



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2011

Ms. Evelyn W. Njuguna
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2011-10183

Dear Ms. Njuguna:

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# 424052 (GC# 18552).

The Houston Police Department (the "department") received a request for forty-two categories of information pertaining to the department's polygraph program. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the National Center for Credibility Assessment, a component of the United States Defense Intelligence Agency (the "DIA"). Accordingly, you state, and provide documentation showing, you notified the DIA of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the DIA. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹We 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.

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). Exhibits 12 and 15 pertain to an investigation completed by the department. Thus, this information is subject to section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* § 552.022(a)(1). You claim section 552.111 of the Government Code for the information at issue. Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the department may not withhold Exhibit 12 or Exhibit 15 under section 552.111 of the Government Code. As you raise no further exceptions for Exhibit 15, the department must release Exhibit 15 in its entirety. However, as section 552.101 of the Government Code is other law that makes information confidential for purposes of section 552.022, we will consider the applicability of section 552.101 for Exhibit 12.

Next, we understand the DIA to argue Exhibit 14 should be withheld from disclosure because the information was provided to the department "with the implicit understanding that it would not be released to the public." However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information in Exhibit 14 falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 261.201 of the Family Code provides as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note portions of Exhibits 11 and 12 relate to investigations of alleged or suspected child abuse or neglect conducted by the department. *See id.* §§ 261.001 (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code), 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Accordingly, we find this information is subject to chapter 261 of the Family Code. You do not indicate the department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, we conclude the information we have marked in Exhibits 11 and 12 is confidential pursuant to section 261.201 of the Family Code, and the department must withhold it under section 552.101 of the Government Code.² *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 of the Government Code also encompasses information made confidential by section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). You argue Exhibits 9 and 10, and the remaining information in Exhibits 11 and 12, consist of information acquired from polygraph examinations. You state the requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, we find the department has demonstrated most of the information at issue

²As our ruling is dispositive with respect to this information, we need not address your remaining argument against its disclosure.

consists of information acquired from polygraph examinations. However, we find you have failed to demonstrate how some of the information at issue consists of information acquired from polygraph examinations. Accordingly, with the exception of the information we have marked for release in Exhibits 9 and 10, the department must withhold Exhibits 9 and 10, and the marked information in Exhibits 11 and 12, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses section 143.089 of the Local Government Code. You indicate the City of Houston 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)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. 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 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.

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 section 143.089(g) made these records confidential. *See City of San Antonio*, 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, 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 Exhibit 8 consists of information contained within an officer's internal personnel file maintained by the department pursuant to section 143.089(g) of the Local Government Code. You further state Exhibit 8 is not the type of information required to be maintained under section 143.089(a) as part of the officer's civil service file. Based on your representations and our review, we find Exhibit 8 is confidential under section 143.089(g) of the Local Government Code and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 of the Government Code exempts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, active warrant information or other information relating to an individual's current involvement in the criminal justice system does not constitute criminal history information

for the purposes of section 552.101. *See* Gov't Code § 411.081(b). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit 13 consists of a communication from a department attorney to department personnel in their capacities as clients. You state this communication was made in furtherance of the rendition of professional legal services to the department. You state this communication was made in confidence, and you state the department has maintained the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 13.

Accordingly, the department may withhold Exhibit 13 under section 552.107(1) of the Government Code.

Next, the department and the DIA each claim portions of the remaining information are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information which, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws).

This office has on numerous occasions concluded section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (1989) (holding that predecessor to section 552.108 excepts detailed guidelines regarding police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that predecessor to section 552.108 excepts sketch showing security measures for execution).

You state Exhibits 1, 2, 3, 4, 5, 6, and 7 contain the Standard Operating Procedures and training and testing materials used by the department's Polygraph Unit. You inform us these procedures were "developed and prepared for the sole purpose of providing [department] officers with tactical assistance and information for dealing with polygraph techniques." You argue, and have provided an affidavit from a department lieutenant showing, release of the information at issue would interfere with law enforcement because release would provide detailed information regarding the department's polygraph testing procedures, question formulation, and protocols, and would provide detailed instructions on how to administer specific types of exams. Furthermore, the affidavit states "[w]ith knowledge of these details, a criminal suspect could attempt to deploy countermeasures or prepare for the test so as to [a]ffect or manipulate and alter test results. . . . A person who has knowledge of these questions and procedures could prepare themselves so as to mask their responses in an effort to [a]ffect the test results." Based on your arguments and our review, we find you have demonstrated the applicability of section 552.108(b)(1) to most of the information at issue. However, we find you have failed to demonstrate how release of portions of the information at issue, which we have marked for release, would interfere with law enforcement and crime prevention. Therefore, with the exception of the information we have marked for release, the department may withhold Exhibits 1, 2, 3, 4, 5, 6, and 7 under section 552.108(b)(1) of the Government Code.

In its briefing to this office, the DIA asserts Exhibit 14 is protected by section 552.108(b)(1) of the Government Code. In support of its assertion, the DIA argues “any release would diminish the effectiveness of the polygraph examination as a credibility assessment tool by allowing persons who submit to such an examination to research the exact techniques and procedures that will be employed by the polygraph examiner.” Thus, the DIA argues, “[i]f the effectiveness of the polygraph examination is diminished, then law enforcement activities at all levels of government will be affected and the justice mission will suffer serious harm.” Based on the DIA’s arguments and our review, we find the DIA has demonstrated the applicability of section 552.108(b)(1) to most of the information at issue. However, we find the DIA has failed to demonstrate how release of a portion of the information at issue, which we have marked for release, would interfere with law enforcement and crime prevention. Therefore, with the exception of the information we have marked for release, the department may withhold Exhibit 14 under section 552.108(b)(1) of the Government Code on behalf of the DIA.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by an agency of this state or an agency of another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov’t Code § 552.130(a)(1), (2)). Upon review, we find portions of the remaining information consist of motor vehicle record information. Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.³

In summary, the department must withhold (1) the information we have marked in Exhibits 11 and 12 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) with the exception of the information we have marked for release, Exhibits 9 and 10, and the information we have marked in Exhibits 11 and 12, under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; (3) Exhibit 8 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (4) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (5) the marked motor vehicle record information under section 552.130 of the Government Code. The department may withhold (1) Exhibit 13 under section 552.107(1) of the Government Code; (2) Exhibits 1, 2, 3, 4, 5, 6, and 7 under section 552.108(b)(1) of the Government Code, with the exception of the information we have marked for release; and (3) Exhibit 14 under section 552.108(b)(1) of the Government Code on behalf of the DIA,

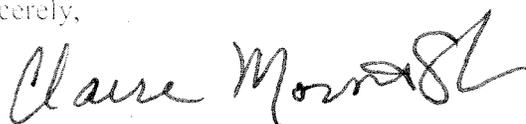
³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a copy of a Texas driver’s license under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

with the exception of the information we have marked for release. The remaining information must be released.⁴

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/bs

Ref: ID# 424052

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Office of General Counsel
Department of Defense
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⁴We note the information being released contains social security numbers. 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. See Gov't Code § 552.147(b).