



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2011

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-00737

Dear Mr. Phillips:

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# 406053 (PIR No. W004571).

The City of Fort Worth (the "city") received a request for information related to the application, testing, education, training, discipline, termination, and resignation of a named former city police officer. You state some information will be released to the requestor. You also state you have redacted certain Texas motor vehicle record information under section 552.130 of the Government Code pursuant to previous determinations issued to the city in Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007). *See* Open Records Decision No. 673 at 7-8 (2001) (previous determination). You also inform us you have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information, a portion of which is a representative sample.²

¹Section 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 under the Act.

²We assume that the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

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 information made confidential by statute, such as section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. 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). *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.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov’t Code §§ 143.051-.055. 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 an 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. Local Gov’t Code § 143.089(b). Information that reasonably relates to an officer’s employment relationship with the police department and that is 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. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the information in Exhibit C is taken from the city’s police department personnel files, which are maintained in the city police department’s internal files pursuant to section 143.089(g). You state this information relates to internal investigations into allegations of misconduct that were determined to be unfounded or did not result in discipline under Chapter 143. Based on your representations and our review, we agree the city must withhold most of the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. We note, however, an officer’s civil service file must contain commendations, documents relating to any misconduct in those cases where the police department took disciplinary action against the officer, and periodic evaluations. See Local Gov’t Code § 143.089(a)(1)-(3). Some of the information in Exhibit C clearly reflects it relates to conduct that resulted in suspension. See Local Gov’t Code §§ 143.051-.052 (suspension is “disciplinary action” for purposes of section 143.089(a)(2)). Therefore, despite your

assertions, we find this information, which we have marked, resulted in disciplinary action against the named officer. In addition, Exhibit C contains commendations and periodic evaluations. In this instance, the request was received by the city, which has access to the files maintained under subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Because the information we have marked consists of commendations or evaluations, or relates to misconduct that resulted in disciplinary action against the officer at issue, this information must be maintained in the civil service file pursuant to subsections 143.089(a)(1), 143.089(a)(2), and 143.089(a)(3), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses information chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(c) states that except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided two of the three pieces of required information for the accident reports in Exhibit E. Thus, the city must withhold the accident reports in Exhibit E under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also incorporates the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523(1989), 373 (1983). You contend the information you have marked in Exhibit D, as well as the requested audio and video recordings, are protected by common-law privacy. You state the city does not possess the technological capability to redact individual portions of the submitted recordings. Upon review, we find some of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Thus, this information must be withheld under section 552.101 of the Government Code in conjunction with common-

law privacy. However, no portion of the requested recordings or remaining information you have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, no portion of remaining information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.³ Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010) (Dec. 20, 2010, motions for reconsideration and rehearing pending). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

We understand you have redacted portions of the submitted information pursuant to section 552.117(a)(2) of the Government Code. The previous determination issued in Open Records Decision No. 670 (2001) authorizes a governmental body to withhold the home addresses, telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of its peace officers under section 552.117(a)(2) without the necessity of requesting an attorney general decision.⁴ Although you have redacted some of the submitted information under section 552.117(a)(2), the remaining portions of the documents at issue contain other information, which we have marked, that may be subject to section 552.117(a)(2). We note Open Records Decision No. 670 only applies to licensed peace officers. *See* ORD 670. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). In this instance, however, the information reflects that the individual whose information is at issue may no longer be employed by the city's police department. You state the city does not possess the technological capability to redact individual portions of the requested recordings in their entirety. Accordingly, if the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the city must withhold the personal information you have redacted, the additional information we have marked, and the requested recordings in their entirety under section 552.117(a)(2) of the Government Code. *See* Open Records

³The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

⁴Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

Decision No. 364 (1983). If the individual is not currently a licensed peace officer, his personal information may not be withheld under section 552.117(a)(2) of the Government Code.

However, if the individual at issue is no longer a licensed peace officer, then his personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, 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 552.024.⁵ 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. Therefore, if the individual at issue is no longer a licensed peace officer, then to the extent he timely elected confidentiality under section 552.024, the city must withhold the personal information you have redacted, the additional information we have marked, and the requested recordings in their entirety under section 552.117(a)(1) of the Government Code. The city may not withhold the information at issue under section 552.117(a)(1) if the individual did not timely elect to keep his personal information confidential.⁶

Finally, we note that a portion of the submitted information appears to 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, except for the information that must be maintained in the civil service file pursuant to subsections 143.089(a)(1), (2), and (3), the city must withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the accident

⁵We note section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former employee's family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(a)-(c), .117(a)(1).

⁶Regardless of the applicability of section 552.117, section 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 under the Act. Gov't Code § 552.147(b).

reports in Exhibit E under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The city must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked in Exhibit D under section 552.102(a) of the Government Code. If the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the city must withhold the personal information you have redacted, the additional information we have marked, and the requested recordings in their entirety under 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 he timely elected confidentiality under section 552.024, the city must withhold the personal information you have redacted, the additional information we have marked, and the requested recordings in their entirety under section 552.117(a)(1) of the Government Code. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 406053

Enc. Submitted documents

c: Requestor
(w/o enclosures)