



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2009

Ms. Jerris Penrod Mapes
Assistant City Attorney
Killeen Police Department
402 North Second Street
Killeen, Texas 76541-5298

OR2009-02077

Dear Ms. Mapes:

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# 335403.

The Killeen Police Department (the "department") received a request for 19 categories of information relating to a named police officer. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the department sent the requestor an estimate of the cost of providing the rest of the requested information. *See* Gov't Code § 552.2615(a). You do not indicate that the department has received a response to the cost estimate. *See id.* § 552.2615(b). We have examined the submitted cost estimate, however, and have determined that it does not comply with the provisions of section 552.2615 of the Government Code. Thus, the request for the remaining information has not been withdrawn by operation of law because the requestor has not received a cost estimate for providing that information that complies with section 552.2615. Therefore, the rest of the requested information must be released.

Next, we address your exceptions to disclosure of the submitted information. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 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.¹

¹You inform us that the department is a civil service department 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, including one that must be maintained as part of the officer's civil service file and another that 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 any instance 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 *et seq.* 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). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made the

records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to “information reasonably related to a police officer’s or fire fighter’s employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You state that the information submitted as Attachment D is held in a file maintained by the department under section 143.089(g). Based on your representations and our review of the information at issue, we conclude that Attachment D is confidential under section 143.089(g) of the Local Government Code and must be withheld from the requestor on that basis under section 552.101 of the Government Code.

You also seek to withhold information maintained in the named officer’s civil service file, which you have submitted as Attachment E.² We note that section 552.101 is applicable to some of that information. Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked medical information in Attachment E that is intimate or embarrassing and of no legitimate public interest. The department must withhold that information under section 552.101 in conjunction with common-law privacy.

Common-law privacy also encompasses certain types of personal financial information. Financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is

²You inform us that “because all records are in the possession of the City of Killeen and the city attorney’s office would ultimately have to assist the civil service director in responding, the requestor has not been referred to the director of civil service so as to minimize delay.” Thus, you are responding to this request for information on behalf of both the department and the civil service director.

sufficient to justify its disclosure must be made on case-by-case basis). We have marked personal financial information in Attachment E that also must be withheld under section 552.101 in conjunction with common-law privacy.

You also raise section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, 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 or 552.1175 of the Government Code. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Except for the information that we have marked that is not protected by this exception and must be released, we agree that the personal information that you have highlighted in Attachment E must be withheld under section 552.117(a)(2). We have marked additional information that must also be withheld under that exception.

You also seek to withhold Texas driver's license information. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See Gov't Code* § 552.130(a)(1).³ The department must withhold the Texas driver's license information that we have marked in Attachment E under section 552.130.⁴

We note that Attachment E also contains military discharge records that may be subject to section 552.140 of the Government Code. Section 552.140 provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 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.

Id. § 552.140(a).⁵ Section 552.140 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). You do not indicate when the department first came into possession of the DD-214 forms that we have marked.

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.130 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁴As we are able to make this determination, we need not address your claim under section 521.051 of the Transportation Code.

⁵Section 552.140 also is a mandatory exception that may not be waived. *Gov't Code* §§ 552.007, .352; ORD 674 at 3 n.4.

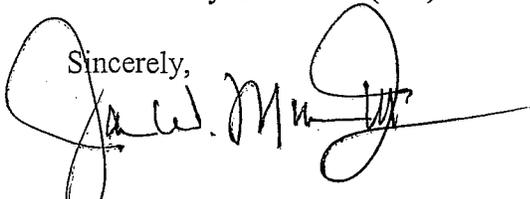
Nevertheless, to the extent that those forms came into the department's possession on or after September 1, 2003, they must be withheld under section 552.140. To the extent that the DD-214 forms came into the department's possession prior to September 1, 2003, they may not be withheld under section 552.140.

In summary: (1) the department must withhold Attachment D under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) the department must withhold the marked medical and personal financial information in Attachment E under section 552.101 in conjunction with common-law privacy; (3) except for the information that we have marked for release, the personal information that you have highlighted in Attachment E and the additional information that we have marked must be withheld under section 552.117(a)(2) of the Government Code; (4) the Texas driver's license information that we have marked in Attachment E must be withheld under section 552.130 of the Government Code; and (5) the marked DD-214 forms in Attachment E must be withheld under section 552.140 of the Government Code to the extent that they came into the department's possession on or after September 1, 2003. The rest of the submitted 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, 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 335403

Enc: Submitted documents

c: Requestor
(w/o enclosures)