



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 15, 2011

Mr. Tyler F. Wallach
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-11734

Dear Mr. Wallach:

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# 426860 (PIR Nos. W009126, W009706, and W009707).

The City of Fort Worth (the "city") received requests for six categories of information: (1) the full narratives regarding the requestor's two felony arrests; (2) all recent code compliance warnings and citations for a named street, including four specified addresses; (3) the civil service records for three named police officers; (4) all calls to the police made before and during a specified incident, including two specified 9-1-1 calls; (5) information pertaining to a specified incident; and (6) Fort Worth Police Department (the "department") internal affairs consistency reports. You state the city has released some of the requested information. We note you have redacted Texas driver's license numbers under section 552.130 of the Government Code as permitted by Open Records Decision No. 684 (2009), and 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 sections

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. In addition, 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).

552.101, 552.102, 552.108, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the information in Exhibit D is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(17).³ Exhibit D contains two magistrate's warnings that are subject to section 552.022(a)(17). Although you seek to withhold these records under sections 552.108 of the Government Code, this section is a discretionary exception that protects a governmental body's interest and is, therefore, not "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the city may not withhold the magistrate's warnings, which we have marked, under section 552.108 of the Government Code. As you raise no other exceptions to the disclosure of this information, it must be released.

We now address your argument under section 552.108 (a)(1) of the Government Code for the information in Exhibit D that is not subject to section 552.022. Section 552.108(a)(1) 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 claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of

²Although you also claim the informer's privilege under Texas Rule of Evidence 508, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); Gov't Code § 552.022(a). Because section 552.022 is not applicable to the information that you seek to withhold under the informer's privilege, we do not address your arguments under rule 508.

³We note the information submitted as Exhibit D in response to PIR Nos. W009126 and W009706 is the same information submitted as Exhibit C in response to PIR No. W009707. Therefore, our discussion of Exhibit D encompasses Exhibit C from PIR No. W009707.

information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). You provide an affidavit from the Tarrant County District Attorney's Office (the "district attorney") asserting Exhibit D pertains to a pending criminal case and release of this information would interfere with the district attorney's prosecution of this case. Based on these representations and our review, we conclude release of the remaining information in Exhibit D would interfere with the prosecution of this 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).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-87; Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the city may withhold the information in Exhibit D that is not subject to section 552.022 under section 552.108(a)(1) of the Government Code.⁴

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 encompasses information made confidential by other statutes, 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).

⁴As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

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 raise section 143.089 of the Local Government Code for Exhibits C and C-1, and, in the alternative, for the information you have marked in Exhibit C-1.⁵ You inform us the city's police department maintains this information in its internal files pursuant to section 143.089(g). You also inform us this information relates to internal administrative investigations that did not result in disciplinary action, or did not result in discipline under chapter 143. Based on your representations and our review, we agree the city must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.⁶ We note that some of the information in Exhibit C-1 concerns an internal investigation of a named officer that resulted in disciplinary action under chapter 143. Section 143.089(a)(2) requires the city to place all records relating to disciplinary action in the police officer's civil service file and such records are subject to release. *See* Local Gov't Code § 143.089(a)(2), (f); ORD 562 at 6. In this instance, the request was received by the city, which is required to maintain a civil service file subject to section 143.089(a). Thus, the information in Exhibit C-1 pertaining to the internal investigation that resulted in disciplinary action under chapter 143 must be placed in the named officer's civil service file, and the city may not withhold this information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, the information you have marked in Exhibit C-1 under section 143.089(g) pertains to an internal investigation that did not result in disciplinary action under chapter 143. Accordingly, we agree this information must be withheld under section 552.101 in conjunction with section 143.089(g).

You have also marked the birth date of an employee in Exhibit C-1 under section 552.102 of the Government Code. Section 552.102(a) of the Government Code 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.*,

⁵We are referring to Exhibit C submitted in response to PIR Nos. W009126 and W009706.

⁶As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the birth date you marked in Exhibit C-1 must be withheld under section 552.102(a) of the Government Code.

