhold the submitted information.

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

³We note that basic information may not be withheld from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

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,



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Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 292088

Enc. Submitted documents

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