



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2012

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2012-02809

Dear Ms. Grace:

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# 446321.

The City of Austin (the “city”) received a request for 25 categories of information related to a specified incident. You indicate that the city has released some of the information to the requestor and that the city has no responsive information for portions of the request.¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.² We have also considered comments received from

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990).

²We 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.

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, and you acknowledge, the city failed to meet the statutory deadlines imposed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). You raise section 552.101 of the Government Code, and we note a portion of the information is subject to section 552.117 of the Government Code,³ both of which can provide a compelling reasons to withhold information. Accordingly, we will address sections 552.101 and 552.117.

Section 552.101 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. We understand 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 for police officers in a civil service city: a civil service file the civil service director is required to maintain and an internal file the police department may maintain for its own use. *See* Local Gov't Code § 143.089(a), (g). Section 143.089(a) provides the police officer's civil service file must contain:

- (1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;
- (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

³The 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).

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

Id. § 143.089(a). For purposes of section 143.089(a)(2), chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of chapter 143 of the Local Government Code).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against the 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. 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. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You assert the submitted information is maintained in the department's internal personnel files pursuant to section 143.089(g). Upon review, we agree a portion of the information at issue constitutes internal files maintained by the department for its own use and thus is confidential under section 143.089(g) of the Local Government Code. Accordingly, the city must withhold this information under section 552.101 of the Government Code. However, the remaining information, which we have marked, consists of evaluations, commendations, and information pertaining to incidents in which the department took disciplinary action against the officer. As previously noted, a police officer's civil service file must contain evaluations conducted by the officer's supervisor, commendations bestowed by a member of the public or the employing department, and information pertaining to misconduct that resulted in disciplinary action. *See* Local Gov't Code § 143.089(a). In this instance, the request was received by the city, which has access to the files maintained under subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Because the information we have marked consists of evaluations, commendations, and information pertaining to disciplinary action taken by the department, it must be maintained in the civil service file pursuant to section 143.089(a)(1). This information may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

We note a portion of the remaining information is protected by common-law privacy, which is also encompassed by section 552.101 of the Government Code. Common-law privacy protects information if it (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 met. *Id.* at 681-82. Common-law privacy protects the types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must withhold the marked information under section 552.101 in conjunction with common-law privacy.

We also note portions of the remaining information may be protected by section 552.117 of the Government Code, which provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, emergency contact information, or social security number of the following person or that reveals whether the person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;
- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable[.]

Gov't Code § 552.117(a)(1)-(2). We have marked information that is subject to this section. Section 552.117(a)(2) applies to the personal information of peace officers as defined by article 2.12 of the Code of Criminal Procedure. It is unclear whether all of the individuals whose information we have marked are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, if an individual whose information we marked is a currently licensed peace officer, the city must withhold that individual's information under section 552.117(a)(2).

However, if an individual is not a currently licensed peace officer, then the information we have marked is subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code exempts from disclosure the personal information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See id.* §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Thus, if an individual who is not a currently licensed peace officer timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). Conversely, if an individual who is not a currently licensed peace officer did not make a timely election under section 552.024, the city may not withhold such information under section 552.117(a)(1).⁴

In summary, with the exception of the information we marked for release, the city must withhold the submitted information under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the information we marked under (1) section 552.101 of the Government Code in conjunction with common-law privacy and (2) section 552.117(a)(2) of the Government Code, for currently licensed peace officers. If an individual whose information we marked is not a currently licensed peace officer, but did make a timely request for confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1). The remaining information we have marked for release must be released to the requestor.

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

⁴We note even if an individual did not make a timely election under section 552.024 of the Government Code, section 552.147(b) of the Government Code permits a governmental body to redact a living individual's social security number with out requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 446321

Enc. Submitted documents

c: Requestor
(w/o enclosures)