



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2012

Ms. Victoria Huynh
Deputy City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2012-15260

Dear Ms. Huynh:

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# 466237.

The City of Plano (the "city") received a request for the personnel file of a named city firefighter, including any disciplinary history. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed 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 information made confidential by other statutes, such as 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 contemplates two different types of personnel files for fire fighters in a civil service city: a civil service file the civil service director is required to maintain and an internal file the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). The fire fighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter's supervisor, and documents relating to any misconduct in which the fire department took disciplinary action against the fire fighter 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 chapter 143 of the Local Government Code).

In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against a fire fighter, 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 fire fighter's civil service file maintained under section 143.089(a). *See Abbott v. City of 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 in possession of the fire department because of its investigation into a fire fighter's misconduct, and the fire department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state Exhibit B-2 is contained in the city's fire department's internal files maintained under section 143.089(g). We note none of the information in Exhibit B-2 relates to internal administrative cases or investigations that resulted in discipline under chapter 143. Based on your representation and our review, we agree Exhibit B-2 is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

You also seek to withhold Exhibit B-1, which consists of the city's civil service file for the named fire fighter, under subsection 143.089(f) of the Local Government Code. Subsection 143.089(f) provides "[t]he director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless the release of the information is required by law." Local Gov't Code § 143.089(f). In Open Records Decision No. 562, this office addressed the phrase "unless the release of the information is required by law" in subsection (f) and concluded the Act is a law that requires release of information. Open Records Decision No. 562 at 5, 6 (1990). Thus, the decision further concluded subsection (f) does not prohibit disclosure of a personnel file in a situation governed by the Act. *Id.* at 6. As such, the fire fighter's written permission is not required in order to release the information at issue because release of the information is required by law. Accordingly, Exhibit B-1 must be released, unless it is otherwise excepted from disclosure under the Act. We note some of the information in Exhibit B-1 is excepted from disclosure under

sections 552.101, 552.102, 552.117, and 552.137 of the Government Code.¹ Accordingly, we will address the applicability of these sections to the information in Exhibit B-1.

Section 552.101 of the Government Code also 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. *Id.* at 681-82. 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. *See id.* at 683. This office has found that 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).* Upon review, we find that portions of the information at issue are highly intimate or embarrassing and not of legitimate public concern. Thus, the city must withhold the information we have marked in Exhibit B-1 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) 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.” Gov’t Code § 552.102(a). The Texas Supreme Court 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). Having carefully reviewed the information at issue, we have marked the information in Exhibit B-1 that must be withheld pursuant to section 552.102(a) of the Government Code.

Section 552.117 of the Government Code 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 that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Therefore, the city may only withhold the information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the

¹The 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).*

request for this information was made. To the extent the employee timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked in Exhibit B-1 under section 552.117 of the Government Code. However, if the employee did not make a timely election, the city may not withhold the marked information on this basis.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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). The e-mail address listed in the information at issue is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked in Exhibit B-1, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release.³ See *id.* § 552.137(b).

In summary, the city must withhold Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the information we have marked in Exhibit B-1 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked in Exhibit B-1 under section 552.102(a) of the Government Code. To the extent the employee timely elected to keep such information confidential, the city must withhold the information we have marked in Exhibit B-1 under section 552.117 of the Government Code. The city must withhold the personal e-mail address we have marked in Exhibit B-1, unless the owner of the address has affirmatively consented to its release. 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

²Regardless of the applicability of section 552.117, 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).

³Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read 'VB', with a long horizontal flourish extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/akg

Ref: ID# 466237

Enc. Submitted documents

c: Requestor
(w/o enclosures)