ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

Ms. Elizabeth L. White
For City of Seabrook
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056

OR2012-10918

Dear Ms. White:

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# 459208 (Seabrook File No. 3957-1).

The City of Seabrook (the "city"), which you represent, received a request for all disciplinary records in the personnel files of four specified individuals. You state the city will release some of the requested information with information redacted pursuant to Open Records Decision Nos. 684 (2009)[1] and 670 (2001)[2] and section 552.147[3] of the Government Code. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.114, 552.115, 552.117, 552.119, 552.122, 552.130, 552.136, 552.137,

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[1]We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including W-2 and W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and direct deposit authorization forms under section 552.101 of the Government Code in conjunction with common-law privacy. ORD 684 at 14-15.

[2]Open Records Decision No. 670 authorizes all governmental bodies to withhold the current and former home addresses and telephone numbers, personal cellular telephone and pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision. ORD 670 at 6.

[3]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. Gov't Code § 552.147(b).

and 552.140 of the Government Code.[4] We have considered the exceptions you claim and reviewed the submitted representative sample of information.[5]

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 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.

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[4]Although you also raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception for information the city holds in an employment capacity. Also, we note that although you raise section 552.024 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

[5]We 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.

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 released.[6] *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 state the information submitted in Exhibits A2, B2, C2, and D2 is contained within the city's internal files and maintained under section 143.089(g) of the Local Government Code. Based on your representations and our review of the information at issue, we agree that the information in Exhibits A2, B2, C2, and D2 is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.[7]

Next, we address your arguments for the remaining information not contained in the city's internal files. Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code, which renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]

26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Chamberlain v. Kurtz*, 589 F.2d 827, 840-41 (5th Cir. 1979); *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the city must withhold the W-4 forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

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[6]Section 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).

[7]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which 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 established. *Id.* at 681–82. The type of information considered highly 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 found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, none of the remaining information may be withheld on that basis.

You assert the submitted birth certificates are excepted from disclosure under section 552.115 of the Government Code. Section 552.115 excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). Section 552.115 is applicable only to information maintained by the bureau of vital statistics or local registration official. *See* Open Records Decision No. 338 (1982). Therefore, because they are maintained by the city, the submitted birth certificates may not be withheld under section 552.115 of the Government Code.

Section 552.117(a)(2) of the Government Code 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 of the Government Code or section 552.1175 of the Government Code.[8] Gov't Code § 552.117(a)(2). Accordingly, the city must withhold the information we have marked in the

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[8]"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

remaining information under section 552.117(a)(2) of the Government Code. We note section 552.117(a)(2) also encompasses a peace officer's cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The remaining information contains the cellular telephone numbers of the named peace officers. Therefore, the city must withhold the information we have marked under section 552.117(a)(2); however, the city must withhold the marked cellular telephone numbers only if a governmental body did not pay for the service.[9]

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we find the city must withhold the driver's license information and motor vehicle record information we have marked in the remaining information under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the city must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.[10]

The remaining information contains birth dates of the specified officers. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a).[11] The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the city must withhold the birth dates we have marked under section 552.102 of the Government Code.

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[9]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

[10]We note section 552.136(c) authorizes a governmental body to redact the information described in section 552.136(b) without the necessity of seeking an attorney general decision. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

[11]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

The remaining information contains a photocopy of one of the specified officer's identification card. Section 552.139(b)(3) of the Government Code provides, "a photocopy or other copy of an identification badge issued to an official or employee of a governmental body" is confidential. Gov't Code § 552.139(b)(3). Therefore, the city must withhold the photocopy of the identification card, which we have marked, under section 552.139(b)(3) of the Government Code.[12]

In summary, the city must withhold: (1) the information in Exhibits A2, B2, C2, and D2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) the W-4 forms we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (3) the information we have marked under section 552.101 in conjunction with common-law privacy; (4) the birth dates we have marked under section 552.102 of the Government Code; (5) the information we have marked under section 552.117(a)(2) of the Government Code; however, the marked cellular telephone numbers may only be withheld if a governmental body did not pay for the service; (6) the driver's license information and motor vehicle record information we have marked under section 552.130 of the Government Code; (7) the insurance policy numbers you have marked under section 552.136 of the Government Code; and (8) the photocopy of the identification card we have marked under section 552.139(b)(3) of the Government Code. The remaining 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.

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,

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

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[12]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Ref: ID# 459208

Enc. Submitted documents

c: Requestor
(w/o enclosures)