



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 2, 2012

Ms. Linda Pemberton
Paralegal
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2012-04714

Dear Ms. Pemberton:

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# 449255 (W007105).

The Killeen Police Department (the “department”) received a 10-part request for information related to (1) the department’s police explorer program, including documents created since a specified date, the program’s curriculum for a specified time period, and officer policies; (2) a named police officer, including his employment contract and disciplinary record, his placement on administrative leave, the incident report for a sexual assault charge, and e-mails involving the officer during specified time periods; and (3) contracts or agreements with BAIR Analytics. You indicate the department has no responsive contract involving the named officer.¹ We understand some of the requested information has been released. You claim the submitted 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 information you submitted.

We note one of the e-mails involving the officer does not fall within either of the time periods specified by the requestor and thus is not responsive to the present request for information. This decision does not address the public availability of the non-responsive information, which we have marked, and the department need not release that information in response to the present request.

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or 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), 452 at 3 (1986), 362 at 2 (1983).

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 261.201 of the Family Code, which provides in part:

(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 [the Family 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 [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We find some of the information in Attachment E was used or developed in an investigation of alleged or suspected child abuse, so as to fall within the scope of section 261.201(a). *See id.* §§ 261.001(1)(E) (defining “abuse,” for purposes of Fam. Code ch. 261, as including offense of sexual assault under Penal Code § 22.011); Penal Code § 22.011(c) (defining “child”). As you do not indicate the department has adopted a rule that governs the release of this type of information, we assume no such rule exists. Given that assumption, we conclude the department must withhold the information we have marked in Attachment E under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute). We find you have not demonstrated any of the remaining information in Attachment E consists of a report of alleged or suspected child abuse or neglect made under chapter 261 of the Family Code; the identity of a person making such a report; or files, reports, records, communications, audiotapes, videotapes, or working papers used or developed in an investigation under chapter 261. We therefore conclude the department may not withhold any of the remaining information in Attachment E under section 552.101 of the Government Code on the basis of section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses section 143.089 of the Local Government Code, which 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 the police department may maintain for its own internal use.² *See* Local Gov’t Code § 143.089(a), (g). The officer’s civil service file must contain certain

²You state the department is subject to chapter 143 of the Local Government Code.

specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to 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 *et seq.* 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 related 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 must be forwarded 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 related to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines 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 a separate and independent internal personnel file related to a police officer for its own use and 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 the 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 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, no pet.) (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 indicate the information in Attachment F is contained in personnel files maintained by the department under section 143.089(g). Based on your representations and our review, we conclude the department must withhold Attachment F under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.³

You also claim section 552.101 of the Government Code in conjunction with chapter 61 of the Code of Criminal Procedure, which deals with intelligence information pertaining to street gangs. Article 61.02 provides in part that “a criminal justice agency may compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of criminal combinations or criminal street gangs.” Crim. Proc. Code art. 61.02(a). Article 61.03 provides in part:

(a) A criminal justice agency that maintains criminal information under this chapter may release the information on request to:

- (1) another criminal justice agency;
- (2) a court; or
- (3) a defendant in a criminal proceeding who is entitled to the discovery of the information under Chapter 39.

Id. art. 61.03(a). Article 61.05 of the Code of Criminal Procedure provides that release of the information to a person who is not entitled to the information is a Class A misdemeanor. You inform us the information in Attachment G is maintained in the department’s intelligence records for the purpose of investigating criminal gangs and may only be retrieved from documents contained in gang records. You do not indicate the requestor is entitled to obtain the information under article 61.03. Based on your representations and our review, we conclude the department must withhold Attachment G under section 552.101 of the Government Code in conjunction with article 61.03 of the Code of Criminal Procedure.⁴

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in

³We note the department is required to refer a request for information held in a file maintained under section 143.089(g) to the civil service director or the director’s designee. We assume the department has done so.

⁴As we are able to make this determination, we need not address your other claim for Attachment G.

workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). Although you seek to withhold some of the remaining information in Attachment E on privacy grounds, you have not demonstrated any of the information in question is highly intimate or embarrassing and not a matter of legitimate public interest. We therefore conclude the department may not withhold any of the remaining information in Attachment E under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code exempts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor . . . 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); *see 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 that, 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). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques but was not applicable to generally known policies and procedures. *See* Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution); *compare* Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You seek to withhold the information in Attachment H under section 552.108(b)(1). Based on your representations and our review, we have marked information that may be withheld on that basis. We find you have not sufficiently demonstrated that release of the remaining information at issue would interfere with law enforcement or crime prevention. We therefore conclude the department may not withhold any of the remaining information in Attachment H under section 552.108(b)(1).

We note some of the remaining information in Attachment E is or may be subject to sections 552.117 and 552.137 of the Government Code.⁵ Section 552.117(a)(2) exempts 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 officer has family members, regardless of whether the officer complies with sections 552.024

⁵This office will raise sections 552.117 and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

or 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) also 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). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. You state the telephone numbers you have marked in Attachment E are the personal numbers of two police officers. We conclude the department must withhold the marked information to the extent it consists of an officer's home telephone number or an officer's personal cellular telephone number, provided the officer pays for the cellular telephone service with his or her personal funds. To the extent the information does not consist of such a home or personal cellular telephone number, it may not be withheld under section 552.117(a)(2).

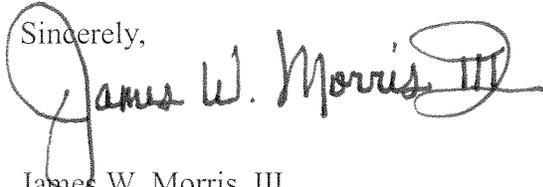
Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. The department must withhold the e-mail addresses we have marked in Attachment E under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.⁶

In summary, the department (1) must withhold the information we have marked in Attachment E under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) must withhold Attachment F under section 552.101 in conjunction with section 143.089(g) of the Local Government Code; (3) must withhold Attachment G under section 552.101 in conjunction with article 61.03 of the Code of Criminal Procedure; (4) may withhold the information we have marked in Attachment H under section 552.108(b)(1) of the Government Code; (5) must withhold the telephone numbers you have marked in Attachment E to the extent they consist of an officer's home telephone number or an officer's personal cellular telephone number, provided the officer pays for the cellular telephone service with his or her personal funds; and (6) must withhold the e-mail addresses we have marked in Attachment E under section 552.137 of the Government Code unless the owners of the e-mail addresses have consented to their disclosure. The rest of the submitted 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.

⁶We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

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,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 449255

Enc: Submitted documents

c: Requestor
(w/o enclosures)