



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2013

Mr. Mark G. Daniel
For City of Watauga
Evans, Daniel, Moore, Evans & Lazarus
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2013-02290

Dear Mr. Daniel:

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# 478781 (ORR# 12-157).

The City of Watauga (the "city"), which you represent, received a request for information concerning the suspension of two police officers.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state report 12-853 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-09650 (2012). There, we determined report 12-853 must be withheld under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. Accordingly, we conclude the city must continue to rely on that decision as a previous determination and withhold

¹We note the city sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you also raise section 552.1175 of the Government Code for some of the submitted information, we note section 552.117 of the Government Code is the proper exception to raise in this instance because the city holds the information at issue in an employment capacity.

report 12-853 in accordance with that ruling. *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).

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 police 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 released. *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 submitted information relates to the indefinite suspension of the two officers. You explain both officers appealed their suspension, but a hearing before a Hearing Examiner has not occurred. You state the submitted information is maintained in the officers' civil service files under section 143.089(a) pending the outcome of the appeal. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-.055 (describing disciplinary action for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). Section 143.089(c) provides information placed in a civil service file under section 143.089(a)(2) may be removed from the civil service file if the civil service commission determines (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov't Code § 143.089(c). Although the submitted information is held in the officers' civil service files, you seek to withhold this information because "[t]he potential exists for the Hearing Examiner to determine that the disciplinary action against both officers was taken without just cause or the charges of misconduct were not supported by sufficient evidence." However, section 143.089(c) signifies complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. As previously noted, records held in the civil service file may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See id.* § 143.089(f); ORD 562 at 6. Accordingly, the city may not withhold the submitted information on that basis.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which makes confidential juvenile law enforcement records relating to conduct by a child that occurred on or after September 1, 1997. Fam. Code § 58.007(c). The relevant portion of section 58.007 provides:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). *See also id.* § 51.02(2) (defining “child” as a person who is ten years of age or older and younger than seventeen years of age). Section 58.007(c) does not apply to law enforcement records that relate to a juvenile only as a complainant, victim, witness, or other involved party; rather the juvenile must be involved as a suspect, offender, or defendant. *See id.* § 58.007(c). Upon review, we find report 12-664 pertains to a case that involves a juvenile only as a detained witness. Accordingly, this information is not subject to section 58.007 of the Family Code and may not be withheld under section 552.101 of the Government Code. The remaining information you seek to withhold pertains to an internal affairs investigation. The internal affairs investigation does not consist of juvenile law enforcement records for purposes of section 58.007. Therefore, none of the remaining information is subject to section 58.007 of the Family Code and may not be withheld under section 552.101 of the Government Code.

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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). Additionally, this office has determined common-law privacy protects the identities of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007(c). Upon review, we find the information we have marked is highly intimate and embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117 also encompasses a personal 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). You state the city does not pay for the cellular service of the employee at issue. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The remaining information you have marked is not subject to section 552.117, and the city may not withhold it on that basis.

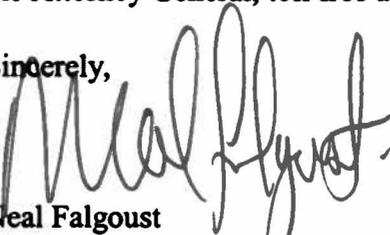
Section 552.130 of the Government Code exempts from disclosure information relating to a motor vehicle operator's or driver's license or permit and a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(1)–(2). Accordingly, the city must withhold the information we have marked under section 552.130 of the Government Code.³ The remaining information you have marked is not subject to section 552.130, and the city may not withhold it on that basis.

In summary, the city must continue to rely Open Records Decision No. 2012-09650 as a previous determination and withhold report 12-853 in accordance with that ruling. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we have marked under section 552.117(a)(2) of the Government Code, and the information we have marked under section 552.130 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

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³Section 552.130 of the Government Code permits a governmental body to redact certain types of motor vehicle record information without requesting a decision from this office, but the governmental body must provide notice to the requestor. See Gov't Code § 552.130(c)–(e). Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to redact several types of information, including a Texas license plate number under section 552.130 of the Government Code, without requesting a decision from this office.

Ref: ID# 478781

Enc. Submitted documents

**c: Requestor
(w/o enclosures)**