



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 12, 2011

Mr. Jeffrey T. Ulmann  
For City of Kyle  
Knight & Partners  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2011-09885

Dear Mr. Ulmann:

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# 423485.

The City of Kyle (the "city"), which you represent, received a request for all e-mails, excluding those pertaining to active investigations, sent to and from a named officer during a specified time period. You claim the requested 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.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

In his written request for information, the requestor specifically excludes information concerning "current active investigations." Accordingly, such information is not responsive to the request for information. This ruling does not address the public availability of non-responsive information, and such information need not be released in response to this request.<sup>2</sup>

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<sup>1</sup>We assume the "representative samples" of records submitted to this office are 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.

<sup>2</sup>As we are able to make this determination, we need not address your claim under section 552.108(a)(1) for this 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 exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including 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). 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 misconduct in any instance in which the police 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. *See id.* § 143.051 *et seq.*

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). *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 police 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).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. 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.

*Id.* § 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 that section 143.089(g) made the records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (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 that the Kyle Police Department (the “department”) is subject to chapter 143 of the Local Government Code. You contend that the e-mails submitted as Exhibit B “are not records required to be maintained in a police officer’s ‘public’ file under section 143.089(a).” However, you do not inform us the information at issue is held solely in personnel files maintained by the department under section 143.089(g) of the Local Government Code. We note that the confidentiality provided by section 143.089(g) may not be engrafted onto information that is not held in a file maintained under section 143.089(g). Accordingly, we must rule conditionally. Thus, to the extent the information submitted as Exhibit B is held solely in personnel files maintained by the department under section 143.089(g) of the Local Government Code, the information must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g). But, to the extent this information is held outside personnel files maintained by the department, the information at issue is not confidential under section 143.089(g) and may not be withheld on that basis under section 552.101.

You assert the remaining responsive information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in pertinent part, as follows:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov’t Code § 552.108(b)(1). A governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(b)(1), .301(e)(1)(A).

Section 552.108(b)(1) of the Government Code encompasses internal law enforcement and prosecution records, the release of which would interfere with ongoing law enforcement and prosecution efforts in general. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex.

App.—Austin 2002, no pet.). This office has concluded that this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed guidelines regarding police department's use of force policy), 508 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). To claim section 552.108(b)(1), 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). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984). Upon review of your arguments and the information at issue, we find the city has demonstrated that release of some of the information in Exhibit C, which we have marked, would interfere with law enforcement and crime prevention. Accordingly, the city may withhold the information we have marked under section 552.108(b)(1) of the Government Code. However, we find the city has failed to demonstrate that release of the remaining information at issue would interfere with law enforcement and crime prevention. Therefore, the city may not withhold any of the remaining responsive information in Exhibit C under section 552.108(b)(1).

Next, we note some of the remaining information is subject to section 552.117(a)(2) of the Government Code.<sup>3</sup> Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone or pager number if the officer pays for the cellular telephone or pager service with his personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cellular telephone or pager number if officer pays for cellular telephone or pager service); *but see* Open Records Decision No. 506 at 5-6 (1988) (statutory

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

predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials' and employees' private vehicles and intended for official business). We have marked a peace officer's cellular telephone number that must be withheld under section 552.117(a)(2), if the officer concerned personally pays for the cellular telephone service.

In summary, to the extent the information submitted as Exhibit B is held solely in personnel files maintained by the department under section 143.089(g) of the Local Government Code, the information must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city may withhold the information we have marked in Exhibit C under section 552.108(b)(1) of the Government Code. If the officer concerned personally pays for the cellular telephone service, the city must withhold the cellular telephone number we have marked in Exhibit C under section 552.117(a)(2) of the Government Code. 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\\_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 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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 423485

Enc. Submitted documents

c: Requestor  
(w/o enclosures)