



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2009

Ms. Yvette Aguilar
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2009-06657

Dear Ms. Aguilar:

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# 343127.

The City of Corpus Christi (the "city") received a request for all documents regarding a specified investigation and any information regarding missing documents from the investigation. You state that no information regarding missing documents from the investigation exists.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You also state, and provide documentation showing, that you notified the Tyler Police Department and the San Antonio Police Department of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the requested information, including the "Patrol Rifle Program Development" presentation and patrol rifle policies, appear to be the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-05827 (2009). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was

¹The 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).

²As of the date of this decision, this office has received no correspondence from the police departments in question.

based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2009-05827. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Because the submitted information appears to be the subject of a previous request for information, we note that the department appears to have released some of the information that you now seek to withhold from the public. We note that section 552.007 of the Government Code prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See* Gov't Code § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless the information is deemed confidential under the Act. *Open Records Decision Nos. 490 (1988), 400 (1983).* Although protection for information covered by the Act's permissive exceptions, such as sections 552.108, can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See* Open Records Decision Nos. 490, 400. Thus, to the extent that the city previously released any of the submitted information to a member or members of the public, the city cannot now withhold such information under section 552.108. Accordingly, because the "Patrol Rifle Program Development" presentation and patrol rifle policies were previously released, we do not address your arguments against release of this information under section 552.108 of the Government Code.

We now address the submitted information that is not encompassed by Open Records Letter No. 2009-05827 and has not been previously released. We note that the submitted documents include purchase orders that fall within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Although you seek to withhold the purchase orders under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally) and 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.108 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the purchase orders may not be withheld under section 552.108. You also raise section 552.101 of the Government Code, which is other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, we will determine whether the city must withhold the purchase orders, along with any of the remaining submitted information, under section 552.101.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses section 143.089 of the Local Government Code. You state that 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; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). 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) 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 state the submitted information is maintained in the referenced police officers’ internal department personnel files.³ However, the documents pertain to an internal investigation of the city’s police department. Because the documents were created for the city, and used for purposes beyond evaluating the individual police officers, this information is also maintained independently, separate, and apart from the personnel files of the city’s police department. The city may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Accordingly, we conclude that the city may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. As you raise no other arguments against release of the information subject to 552.022(a)(3), this information

³Section 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.

must be released. However, we will address your argument against release of the remaining information not subject to 552.022.

You claim section 552.108(b)(2) is applicable to the remaining submitted information. Section 552.108(b)(2) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body that claims section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706. We note, however, that section 552.108 is generally not applicable to records of an administrative investigation that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). In this instance, the submitted information is related to an internal affairs administrative investigation. You also state that the city police department’s internal investigation did not result in a criminal investigation or prosecution. Thus, the internal investigation documents may not be withheld under section 552.108(b)(2).

We note that the submitted information contains information subject to sections 552.117, 552.130, and 552.137 of the Government Code.⁴ Section 552.117(a)(4) excepts from disclosure the home address, home telephone number, personal pager and cell phone numbers, social security number, and family member information of a peace officer who was killed in the line of duty, regardless of whether the deceased complied with Section 552.024 or 552.1175. Gov’t Code § 552.117(a)(4). Section 552.117(a)(4) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. We note that the records contain the personal information of an officer who was killed in the line of duty. Thus, the city must withhold the information that we have marked under section 552.117(a)(4).

Next, section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver’s license and registration information. Gov’t Code § 552.130. The city must withhold the license plate information we have marked under section 552.130 of the Government Code.

Finally, section 552.137 states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). We have marked the e-mail address that the city must withhold under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consented to their disclosure.

In summary, with regard to the information that is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2009-05827 as a previous determination and withhold or release such information. The city must withhold the deceased officer's information that we have marked under section 552.117(a)(4). The city must withhold the license plate information we have marked under section 552.130. Unless the owner of the e-mail address affirmatively consented to its disclosure, the city must also withhold the e-mail address we have marked under section 552.137. 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, 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 343127

Enc. Submitted documents

c: Requestor
(w/o enclosures)