



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-08600

Dear Ms. Chang:

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# 382509.

The Houston Police Department (the "department") received a request for eight categories of information pertaining to a specified officer-involved shooting incident. You state the department has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested 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 section encompasses information protected by other statutes. The City

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 of the Local Government Code provides in relevant part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state Exhibit 3-B consists of records of an internal investigation of alleged misconduct on the part of a police officer. You state the allegation was not sustained and no disciplinary action was taken. Thus, you state Exhibit 3-B is maintained in the department's investigatory files and is not part of the officer's civil service personnel file. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). Further, you state the information does not meet the requirements of section 143.1214(c) for inclusion in the police officer's civil service personnel file. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). Additionally, you state the requestor is not a representative of another law enforcement agency, a fire department, or the office of a district or United States attorney. *See id.* § 143.1214(b)(1)-(2).

The requestor claims the internal investigation was never undertaken or was a "sham" because the criminal investigation into the officer's conduct resulted in a finding of justifiable homicide before the autopsy of the deceased was completed. Whether the internal investigation was proper is a question of fact and this office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Thus, because the department submitted its internal investigation into the officer's conduct for our review as Exhibit 3-B and such investigation is kept in its investigatory files, we find section 143.1214 is applicable to Exhibit 3-B.

Additionally, the requestor argues the deceased's wife's witness statement must be released to her because the department "has offered no evidence [her] statement, which has been requested, is excepted from disclosure to her on any basis." The requestor further contends the department may not withhold the deceased's wife's witness statement from her under section 552.101 in conjunction with section 143.1214 because she is entitled to have her own statement. We note the requestor offers no basis for these arguments. Moreover, the department contends such information is excepted under the Act as it raised exceptions against disclosure of this information. Further, the deceased's wife is not a representative of another law enforcement agency, a fire department, or the office of a district or United States attorney. Accordingly, as the release provisions of section 143.1214 do not apply, the deceased's wife is not entitled to her own witness statement under section 143.1214. Thus, because you represent Exhibit 3-B consists of an internal investigation that is maintained in the department's investigatory files and the access provisions of section 143.1214(b) do not apply, we agree the department must withhold Exhibit 3-B under section 552.101 in conjunction with section 143.1214.²

Next, we address your claim under section 552.108(a)(2) of the Government Code for the remaining information. We note the requestor argues the requested autopsy report has been previously released to the public. The Act does not permit the 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); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108).

²As our ruling is dispositive, we do not address your remaining argument against disclosure of Exhibit 3-B.

Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, section 552.108 neither prohibits public disclosure of information nor makes information confidential under law. Therefore, if the department previously released the autopsy report to the public, the autopsy report may not be withheld from the present requestor under section 552.108.

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the remaining information pertains to two different closed cases that did not result in convictions or deferred adjudications. The requestor contends no criminal investigation involving the deceased was undertaken because he was shot by a department officer. However, the information submitted reflects the department investigated the criminal offense of aggravated kidnapping and, due to the death of the only suspect, the criminal investigation was closed and ended in a result other than conviction or deferred adjudication. Further, although the requestor contends no investigation into the officer's conduct was undertaken because the deceased's death was ruled a justifiable homicide the same day of his death, the submitted information reflects a criminal investigation took place. Moreover, we note a criminal investigation that begins and ends on the same day is nonetheless a criminal investigation. Additionally, the requestor argues the department failed to prove the closed criminal investigation into the officer who shot the deceased was "no billed" by the grand jury. We note, however, the submitted information reflects the grand jury "no billed" the officer on February 27, 2009; thus, the criminal investigation into the officer's conduct ended in a result other than conviction or deferred adjudication. Accordingly, based on your representations and our review, we agree section 552.108(a)(2) is applicable to the remaining information.

However, as you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *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). Basic information includes the identification and description of the complainant. *See Houston Chronicle Publ'g Co.*, 531 S.W.2d at 186–87; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). We note you have released the first page of the two submitted offense reports. However, the information you have released as basic information of the

aggravated kidnapping offense does not contain information sufficient to satisfy the requirement that the identification and description of the complaint be released as basic information. *See* ORD 127. Accordingly, we determine the department must release a sufficient portion of the aggravated kidnapping report to encompass the identification and description of the complainant pursuant to *Houston Chronicle*.

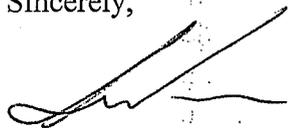
The requestor argues all radio dispatch logs or radio cards maintained by the department must be released as basic information. However, the department has already released the basic information relating to the investigation into the officer's conduct and after releasing the identity and description of the complainant in relation to the aggravated kidnapping, the department will have released all basic information pertaining to that offense. Thus, to the extent all basic information is released, the department may withhold the remaining information, including any radio dispatch logs or radio cards, under section 552.108(a)(2).

In summary, the department may withhold Exhibit 3-B under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The remaining information may withheld under section 552.108(a)(2) of the Government Code; however, the department must release the identity and description of the complainant as basic information and the autopsy report if the department has previously released it to the public.

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 382509

Enc. Submitted documents

c: Requestor
(w/o enclosures)