



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 10, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-05126

Dear Ms. Evans:

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# 450226 (Houston GC No. 19309).

The Houston Police Department (the "department") received a request for twelve categories of information regarding motor vehicle accidents involving a named police officer, including a specified incident report and photographs, and any related investigation or disciplinary action. You state that the department has no responsive information for portions of the request.¹ You also state that a portion of the requested information will be made available to the requestor. You claim the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, you inform us the requested incident report and photographs were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-11257 (2011). In that ruling, we found that, with the exception of basic

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.

information, the department may withhold the incident report and photographs under section 552.108(a)(2) of the Government Code. You state the law, facts, and circumstances on which the prior ruling was based have not changed. Thus, we agree the department may continue to rely on Open Records Letter No. 2011-11257 with respect to the incident report and photographs. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we address the requestor's assertion that the department has previously been directed by our office to release some of the requested information in response to a previous request for information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The requestor contends the department was previously directed to release some of the requested information by this office in Open Records Letter No. 2012-01143 (2012) issued January 24, 2012. However, we note this office issued a corrected ruling, Open Records Letter No. 2012-01143A (2012), on February 21, 2012 in which we determined the department may continue to rely on a prior ruling and withhold the information at issue. Further, we have no indication the information at issue has been released to any member of the public. Accordingly, we find section 552.007 is inapplicable to the submitted information.

Next, we address the requestor's assertion the department failed to comply with the procedural requirements of subsections 552.301(d) and 552.301(e-1) of the Government Code. Pursuant to section 552.301(d), the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking for a decision. *See* Gov't Code § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the requestor within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). You state, and provide documentation showing, the department received the request for information on January 20, 2012. Thus, the department's ten and fifteen-business-day deadlines to provide information to the requestor pursuant to subsections 552.301(d) and 552.301(e-1) were February 3, 2012 and February 10, 2012, respectively. The department's request for a decision from this office bears a postmark date of February 3, 2012 and the department's written comments bear a postmark date of February 10, 2012. However, both documents reflect the department copied the requestor's client and not the requestor on the correspondence. Therefore, we

conclude the department failed to comply with the procedural requirements of subsections 552.301(d) and 552.301(e-1) of the Government Code.

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 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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider the applicability of this section 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 exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 143.1214 of the Local Government Code, which provides in part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to a disciplinary action against a fire fighter or police officer to the [civil service] director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) [of the Local Government Code] only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and

(3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You explain the information at issue is related to an internal affairs investigation in which allegations of misconduct by a police officer were sustained. You state the department has forwarded documents that meet the requirements of section 143.1214(c) to the officer's personnel file maintained under section 143.089(a). You indicate the remaining information does not meet all of the conditions of section 143.1214(c) for inclusion in the officer's civil service personnel file. You also state the requestor is not a representative of another law enforcement agency, fire department, or the office of a district or United States attorney. Based on your representations and our review of the information at issue, we conclude the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. *See* Open Records Decision No. 642 (1996) (files relating to investigations of Houston Fire Department personnel by Public Integrity Review Group of Houston Police Department were confidential under Local Gov't Code § 143.1214).

In summary, the department may continue to rely on Open Records Letter No. 2011-11257 with respect to the incident report and photographs. The department must withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/eb

Ref: ID# 450226

Enc. Submitted documents

c: Requestor
(w/o enclosures)