ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 22, 2013

Mr. Steven M. Kean
Deputy City Attorney
Legal Department
City of Tyler
P.O. Box 2039
Tyler, Texas 75710-2039

OR2013-08502

Dear Mr. Kean:

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# 488175 (LegalDesk #HNF-634492).

The Tyler Police Department (the "department") received a request for nine categories of information pertaining to the department's Special Weapons and Tactics teams (the "SWAT teams") and seven categories of information pertaining to the department's "Cutting-Edge Weapons and Technology." You indicate the department does not have some of the requested information.[1] You inform us the department will release some of the responsive information. You also inform us the department will redact social security numbers pursuant to section 552.147(b) of the Government Code.[2] You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the

[1]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

[2]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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.[3]

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in relevant part, as follows:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
>
> . . .
>
> (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). We have marked information relating to the expenditure of public funds by the department that is subject to section 552.022(a)(3) of the Government Code, and a search warrant signed by a magistrate that is subject to section 552.022(a)(17) of the Government Code. You seek to withhold this information under section 552.108 of the Government Code. However, this section is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Thus, the department may not withhold the information we have marked pursuant to section 552.022 under section 552.108 of the Government Code. As no further exceptions to disclosure are raised for the information we have marked under section 552.022(a)(17) of the Government Code, the department must release this information on that basis. However, we will address your arguments under section 552.108 for the information not subject to section 552.022. In addition, because sections 552.101, 552.102, 552.130, 552.136, and 552.137 of the Government Code can

[3]We assume the "representative samples" of records submitted to this office are 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.

make information confidential under the Act, we will address the applicability of these sections to all of the remaining information.[4]

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. Section 552.101 encompasses section 143.089 of the Local Government Code. You state the City of Tyler is a civil service municipality 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.[5] *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).

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

[5]Section 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.

You inform us a portion of the remaining information is contained in the department's internal file pursuant to section 143.089(g). Based on your representations and our review, we agree the information at issue is confidential pursuant to section 143.089(g) of the Local Government Code. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code on that basis.

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 claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us some of the remaining information pertains to active criminal investigations being conducted by the department. Based on your representation and our review, we conclude the release of the information you have marked under section 552.108(a)(1) 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). Therefore, we find section 552.108(a)(1) is applicable to this information.

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 information held to be public in *Houston Chronicle. See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We note basic information includes the identity of the complainant and a detailed description of the offense, but does not include information protected by section 552.130 of the Government Code. *See* ORD 127 at 3-4. Thus, with the exception of basic information, which you inform us will be released, the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code.[6]

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the

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[6]As our ruling for this information is dispositive, we do not address your remaining argument against its release.

laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 52.108 excepts sketch showing security measures for execution).

You inform us the remaining information you have marked under section 552.108(b)(1) details the SWAT teams' operation plans, training, and weapons and other equipment. You assert the release of the information at issue would interfere with department operations, would endanger the safety of officers and other persons, and could give individuals a tactical advantage when confronting the police. Based on your representations and our review, we agree the release of some of the information at issue would interfere with law enforcement or crime prevention. Thus, the department may withhold this information, which we have marked and indicated, under section 552.108(b)(1) of the Government Code. However, we find you have not demonstrated how the release of any of the remaining information would interfere with law enforcement or crime prevention. Accordingly, the department may not withhold any of the remaining information under section 552.108(b)(1).

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 personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find you have failed to demonstrate how any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold any of the remaining information under 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 has 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 birth dates we have marked must be withheld under section 552.102(a) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130(a)(1)-(2). Accordingly, the department must withhold the motor vehicle record information you have marked, and the additional information we have marked, in under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides in part that "[n]otwithstanding any other provision of this chapter, 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); *see also id.* § 552.136(a) (defining "access device"). Accordingly, the department must withhold the credit card account numbers we have marked under section 552.136 of the Government Code.

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 id.* § 552.137(a)-(c). Upon review, we have marked e-mail addresses that are not specifically excluded by section 552.137(c). *See id.* § 552.137(c). As such, the e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless their owners affirmatively consent to their release.

Finally, we note a portion of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must release the information we have marked under section 552.022(a)(17) of the Government Code. The department must withhold the information you have marked 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, which you inform us will be released, the department may withhold the information you have marked under section 552.108(a)(1) of the Government Code. The

department may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. The birth dates we have marked must be withheld under section 552.102(a) of the Government Code. The department must withhold the motor vehicle record information you have marked, and the additional information we have marked, under section 552.130 of the Government Code. The credit card account numbers we have marked must be withheld under section 552.136 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The department must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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/bhf

Ref: ID# 488175

Enc. Submitted documents

c: Requestor
(w/o enclosures)