



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2010

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2010-18814

Dear Ms. Valkavich:

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# 402980 (COSA# 10-1569).

The City of San Antonio (the "city") received a request for (1) work product of a named city attorney substantiating the allegations of a named officer and copies of a specified search warrant, (2) work product and client communications pertaining to two specified addresses prepared or received by a named attorney, (3) work product prepared by the city pertaining to a specified hearing, (4) a specified certified mail return receipt, (5) engineering findings concerning a specified address, (6) video recordings presented at specified hearings, (7) audio recordings of the specified hearings, (8) personnel records and work product concerning the named officer, (9) a specified agreement on tax collection, and (10) specified records submitted to the Office of the Attorney General. You state you have released some of the requested information. You state you have no information responsive to portions of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged

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).

under rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state a portion of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2010-16355 (2010). In that ruling, we determined the city may withhold the submitted information under section 552.103 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2010-16355 as a previous determination and withhold the identical information in accordance with that ruling.² *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). We will address your arguments for the remaining information.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). You state the city received the request for information on September 24, 2010. Accordingly, you were required to provide the information required by section 552.301(e) by October 15, 2010. The package in which the city provided the information required by section 552.301(e) was postmarked October 18, 2010. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we determine the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See*

²As our ruling is dispositive, we need not address your argument under sections 552.107 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5 for this information.

id. § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 586 (1991). This office has held a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. See Open Records Decision No. 150 (1977) (construing predecessor statute). The city claims sections 552.103 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure for the remaining information. However, these exceptions are discretionary in nature. They serve to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information. See *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 Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 or rule 192.5 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the remaining information may be withheld under section 552.103 or section 552.111 of the Government Code or under rule 192.5 of the Texas Rules of Civil Procedure. You also raise section 552.101 of the Government Code. Further, portions of the remaining information are subject to section 552.117 of the Government Code.³ Sections 552.101 and 552.117 can provide compelling reasons to withhold information. Therefore, we will consider the applicability of these exceptions to the remaining 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. Section 552.101 encompasses information protected by section 143.089 of the Local Government Code. You inform us the city is a civil service city under chapter 143 of the Local Government Code.

Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: 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). Under section 143.089(a), 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-.055. We note a letter of reprimand does not constitute discipline under chapter 143. In cases in which a police department

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. See *id.* § 143.089(g). 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.

Local Gov't Code § 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 section 143.089(g) made these records confidential. See 851 S.W.2d at 949; see also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet. h.) (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 the information you have indicated is maintained in the internal file of the city's police department (the "department") pursuant to section 143.089(g). However, you acknowledge portions of the information at issue, which you have marked, consist of commendations and documents relating to misconduct in which the department took disciplinary action against the officer subject to subsections 143.089(a)(1) and 143.089(a)(2). See Local Gov't Code § 143.089(a)(1)-(2). Further, you acknowledge this information is contained in the officer's civil service file, which the city maintains under section 143.089(a). We note you have marked a letter of reprimand as being in the officer's civil service file maintained under section 143.089(a). As noted above, a letter of reprimand does not constitute discipline under chapter 143 and may not be maintained in the section 143.089(a) file. Therefore, with the exception of the commendations and information that relates to misconduct that resulted in disciplinary action, the city must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

We note portions of the information contained within the section 143.089(a) file may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, the information at issue concerns an individual who is no longer employed by the city, and it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12. Accordingly, if the individual whose information we have marked is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. Conversely, to the extent the individual at issue is no longer a licensed peace officer as defined by article 2.12, then the city may not withhold the marked information under section 552.117(a)(2).

If the individual at issue is no longer a licensed peace officer, then the personal information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. See Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore,

to the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).⁴

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2010-16355 as a previous determination and withhold the identical information in accordance with that ruling. With the exception of the information that must also be maintained in the officer's civil service under section 143.089(a), the city must withhold the officer's internal personnel file, which you have indicated, under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. If the individual whose information we have marked is currently a licensed peace officer as defined by article 2.12, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code. If the individual at issue is no longer a licensed peace officer, then to the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released, but any information subject to copyright may only be released in accordance with copyright law.⁵

⁴Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. See Gov't Code § 552.147(b).

⁵We note the information being released in this instance includes information that may be confidential with respect to the general public. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 402980

Enc. Submitted documents

c: Requestor
(w/o enclosures)