



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 17, 2010

Ms. Angela M. DeLuca  
Assistant City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

OR2010-07060

Dear Ms. DeLuca:

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# 379503.

The Bryan Police Department (the "department") received a request for the incident report, probable cause affidavit, and CAD report related to the arrest of a named police officer and any and all other records pertaining to the arrest that have been released to the arrested officer. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the department has already released the requested incident report to the public and, therefore, may not now withhold that information under sections 552.103 and 552.108 of the Government Code. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision

Nos. 518 at 3 (1989), 490 at 2 (1988). Pursuant to section 552.303 of the Act, we asked the department whether it had previously released the incident report at issue.<sup>1</sup> In response, you informed us that although the department disseminated a news release regarding the basic facts surrounding the incident, the department did not release any other information regarding the investigation of the incident. You also provided a copy of the department's news release for our review. Further, you explain that individuals who request probable cause statements are directed to the Brazos County Clerk's Office and that the Brazos County Sheriff's Office also maintains a website that may be accessed by members of the local media to obtain probable cause statements. Upon review, we find that the department has not released the incident report to the public. Therefore, we will address your arguments against disclosure of the incident report and the remaining requested information.

Next, we note that section 552.022 of the Government Code is applicable to the submitted incident report, which you have labeled Exhibit C. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation that is subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold any portion of Exhibit C under section 552.103. We note that the requestor asserts the requested probable cause affidavit is a court-filed document subject to section 552.022(a)(17) of the Government Code, which provides for required public disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. Gov't Code 552.022(a)(17). Upon review, we find no portion of the submitted information is subject to section 552.022(a)(17). Accordingly, we will address your argument under section 552.108 of the Government Code against the disclosure of Exhibit C and your argument under section 552.101 against disclosure for the remaining information not subject to section 552.022.

Section 552.108 of the Government Code provides in pertinent part:

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<sup>1</sup>See Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An 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 is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1). Generally, subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsection 552.108(a)(2). Subsection 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with on-going law enforcement and prosecution efforts in general. In contrast, subsection 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the information in Exhibit C relates to a pending criminal prosecution. You have also provided an affidavit from the Brazos County Attorney stating that release of the information at issue would interfere with the pending prosecution of the criminal case. Based on these representations and our review, we find that section 552.108(a)(1) is applicable to Exhibit C. *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).

We note that 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 front-page information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). In this instance, the information at issue includes a computer aided dispatch (“CAD”) report. In Open Records Decision No. 649 (1996), this office concluded that information contained in a CAD report is substantially the same as basic information. See ORD 649 at 3; see also Open Records Decision No. 394 at 3 (1983) (there is no qualitative difference between information contained in radio cards or radio logs and front-page offense report information expressly held to be public in *Houston Chronicle*; thus, such information is generally public). Therefore, with the exception of the basic information that must be released under section 552.108(c), the department may withhold the information in Exhibit C under section 552.108(a)(1).

We now turn to your argument against the disclosure of the remaining information not subject to section 552.022 of the Government Code. 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, including section 143.089 of the Local Government Code. You state that the City of Bryan is a civil service city. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that a city’s civil service director is required to maintain, and an internal file that the police department may maintain for its own use. See 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).<sup>2</sup> See *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.* 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, a document relating to a police officer’s alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. See Local Gov’t Code § 143.089(b). Information that reasonably relates to a police officer’s employment relationship with the police department and that is

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<sup>2</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov’t Code §§ 143.051-.055.

maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released.<sup>3</sup> See *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. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform us that Exhibit B consists of information that was created by the department for its use in evaluating the employment of the named officer and is maintained in the department's internal personnel file for that officer. Further, you state that the internal affairs investigation to which this information relates has not yet reached a conclusion. You also state, and the submitted records reflect, that the named officer has been placed on administrative leave with pay during the investigation. The requestor asserts that the department's action toward the officer is governed by section 143.056 of the Local Government Code and that, accordingly, the officer has been suspended. Section 143.056 provides in relevant part "[i]f a . . . police officer is indicted for a felony or officially charged with the commission of a Class A or B misdemeanor, the department head *may* temporarily suspend the person with or without pay[.]" Loc. Gov't Code § 143.056 (emphasis added). We note that section 143.056 gives the department head the discretion to suspend the officer; it does not mandate suspension. Therefore, based on the department's assertions that the officer has been placed on administrative leave with pay, we conclude the information in Exhibit B is properly maintained in the department's internal personnel file and is confidential pursuant to section 143.089(g) of the Local Government Code. Therefore, Exhibit B must be withheld under section 552.101 of the Government Code on that basis.

In summary, with the exception of basic information, the department may withhold Exhibit C under section 552.108(a)(1) of the Government Code. The department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

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

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<sup>3</sup>We 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.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

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Sincerely,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/dls

Ref: ID# 379503

Enc. Submitted documents

c: Requestor  
(w/o enclosures)