



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 10, 2011

Mr. Norman Ray Giles  
Attorney for City of Santa Fe  
Chamberlain, Hrdlicka, White, Williams & Martin, P.C.  
1200 Smith Street, Suite 1400  
Houston, Texas 77002

OR2011-06447

Dear Mr. Giles:

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# 418137.

The Santa Fe Police Department (the "department"), which you represent, received six requests from the same requestor for the employment records of five named officers and a department police dog. You state the City of Santa Fe (the "city") has released some of the requested information, but claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, and 552.1175 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We understand the department to raise section 552.111 of the Government Code as it refers to the "deliberative process privilege." In addition, although you raise section 552.024 of the Government Code as an exception to disclosure, we note this section is not an exception to public disclosure under the Act. Rather, it permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

<sup>2</sup>We 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.

Initially, we note it appears some of the information you have submitted to us for review is not responsive to the request for information as it does not consist of employment records of the five named officers or the department police dog. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release any nonresponsive information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

We next note the submitted information includes completed reports, evaluations, and leases that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. In addition, under section 552.022(a)(3) of the Government Code, information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *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. 663 at 5 (1999) (governmental body may waive section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the department may not withhold this information under section 552.103 or 552.111. Section 552.108 of the Government Code is also a discretionary exception and, thus, does not constitute other law for purposes of section 552.022(a)(3). *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.108. However, we will consider whether section 552.108 excepts from disclosure the information subject to section 552.022(a)(1). *See* Gov't Code § 552.022(a)(1). In addition, sections 552.101, 552.117, and 552.1175 constitute other law for purposes of section 552.022; therefore, we will also consider whether these sections require you to withhold any of the information at issue.

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 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).<sup>3</sup> *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 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.<sup>4</sup> *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You inform us the information in Exhibits E, F, G, H, and P, which consist of the named officers' employment records, are maintained in the department's internal file pursuant to section 143.089(g). Based on your representation and our review, we find Exhibits E, F, G, H, and P are confidential under section 143.089(g) of the Local Government Code and the department must withhold this information from disclosure under section 552.101 of the Government Code.<sup>5</sup>

Section 552.103 of the Government Code provides in part as follows:

(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

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<sup>3</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-143.055.

<sup>4</sup>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. You inform us the city has released all information maintained in the named officers' civil service files under section 143.089(a).

<sup>5</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

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). The 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The department asserts Exhibit B, which pertains to the department police dog, is excepted from disclosure under section 552.103 because the requestor is involved in litigation with the city. In support of its arguments, the department has submitted documentation related to two separate lawsuits: the first is a defamation lawsuit filed by a department officer against the requestor and his son, which resulted in the requestor filing a related suit in federal court; and the second is a civil rights violation lawsuit filed by the requestor against the city and two named department officers. You do not inform us, and the information does not otherwise indicate, the city is a party to the defamation lawsuit; therefore, we find you have not established this litigation was pending against the city. In regard to the civil rights violation lawsuit, however, we agree the city is a party to this litigation; therefore, you have established there was pending litigation against the city when the department received the request for information. However, you have not explained how the requested information pertaining to the department police dog is related to the pending civil rights violation litigation. See Gov't Code § 552.301(e)(1)(A); *Univ. of Tex. Law Sch.*, 958 S.W.2d at 481; *Heard*, 684 S.W.2d at 212; ORD 551 at 4. Thus, we find the department has not established Exhibit B is excepted from disclosure under section 552.103.

We note the remaining information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.<sup>6</sup> 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.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). 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.

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<sup>6</sup>The 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.

You assert some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). The department must withhold the information we have marked in Exhibit B under section 552.117(a)(2).<sup>7</sup>

Some of the remaining information is also excepted from disclosure under section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.<sup>8</sup>

To conclude, the department must withhold Exhibits E, F, G, H, and P under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must also withhold the information we have marked in Exhibit B under sections 552.102(a), 552.117(a)(2), and 552.137 of the Government Code. The department must release the remaining information.

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

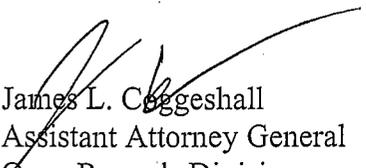
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<sup>7</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

<sup>8</sup>This office issued Open Records Decision No. 684 (2009), 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 opinion.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/eb

Ref: ID# 418137

Enc. Submitted documents

c: Requestor  
(w/o enclosures)