



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2013

Ms. Julia Gannaway
Lynn, Ross & Gannaway, L.L.P
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2013-09080

Dear Ms. Gannaway:

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# 488871.

The City of Waxahachie and the Waxahachie Police Department (collectively, the "city"), which you represent, received a request for information pertaining to a specified internal affairs investigation of a named officer and a second, subsequent request from a different requestor (the "second requestor") for the personnel file of the named officer. You indicate you are withholding social security numbers pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact living person's social security number from public release without necessity of requesting decision from this office under the Act). You state the city has made some of the requested information available to the requestors but claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have also considered comments submitted by the second requestor. *See*

¹Although you also raise section 552.108 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume the city no longer asserts this exception. *See* Gov't Code §§ 552.301, 552.302.

²We 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.

id. § 552.304 (interested party may submit comments stating why information should or should not be released).

You inform us the submitted information pertains to a completed investigation. Section 552.022(a)(1) of the Government Code reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a). You assert the submitted information is excepted from release under section 552.103 of the Government Code. However, section 552.103 is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the submitted information under section 552.103. However, sections 552.101, 552.117, and 552.130 of the Government Code make information confidential under the Act. Accordingly, we will consider the applicability of these sections to 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 excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You inform us 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: a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). 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).³ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122

³Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-143.055.

(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 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. *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 police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

As noted above in part above, you state the submitted information pertains to an investigation of the named officer that resulted in agreed, formal discipline. Thus, while this information may be kept in the internal file maintained under subsection 143.089(g), it must also be kept in the civil service personnel file maintained under subsection 143.089(a). *See* Local Gov’t Code § 143.089(a)(2). The requests for information were collectively received by the city, which has access to the files maintained under both subsections 143.089(a) and 143.089(g). Therefore, the requests encompass both of these files. Accordingly, the city may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). 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. *Id.* at 683. This office has also concluded information that either identifies or tends to identify a victim of sexual harassment must be withheld under common-law privacy. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job).

You inform us the submitted information relates to an internal affairs investigation of the named officer. You assert the identifying information of alleged “victims” and witnesses to the investigation are confidential under common-law privacy because this information relates to sexual matters. Some of the submitted information on one of the submitted recordings is highly intimate or embarrassing and is not of legitimate concern to the public. Therefore, the

city must withhold this information, which we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, however, we find the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code.⁴ Section 552.102(a) 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). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a) 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 or section 552.1175 of the Government Code.⁵ Gov’t Code § 552.117(a)(2). Upon review, we find portions of the submitted information contain personal information of current and former department officers. It is unclear whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, if the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, then the city must withhold the information we have marked on the submitted documents and indicated on the submitted audio recordings under section 552.117(a)(2) of the Government Code. You assert the submitted audio recordings are excepted from release in their entirety because they contain information subject to section 552.117(a)(2) of the Government Code and the city lacks the technical capacity to redact such information from the recording or the confidential information is so closely intertwined or intermingled with nonconfidential information that redaction of the confidential information is impossible. However, because the city has the ability to copy the audio recordings in order to submit them for our review, we believe the city has the capacity to produce copies of only the nonconfidential portions of the audio recordings. Therefore, the city may not withhold the audio recordings in their entirety on that ground. Nevertheless, if the individuals whose information is at issue are no longer licensed peace officers as defined by article 2.12, then the city may not withhold this information under section 552.117(a)(2). None of the remaining information you seek to withhold under section 552.117(a)(2) consists of a peace officer’s home address, home telephone

⁴The Office of the Attorney General will raise a mandatory exception like section 552.102 on behalf of a governmental body, but ordinarily will not raise other exceptions.

⁵“Peace officer” is defined by article 2.12 of the Texas Code of Criminal Procedure.

number, emergency contact information, social security number, or family member information. Accordingly, the city may not withhold any of the remaining information under section 552.117(a)(2).

If the information we marked and indicated under section 552.117 pertains to individuals who are no longer licensed peace officers, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals at issue are no longer peace officers as defined by article 2.12 and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information at issue under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue are no longer peace officers as defined by article 2.12 and did not timely request confidentiality under section 552.024, the city may not withhold the information at issue under section 552.117(a)(1).

Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information you seek to withhold under section 552.130 does not relate to motor vehicle record

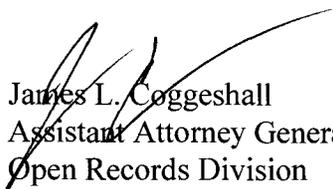
information or a personal identification document issued by a Texas agency or another state or country or a local agency authorized to issue an identification document, and the city may not withhold it from release on that ground.

To conclude, the city must withhold the information we have indicated on the submitted recordings under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information we have marked under sections 552.102 and 552.130 of the Government Code. The city must withhold the information we have marked and indicated under section 552.117(a)(2) of the Government Code to the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure; however, to the extent the individuals at issue are no longer peace officers as defined by article 2.12 and to the extent these individuals timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked and indicated under section 552.117(a)(1) of the Government Code. The city must release the remaining information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 488871

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)