You assert the ST-3 accident report submitted as Exhibit F is confidential under section 550.065(b) of the Transportation Code. Section 552.101 also encompasses section 550.065(b), which states that except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065. 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). Upon review, we find the requestor has not provided the city with two of the three requisite pieces of information specified by the statute. Accordingly, the city must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.⁷

You raise the common-law informer's privilege for portions of Exhibits E and E-2. Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You state portions of the information in Exhibits E and E-2 disclose the identities of citizens who reported penal code violations to the city's police department, and a city code violation to city staff members charged with enforcement of the code. You also state, and provide documentation showing, the penal code violations are punishable by either fine or confinement in jail, and the city code violation is punishable by a fine of up to \$2,000. Furthermore, you represent the alleged code violator is not aware of the complainants' identities. Based on your representations and our review, we conclude the city may withhold the complainant's identifying information you marked in Exhibit E-2 under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city may also withhold the complainants' identifying information we marked in the documents in Exhibit E, and the complainants' names, addresses, and telephone numbers we have

⁷As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

indicated in the recordings in Exhibit E, under section 552.101 in conjunction with the common-law informer's privilege.⁸ We note, however, that the common-law informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2. One of the submitted requests for information reveals that the subject of the complaint at issue in police report 11-46587, its corresponding incident detail report, and the recording labeled 11-46587 in Exhibit E knows the identity of the complainant. Accordingly, this complainant's identifying information is not protected under the common-law informer's privilege. Furthermore, you have marked the identifying information of the witness listed in police report 11-46587. However, a witness who provides information in the course of an investigation, but does not make the initial report of a violation, is not an informant for purposes of the common-law informer's privilege. Thus, the witness identifying information you marked in police report 11-46587 may not be withheld under the common-law informer's privilege. Additionally, you provide no explanation how the first call on the recording labeled 11-45117 in Exhibit E is protected by the common-law informer's privilege. Therefore, no portion of this call may be withheld under section 552.101 on that basis.

Section 552.101 also encompasses chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Section 772.218 of the Health and Safety Code applies to an emergency communication district for a county with a population of more than 860,000 and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier. *See* Open Records Decision No. 649 (1996). You state the city is part of an emergency communication district that is subject to section 772.218 of the Health and Safety Code. We understand that you seek to withhold an address contained in the first call on the recording labeled 11-45117 in Exhibit E, and an address contained in the recording labeled 11-46587 in Exhibit E. However, we note these recordings reflect that the addresses at issue were provided by the 9-1-1 callers themselves, and not by a 9-1-1 service provider. Thus, this information is not confidential under section 772.218 of the Health and Safety Code and it may not be withheld on that basis under section 552.101 of the Government Code. We also understand that you seek to withhold a telephone number contained in the recording labeled 11-46587 in Exhibit E. In addition, you seek to withhold this telephone number from the incident detail report in Exhibit E which corresponds to that recording. In this instance, the recording reveals that the telephone number at issue was provided by a 9-1-1 service provider. Therefore, the city must withhold this information, which we have indicated and marked, under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code.

You raise section 411.083 of the Government Code for portions of Exhibits E and G. Section 552.101 also encompasses laws that make criminal history record information

⁸As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. Upon review, we find the information we marked in Exhibits E and G consists of CHRI that is confidential under chapter 411 and federal law. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.

The remaining information in Exhibit E includes an e-mail address of a member of the public. 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 email address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address is not specifically excluded by section 552.137(c). As such, the e-mail address, which you have marked, must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, with the exception of basic information and the marked magistrate's warnings, the city may withhold Exhibit D pursuant to section 552.108(a)(1) of the Government Code. The city must withhold Exhibit C and the information you marked in Exhibit C-1 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The birth date you marked in Exhibit C-1 must be withheld under section 552.102(a) of the Government Code. In conjunction with section 552.101 of the Government Code, the city must withhold (1) Exhibit F under section 550.065(b) of the Transportation Code; (2) the information you marked in Exhibit E-2, as well as the information we marked in the documents in Exhibit E and indicated in the recordings in Exhibit E, under the common-law informer's privilege; (3) the telephone number we indicated in the recording labeled 11-46587 in Exhibit E, and marked in the corresponding incident detail report in Exhibit E, under section 772.218 of the Health and Safety Code; and (4) the information we marked in Exhibits E and G under chapter 411 of the Government

Code and federal law. The e-mail address you marked in Exhibit E must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. The remaining information must be released.⁹

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 426860

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁹We note the information being released contains information about the requestor that would be protected from public disclosure by laws and exceptions enacted to protect personal privacy. The requestor has a right of access to this private information in accordance with section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). Therefore, if the city receives another request for this particular information from a different requestor, then it should again seek a decision from this office.