



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2011

Ms. Judith Sachitano Rawls
Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2011-05639

Dear Ms. Rawls:

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# 415317 (Beaumont ORR#s 01-69 and 02-35).

The Beaumont Police Department (the "department") received a request for the GPS coordinates and time for a vehicle driven by a named officer during a specified time period; written directives for turning on a computer and GPS tracking for department vehicles; all testing, scores, results, and assignments related to all positions of the canine unit for the past six months; all correspondence among named individuals related to the canine unit for the past six months; all correspondence among named individuals relating to the removal of a named officer from the SWAT team for the past six months; a copy of all video and audio recordings from a specified shooting; all internal documents relating to the same shooting; and any correspondence among named individuals regarding the video or audio recordings of the same shooting.¹ The department received another request from a different requestor for all e-mails among specified individuals regarding a specified job opening; all documents provided to training and K-9 supervisors pertaining to the job opening and subsequent selection of the chosen applicant; written reasons why the chosen applicant was selected for the position and why all other applicants were not chosen and any documentation used to confirm those reasons; any other documents used or not used in the job selection; and all

¹We note the department sought and received clarification of a portion of this request. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from the date request is clarified or narrowed).

mobile computer terminal messages sent and received by specified units and a named officer for a specified time period. You state you have released some information to both requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.122, and 552.137 of the Government Code.² You indicate you have notified an interested third party of the request. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered the exceptions you claim and reviewed the submitted information, portions of which are representative samples.³

Initially, we note some of the submitted e-mails, which we have marked, are not responsive to the first request because they were created before the time period specified in the request. The department need not release nonresponsive information in response to this request, and this ruling will not address that 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 excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You state the City of Beaumont 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). 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). 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).⁴ *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

²Although you claim section 552.1175 of the Government Code for portions of the submitted information, section 552.117 is the proper exception to raise in this instance because the department holds the information at issue in an employment capacity.

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

⁴Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-143.055.

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 the Act. *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.⁵ *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the submitted video recording is maintained in the department's internal personnel file pursuant to section 143.089(g). You state this information relates to a matter that has not result in disciplinary action for purposes of chapter 143. We note, however, you also indicate the video is part of a closed criminal investigation, and, therefore, is maintained separate and apart from the officer's personnel file. The present request does not specifically seek information from the officers' police department personnel files. Instead, the requestor seeks the video recording pertaining to a specified incident. Because the requestor asks for information relating to a specified incident, both the officer's personnel file and any copies of investigatory materials that the department maintains for law enforcement purposes are responsive. The department may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Accordingly, the submitted video recording is not confidential under section 143.089(g) of the Local Government Code. Thus, the department may not withhold the video recording under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the common-law right of privacy. Common-law privacy 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has

⁵You inform us that pursuant to section 143.089, you have referred the requestor to the City of Beaumont's Civil Service Director to the extent that the request seeks information which may also be contained within the officer's civil service file.

interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the submitted information is either not highly intimate or embarrassing or is of legitimate public concern. Thus, the department may not withhold any of the responsive information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not

actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You state section 552.103 applies to portions of the responsive information because it relates to an employee grievance. However, you have not submitted any arguments explaining how the grievance process constitutes litigation for purposes of section 552.103 of the Government Code. Gov't Code § 552.301(e)(1)(A). Thus, we find you have failed to demonstrate the department was involved in or reasonably anticipated litigation on the date the department received the request for information. Accordingly, the department may not withhold any of the responsive information under section 552.103 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the responsive e-mails you have marked relate to ongoing criminal investigations and prosecutions and that release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ;g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may withhold the responsive e-mails you have marked under section 552.108(a)(1) of the Government Code.

Section 552.108(a)(2) 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 [.]" Gov't Code § 552.108(a)(2). You state the submitted video and the responsive e-mail

you have marked relate to concluded criminal investigations that did not result in conviction or deferred adjudication. Based on your representations and our review of the information at issue, we conclude the department may withhold the submitted video and the responsive e-mails you have marked under section 552.108(a)(2) of the Government Code.

We understand you to raise section 552.108(b)(1) of the Government Code for one of the remaining e-mails. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.) To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). You state one of the submitted e-mails consists of information that pertains to weapons used by the department. We understand you to assert that release of this information would jeopardize officer safety. Upon review, we find the information we have marked would interfere with law enforcement and crime prevention. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1). However, we find you have failed to demonstrate how the release of the remaining information in the e-mail you marked would interfere with law enforcement and crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1).

We now turn to your argument against disclosure of the submitted interview questions. Section 552.122(b) of the Government Code excepts from required public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future

examinations: *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the submitted interview questions under section 552.122. You state these questions may be used in future selection processes and release of the questions would make them unusable in future selection processes. Having reviewed the submitted information, we find that questions 6 and 8 evaluate the applicant's specific knowledge or ability in a particular area, thus qualifying as "test items" under section 552.122(b) of the Government Code. We also find that release of the recommended and actual answers to these test items would tend to reveal the questions themselves. Therefore, the department may withhold this information pursuant to section 552.122(b). However, we find that the remaining information consists of general questions evaluating an applicant's individual abilities, personal opinions, and subjective ability to respond to particular situations, and does not test any specific knowledge of an applicant. Accordingly, the remaining interview questions are not excepted from disclosure under section 552.122 of the Government Code.

Section 552.117(a)(2) of the Government Code 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. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You inform us the cellular telephone number you have marked is the personal telephone number of the officer at issue and not a department telephone number. Accordingly, the department must withhold the peace officer's personal cellular telephone number you have marked, as well as the additional personal information we have marked, under section 552.117(a)(2) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address you have marked is not specifically excluded by section 552.137(c). Therefore, the department must withhold the e-mail address you have marked under section 552.137 unless the owner of the address has affirmatively consented to its release.⁶ *See id.* § 552.137(b).

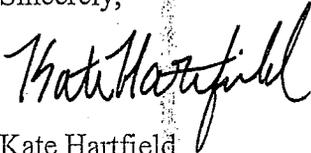
⁶We note Open Records Decision No. 684 (2009) was issued as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the department may withhold the following information: (1) the responsive e-mails you have marked under section 552.108(a)(1) of the Government Code, (2) the video recording and the responsive e-mails you have marked under section 552.108(a)(2) of the Government Code, and (3) the information we have marked under section 552.108(b)(1) of the Government Code. The department may withhold questions 6 and 8 and the corresponding recommended and actual answers under section 552.122 of the Government Code. The department must withhold the marked information under section 552.117(a)(2) of the Government Code. The department must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless its owner has consented to its release. The remaining responsive 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_or1.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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 415317

Enc. Submitted documents

c: Requestor
(w/o enclosures)