



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2012

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2012-15276

Dear Ms. Grace:

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# 466053.

The Austin Police Department (the "department") received three requests for information pertaining to a specified incident involving the shooting of a named individual by a department officer on a specified date, including, documents pertaining to the interaction of department officers with the named individual since April 1, 2012, all reports, investigations, notes, and all other information pertaining to the investigation, including witness statements, audio and video recordings, as well as the name and rank of the officers who found specified evidence at the crime scene and logged the evidence, and five probable cause affidavits filed by the named officer that were deemed insufficient prior to his first evaluation. You state two 9-1-1 telephone calls and other information have been made available to the requestors. You further state the department does not have information responsive to portions of the requests.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

exceptions you claim and reviewed the submitted representative sample of information.² We have also considered comments received from one of the requestors. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, you inform us the audio and video recordings and 9-1-1 telephone calls that were not released were previously the subject of a request for information in response to which this office issued Open Records Letter No. 2012-06099 (2012). In Open Records Letter No. 2012-06099, we concluded the department may withhold the audio and video recordings and 9-1-1 telephone calls at issue under section 552.108(a)(1) of the Government Code. You state the law, facts, and circumstances on which Open Records Letter No. 2012-06099 was based have not changed. Therefore, the department may continue to rely on this prior ruling as a previous determination and withhold the identical information in accordance with Open Records Letter No. 2012-06099. *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 information is or is not excepted from disclosure).

Next, we must address one of the requestor's assertions that the department did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See Gov't Code § 552.301(b)*. This requestor states that he sent his initial request for information via facsimile to the department on April 6, 2012, and provides a copy of a confirmation that the facsimile was sent. You state the department received the initial request from this requestor via facsimile on July 6, 2012 and provide an affidavit stating the department did not receive a request from this requestor on April 6, 2012. The determination of the date the department received the request for information is a question of fact. This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986)*. Where a fact issue is not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4*. Thus, we must accept the department's representation that it received the request for information on July, 6, 2012. Accordingly, the tenth business day was July 20, 2012. The department requested a ruling from this office on July 19, 2012. Therefore, we conclude the department complied with the requirements of section 552.301 of the Government Code.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Accordingly, we will consider the department's arguments against disclosure of 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 section 143.089 of the Local Government Code. The City of Austin 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 the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). 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 department must forward them to the civil service commission for placement in the civil service personnel file.³ *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, information maintained in a police 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 that the information in Exhibit A is held in files maintained by the department under section 143.089(g). You state the information contained in Exhibit A pertains to an administrative investigation by the department's Internal Affairs unit into the officer

³Section 143.089(g) requires a police or fire department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

involved shooting. You further state that investigation is ongoing, and thus, no disciplinary action has been taken against the officer involved. Upon review, we agree that the information maintained in the department's internal files is confidential under section 143.089(g) of the Local Government Code, and therefore, the information in Exhibit A must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body must reasonably explain how release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information in Exhibit B is related to an ongoing criminal investigation, and its release would interfere with the investigation. Based on your representation, we find release of the information at issue would interfere with the detection, investigation or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page offense and arrest information held to be public in *Houston Chronicle* and includes the name of the investigating officer. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Accordingly, with the exception of basic information, the department may withhold the information in Exhibit B under section 552.108(a)(1) of the Government Code.

In summary, the department may continue to rely on Open Records Letter No. 2012-06099 as a previous determination and withhold the information we previously ruled on in accordance with that prior ruling. The department must withhold the information contained in Exhibit A under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. With the exception of basic information, the department may withhold the information contained in Exhibit B under section 552.108(a)(1) 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/eb

Ref: ID# 466053

Enc. Submitted documents

c: Requestor
(w/o enclosures)