



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 19, 2012

Mr. Brandon S. Shelby  
City Attorney  
City of Sherman  
P.O. Box 1106  
Sherman, Texas 75091-1106

OR2012-04030

Dear Mr. Shelby:

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# 448045.

The City of Sherman (the "city") received a request for information related to the termination and reassignment of a named employee. You claim the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, 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 must address the city's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). You state the city received the request for information on December 20, 2011. This office does not count holidays as business days for

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<sup>1</sup>We assume the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the city's ten-business-day deadline was January 5, 2012. The city did not request a decision from this office until January 6, 2012. Accordingly, we conclude the city failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption 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.—Forth Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-81 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You claim an exception to disclosure under section 552.108 of the Government Code, which is discretionary and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the city may not withhold any of the submitted information under section 552.108. However, you also raise sections 552.101 and 552.102 of the Government Code. In addition, some of the submitted information is subject to sections 552.117, 552.1175, 552.130, and 552.137 of the Government Code.<sup>2</sup> Because these exceptions can provide compelling reasons to withhold information, we will address the applicability of these exceptions to the submitted 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 section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. 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

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. You contend the present request requires the city to compile the criminal history of a named individual. After reviewing the request and the submitted information, however, we find the requestor is seeking specified information. Accordingly, we find this request does not require the city to compile unspecified law enforcement records; thus, the request does not implicate an individual's common-law right to privacy.

Section 552.101 of the Government Code also encompasses information protected by 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 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)-(2). 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). 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. Texas Attorney General*, 851 S.W.2d 946 (Tex.App.—Austin 1993, writ denied).

You state the submitted information contains “information relating to a fire fighter or police officer.” However, you do not state how the information is maintained. We note the submitted information pertains to an incident in which the department took disciplinary action against the officer and this information also pertains to criminal allegations. As

previously noted, a police officer's civil service file must contain 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 submitted information consists of 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). As previously noted, the submitted information does not relate solely to an internal affairs investigation, in that the police department also conducted a criminal investigation of the incident. Confidentiality under section 143.089(g) may not be engrafted onto information that is created for other law enforcement purposes and does not relate solely to the officer's employment relationship. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 564-65 (Tex. App.—San Antonio 2000, pet. denied). The submitted information may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses section 1701.306 of the Occupations Code, which provides in relevant part:

(a) The [Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE")] may not issue a license to a person unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a blood test or other medical test.

(b) An agency hiring a person for whom a license is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. A declaration is not public information.

Occ. Code § 1701.306(a), (b). The submitted information contains L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms. These forms, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

As previously discussed, section 552.101 of the Government Code encompasses the common-law right of privacy, which protects information that is highly intimate or

embarrassing and is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d 685. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision No. 545 (1990). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, this information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. We note the submitted information is related to a criminal investigation. The public has a legitimate interest in knowing the general details of a crime. See generally *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 250 (5th Cir. 2007) (noting a “legitimate public interest in facts tending to support an allegation of criminal activity” (citing *Cinel v. Connick*, 15 F.3d 1338, 1345-46 (5th Cir. 1994)); *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-187 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref’d n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (public has legitimate interest in details of crime and police efforts to combat crime in community). We therefore conclude the remaining information either is not highly intimate or embarrassing or it is of legitimate public concern. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim the remaining information is excepted from disclosure under section 552.102 of the Government Code. 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) and held excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we conclude you must withhold the information we marked under section 552.102(a) of the Government Code. The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

We note some of the remaining information may be subject to section 552.117(a)(2) of the Government Code, which excepts from public disclosure the home addresses, home telephone numbers, 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.<sup>3</sup> See Gov’t Code § 552.117(a)(2). We note section 552.117(a)(2)

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<sup>3</sup>“Peace officer” is defined by Article 2.12 of the Texas Code of Criminal Procedure.

protects a peace officer's personal cellular telephone or pager number if the officer pays for the cellular telephone or pager service with his or her personal funds. *See* Open Records Decision No. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cell phone or pager number if officer pays for cell phone or pager service). We note the information at issue pertains to a current city police officer and the named individual, a former city police officer. The city must withhold the cellular telephone number we have marked that belongs to the current city police officer if the officer pays for the cellular telephone service with his own funds. It is unclear whether or not the named individual is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Thus, if the named individual is a currently licensed peace officer as defined by article 2.12, the city must withhold the marked information pertaining to her under section 552.117(a)(2) of the Government Code; the city may only withhold the named individual's cellular telephone number if she pays for the cellular telephone service with her own funds. If, however, the named individual is not a currently licensed peace officer, her personal information may not be withheld under section 552.117(a)(2) of the Government Code.

However, if the named individual is no longer a licensed peace officer, then her personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). 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 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. Therefore, if the individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12 and timely requested confidentiality under section 552.024, the city must withhold the marked information pertaining to her under section 552.117(a)(1) of the Government Code; the city may only withhold the named individual's cellular telephone number if she pays for the cellular telephone service with her own funds. If the individual whose information is at issue did not make a timely election under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Upon review, we find

the city must withhold the types of information we have marked and noted under section 552.1175 if the individuals to whom this information concerns are currently licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b). However, the city may not withhold the marked information under section 552.1175 if the individuals are not peace officers or no election is made.

The remaining information contains information subject to section 552.130 of the Government Code, which excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1). Accordingly, the city must withhold the information we have marked under section 552.130 of the Government Code.

The remaining information also contains information subject to section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). The e-mail address we have marked is not specifically excluded by section 552.137(c). As such, this marked e-mail address must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

In summary, the city must withhold: (1) the L-2 Declaration of Medical Condition and L-3 Declaration of Psychological and Emotional Health forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the information we have marked under section 552.102(a) of the Government Code. The city must withhold the cellular telephone number we have marked that belongs to the current city police officer if the officer pays for the cellular telephone service with his own funds under section 552.117(a)(2) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, if the named individual is a currently licensed peace officer as defined by article 2.12; the city may only withhold the named individual's cellular telephone number if she pays for the cellular telephone service with her own funds. If the named individual is no longer a peace officer as defined by article 2.12 and timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, but may only withhold the named individual's cellular telephone number if she pays for the cellular telephone service with her own funds. The city must withhold the information we have marked and noted under section 552.1175 of the Government Code if the individuals to whom this information concerns are currently licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code; and the e-mail address we have

marked under section 552.137, unless the owner of the address has affirmatively consented to its release. The city 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 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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 448045

Enc. Submitted documents

c: Requestor  
(w/o enclosures)