



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2012

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
P.O. Box 850137
Mesquite, Texas 75185-0137

OR2012-08748

Dear Ms. Graham:

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# 455938.

The Mesquite Police Department (the “department”) received a request for all disciplinary reports, complaints, and internal affairs investigation records for four named individuals. You inform us that the department does not have records responsive to some of the requested information pertaining to the first individual named in the request.¹ You state the department will redact information as permitted by Open Records Letter Nos. 2011-15075 (2011) and 2011-15761 (2011).² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.147 of the Government Code.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Open Records Letter Nos. 2011-15075 and 2011-15761 are previous determinations to the department authorizing the department to withhold the originating telephone numbers and addresses, respectively, of 9-1-1 callers furnished to the department by a service supplier established in accordance with chapter 772 of the Health and Safety Code under section 552.101 of the Government Code in conjunction with section 772.118 of the Health and Safety Code without requesting a decision from this office.

We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.³

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 143.089 of the Local Government Code. You state the City of Mesquite is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: 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 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; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). 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 police 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, a document relating to a police officer’s alleged misconduct may not be placed in his civil service file if there is insufficient evidence to sustain the charge of misconduct. Local Gov’t Code § 143.089(b). Information that reasonably relates to a police 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

³We 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 those records contain substantially different types of information than those submitted to this office.

released.⁴ *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You raise section 143.089 for Exhibit 2. You inform us the 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 discipline under chapter 143. Based on your representations and our review, we agree the department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Open Records Decision No. 565 at 7 (1990); *see also generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas 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 id.* § 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. *See 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. Thus, 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. We note, however, section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in criminal justice system). Additionally, we note CHRI does not include information relating to routine traffic violations. *See id.* § 411.082(2)(B). You claim that portions of Exhibit 3 are subject to section 411.083. Upon review, we find the

⁴Section 143.089(g) of the Local Government Code requires a police department that receives a request for information maintained in a personnel file under section 143.089(g) to refer that requestor to the civil service director or the director’s designee. Local Gov’t Code § 143.089(g).

information we have marked constitutes CHRI for purposes of chapter 411.⁵ Accordingly, the department must withhold this information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. However, we find no portion of the remaining information you have marked is CHRI for purposes of chapter 411. Thus, none of the remaining information in Exhibit 3 may be withheld under section 552.101 in conjunction with section 411.083.

Section 552.101 of the Government Code also encompasses section 411.192 of the Government Code. Section 411.192 governs the release of all information maintained by the Texas Department of Public Safety (“DPS”) concerning the licensure of individuals to carry a concealed handgun, and provides as follows:

(a) [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual’s name, date of birth, gender, race, zip code, telephone number, e-mail address, and Internet website address. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552.

(b) An applicant or license holder may be furnished a copy of disclosable records regarding the applicant or license holder on request and the payment of a reasonable fee.

See id. § 411.192(a), (b). We note the remaining information in Exhibit 3 includes concealed handgun license information. It appears the department received this information from DPS. In this instance, the requestor is not a criminal justice agency, nor is the requestor a license holder whose information is at issue. Further, we note section 411.193 is not applicable in this instance. *See id.* § 411.193 (making statistical report including number of licenses issued, denied, revoked, or suspended during preceding month available to public). Therefore, the department must withhold the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 411.192 of the Government Code.⁶

⁵As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

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Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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 demonstrated. *Id.* at 681-82. This office has found that 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) (finding significant privacy interest in compilation of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of criminal history information). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find that a portion of the remaining information in Exhibit 3 is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the department must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.⁷

You assert portions of the remaining information in Exhibit 3 are subject to section 552.117 of the Government Code. Section 552.117(a)(2) 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.⁸ Gov't Code § 552.117(a)(2). Upon review, we conclude the department generally must withhold the information you have marked and we have marked in Exhibit 3 under section 552.117(a)(2) of the Government Code. We note, however, that some of this information concerns a police officer who retired from the department. If the retired officer is currently a licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, then the department must withhold his marked information under section 552.117(a)(2). Otherwise, this information may not be withheld under section 552.117(a)(2).

However, if the retired officer is no longer a licensed peace officer, then his information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request 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

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

⁸"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

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 retired officer is not currently a licensed peace officer as defined by article 2.12, then the department must withhold his marked information under section 552.117(a)(1) of the Government Code if he timely elected to withhold this information pursuant to section 552.024 of the Government Code. However, if the retired officer did not make a timely election, the department may not withhold his information on that basis.

You have marked portions of the remaining information in Exhibit 3 under sections 552.130 and 552.147 of the Government Code. Section 552.130 provides, in part, that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state, or another state or country, is excepted from public release. Gov't Code § 552.130(a)(1)-(2). Upon review, we conclude the department must withhold the driver's license and motor vehicle record information you have marked and we have marked in Exhibit 3 under section 552.130 of the Government Code.⁹

Section 552.147(a) of the Government Code provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *Id.* § 552.147(a). The department may withhold the social security numbers you have marked in Exhibit 3 under section 552.147 of the Government Code.¹⁰

In summary, the department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The department must withhold the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code, section 411.192 of the Government Code, and common-law privacy. The department generally must withhold the information you have marked and we have marked

⁹We note the Texas legislature amended section 552.130 of the Government Code effective September 1, 2011, to allow a governmental body to redact the information described in subsections 552.130(a)(1) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Further, we note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas license plate number, under section 552.130(a)(2) of the Government Code, without the necessity of requesting an attorney general opinion.

¹⁰We note 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.

in Exhibit 3 under section 552.117(a)(2) of the Government Code. However, if the retired officer whose information is at issue is not currently a licensed peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, then the department may not withhold his marked information under section 552.117(a)(2) of the Government Code. The department, however, must withhold this information under section 552.117(a)(1) of the Government Code if the retired officer timely elected to withhold it pursuant to section 552.024 of the Government Code. Otherwise, the department may not withhold this information on that basis. The department must withhold the driver's license and motor vehicle record information you have marked and we have marked in Exhibit 3 under section 552.130 of the Government Code. The department may withhold the social security numbers you have marked in Exhibit 3 under section 552.147 of the Government Code. The department must release the remaining information in Exhibit 3.

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/dls

Ref: ID# 455938

Enc. Submitted documents

c: Requestor
(w/o enclosures)