



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 8, 2009

Ms. Kelley Messer  
Assistant City Attorney  
City of Abilene  
P.O. Box 60  
Abilene, Texas 79604-0060

OR2009-01244A

Dear Ms. Messer:

This office issued Open Records Letter No. 2009-01244 (2009) on January 30, 2009. In that ruling, we concluded the Abilene Police Department (“department”) must rely on Open Records Letter No. 2008-10069 (2008) as a previous determination for the standard operating procedures you submitted as Exhibit E, and must withhold or release Exhibit E in accordance with Open Records Letter No. 2008-10069. You subsequently notified this office the operating procedures in Exhibit E were revised after Open Records Letter No. 2008-10069 was issued. Thus, because the information ruled upon in Open Records Letter No. 2008-10069 is not the same information submitted as Exhibit E, Open Records Letter No. 2008-10069 may not be relied upon as a previous determination with respect to Exhibit E. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 30, 2009. *See generally* Gov’t Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the “Act”)).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 341786 (previous ID# 333664).

The department received a request for (1) all records regarding a specified incident, (2) all personnel files of the officers involved in the specified incident, (3) all department policies

and procedures, and (4) all insurance policies or indemnity agreements that could provide coverage for the specified incident. You state you have provided some of the requested information to the requestor. You also state you have no information responsive to the request for insurance policies or indemnity agreements.<sup>1</sup> You claim the submitted investigation, policy and procedure, and personnel information is excepted from disclosure under sections 552.101, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code for the personnel records in Exhibit D. We understand the City of Abilene (the "city") is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. 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). *See Abbott v. 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 are in the 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 may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *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)

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate the submitted personnel records in Exhibit D pertain to internal investigations regarding the police officers specified in the request that did not result in disciplinary action, and are maintained in the department's internal files as authorized under section 143.089(g) of the Local Government Code. Based on this representation and our review of the submitted documents, we agree Exhibit D is confidential pursuant to section 143.089(g). Accordingly, the department must withhold the personnel records in Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.<sup>2</sup>

We note the investigation information submitted as Exhibit B and the civil service records submitted as Exhibit C contain fingerprints, which we have marked. Section 552.101 also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). The fingerprints contained in Exhibit B belong to the requestor’s client. Therefore, as the authorized representative of the individual whose fingerprints are at issue in Exhibit B, the requestor has a right of access to that information under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the department must release the marked fingerprints in Exhibit B under section 560.002 of the Government Code. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). With regard to the fingerprint in Exhibit C, however, there is no indication the requestor has a right of access to the fingerprint under section 560.002. Therefore, the department must withhold the marked fingerprint in Exhibit C under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

You claim the remaining investigation information in Exhibit B is excepted from disclosure 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.” Gov’t Code

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining argument against disclosure for this information.

§ 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 id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the remaining information in Exhibit B relates to a pending criminal investigation. Based on this representation and our review, we conclude 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. 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).

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). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-88. Thus, with the exception of basic information, the department may withhold the remaining information in Exhibit B pursuant to section 552.108(a)(1) of the Government Code. We note you have the discretion to release all or part of this information that is not otherwise confidential by law. Gov’t Code § 552.007.

You claim the department’s standard operating procedures, submitted as Exhibit E, are also excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. *Id.* § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You indicate release

of the submitted operating procedures in Exhibit E would interfere with law enforcement duties, and endanger police officers and suspects. Based on your representation and our review, we agree portions of Exhibit E, which we have marked, are protected by section 552.108(b)(1) and may be withheld on that basis. However, we conclude the remaining information in Exhibit E consists only of routine administrative policies and procedures of the department. Thus, we find you have failed to establish how public access to the remaining information in Exhibit E would interfere with law enforcement or endanger police officers. Accordingly, the department may not withhold the remaining information in Exhibit E under section 552.108(b)(1) of the Government Code. As you have claimed no other exceptions to disclosure for this information, it must be released.

Exhibit C contains tax return information. Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), aff'd in part, 993 F.2d 1111 (4th Cir. 1993). The department must withhold the W-4 forms we have marked in Exhibit C pursuant to federal law.

You assert portions of the civil service records in Exhibit C are protected by common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon

review of the civil service records in Exhibit C, we find some of the information, including personal loan, beneficiary designation, deferred compensation allowance, flexible spending, and direct deposit authorization information, constitutes personal financial information. We also find this information is not of legitimate public concern. Thus, the department must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim portions of Exhibit C are protected under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address, 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.<sup>3</sup> *Id.* § 552.117(a)(2). Thus, the department must withhold the personal information of the peace officers specified in the request that we have marked in Exhibit C under section 552.117(a)(2) of the Government Code.<sup>4</sup>

Exhibit C includes Texas driver's license information. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.<sup>5</sup> *Id.* § 552.130(a)(1), (2). Therefore, the department must withhold the Texas driver's license information we have marked in Exhibit C under section 552.130 of the Government Code.

Exhibit C contains bank account and routing numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

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<sup>3</sup>"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

<sup>4</sup>We note the previous determination issued in Open Records Decision No. 670 (2001) authorizes the department to withhold the home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.

<sup>5</sup>The 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).

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

*Id.* § 552.136. Thus, the department must withhold the bank account and routing numbers we have marked in Exhibit C under section 552.136 of the Government Code.

Exhibit C includes e-mail addresses subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses in Exhibit C are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

Exhibit C contains DD-214 and DD-215 forms. Section 552.140 of the Government Code provides that a military veteran’s DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). We have marked the DD-214 and DD-215 forms in Exhibit C. You do not inform us when the department came into possession of these forms. Therefore, if the department came into possession of the forms on or after September 1, 2003, it must withhold the marked DD-214 and DD-215 forms in Exhibit C under section 552.140 of the Government Code. If the forms were received by the department before September 1, 2003, then the department may not withhold them pursuant to section 552.140 of the Government Code.

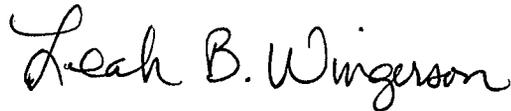
In summary, the department must release the marked fingerprints in Exhibit B pursuant to the requestor’s right of access under section 560.002 of the Government Code. With the exception of basic information, the department may withhold the remaining information in Exhibit B under section 552.108(a)(1) of the Government Code. The department may withhold the information we have marked in Exhibit E under section 552.108(b)(1) of the Government Code. The department must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; the marked fingerprint in Exhibit C under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code; the marked W-4 forms in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with federal law; the marked personal financial information in Exhibit C under section 552.101 of the Government

Code in conjunction with common-law privacy; the marked personal information of peace officers in Exhibit C under section 552.117(a)(2) of the Government Code; the marked Texas driver's license information in Exhibit C under section 552.130 of the Government Code; the marked bank account and routing numbers in Exhibit C under section 552.136 of the Government Code; the marked e-mail addresses in Exhibit C under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release; and the marked DD-214 and DD-215 forms in Exhibit C under section 552.140 of the Government Code, if the department came into possession of the forms on or after September 1, 2003. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 341786

Enc. Submitted documents

c: Requestor  
(w/o enclosures)