



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-14753

Dear Ms. Folsom:

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# 497138 (Houston GC Nos. 20546, 20547, 20548, 20553, 20557, 20559, 20567, 20571, and 20572).

The City of Houston (the "city") received nine requests from seven requestors for information pertaining to the following for specified time periods: a specified incident, a specified address, training records for four specified members of the city's fire department (the "fire department"), truck equipment used by the fire department, injury and death information for members of the fire department, and recent captains of the fire department.¹ You state the city has released some of the requested information. You also state the city

¹By letters dated June 18 and 20, 2013, you inform this office you are withdrawing your request for a ruling with respect to two of the requests for information because you state information responsive to one of the requests has been released and the city does not possess information responsive to the other request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (Act does not require governmental body to release information that did not exist when it received request or to create responsive information); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

does not possess some of the requested information.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note a portion of Exhibit 4 is not responsive because it was created after the dates all of the present requests for information were received.⁴ This ruling does not address the public availability of any information that is not responsive to the requests, and the city need not release such information in response to these requests.

Next, we address your argument under section 552.108 of the Government Code because it is potentially the most encompassing exception. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) 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 release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Exhibits 5 through 12 relate to a pending criminal investigation, which you indicate is being conducted by the city’s police department. Based upon your representation and our review, we conclude 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). Thus, section 552.108(a)(1) is applicable to Exhibits 5 through 12.

We note, 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). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open

²As previously noted, the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp.*, 562 S.W.2d 266; ORD Nos. 605 at 2, 555 at 1, 452 at 3, 362 at 2.

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴As previously noted, the Act does not require a governmental body to release information that did not exist when it received a request. *See Economic Opportunities Dev. Corp.*, 562 S.W.2d 266.

Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Thus, with the exception of the basic front page offense information, the city may withhold Exhibits 5 through 12 under section 552.108(a)(1).

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 protected by other statutes such as section 143.089 of the Local Government Code. We understand 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 relating to a fire fighter: a fire fighter’s civil service file that the civil service director is required to maintain, and an internal file that 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)-(3).

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).⁵ *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 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 fire fighter’s alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov’t Code § 143.089(b). In addition, a document relating to disciplinary action against a fire fighter that has been placed in the fire fighter’s personnel file as provided by section 143.089(a)(2) must be removed from the fire fighter’s file if the civil service commission finds the disciplinary action was taken without just cause or the charge of misconduct was not supported by sufficient evidence. *See id.* § 143.089(c).

⁵Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. Local Gov’t Code §§ 143.051-.055; *see, e.g.*, Attorney General Opinion JC-0257 (2000) (written reprimand is not disciplinary action for purposes of Local Government Code chapter 143).

Information that reasonably relates to a fire fighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See 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. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the training records in Exhibit 2 are maintained in the fire department's internal file pursuant to section 143.089(g). Based on your representation and our review, we find Exhibit 2 is confidential under section 143.089(g). Accordingly, the city must withhold Exhibit 2 pursuant to section 552.101 in conjunction with section 143.089(g).

Section 552.101 of the Government Code also encompasses section 1702.284(a) of the Occupations Code, which provides:

Information contained in alarm systems records maintained by a governmental body that concerns the location of an alarm system, the name of the occupant of an alarm system location, or the type of alarm system used is confidential and may be disclosed only to the [Texas Private Security Board], to the alarm company to which the confidential records relate, or as otherwise required by state law or court order.

Occ. Code § 1702.284(a); *see also id.* § 1702.002(1)(A)(ii) (defining “alarm system” as electronic equipment and devices designed to detect or signal occurrence of robbery or other emergency). You contend Exhibit 4 pertains to an alarm permit holder and is subject to section 1702.284. Upon review, we find the address, occupant name, and alarm system type we have marked are generally confidential under section 1702.284. We note section 1702.284 provides that information “that concerns the location of an alarm system [or] the name of the occupant of an alarm system location” is protected from disclosure. *Id.* § 1702.284(a). Accordingly, to the extent the information we have marked corresponds to an alarm system location, the name of the occupant of an alarm system location, or the type of alarm system used, we conclude the city must withhold this information under section 552.101 in conjunction with section 1702.284. To the extent the responsive information at issue does not so correspond, the city may not withhold it under section 552.101 on that basis. In either instance, the city has failed to demonstrate how the remaining responsive information in Exhibit 4 concerns the location of an alarm system, the name of the occupant of an alarm system location, or the type of alarm system used. Accordingly, the remaining responsive information in Exhibit 4 may not be withheld under section 552.101 on this basis. *See Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).*

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 satisfied. *Id.* at 681-82. This office has found 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) (information pertaining to prescription drugs, illnesses, operations, and physical disabilities protected from disclosure). However, this office has also noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982). Further, we note that privacy is a personal right that lapses at death, and, thus, common-law privacy is not applicable to information that relates to only a deceased individual. See *Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

You raise common-law privacy for Exhibit 3. We note some of the information at issue in Exhibit 3 pertains to deceased individuals. As previously noted, the right to privacy lapses at death. See *Moore*, 589 S.W.2d at 491. Thus, those individuals' rights to privacy have lapsed, and the information relating to them may not be withheld on this basis. Upon review, we find the types of information we have indicated consist of information pertaining to living individuals that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the types of information we have indicated in Exhibit 3 pursuant to section 552.101 in conjunction with common-law privacy. We find you have failed to demonstrate the remaining information you seek to withhold is information pertaining to living individuals that is highly intimate or embarrassing and not of legitimate public concern. As such, the city may not withhold the remaining information in Exhibit 3 under section 552.101 on the basis of 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). However, we note section 552.102(a) protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore*, 587 S.W.2d at 491. Upon review, we find the information you have marked in Exhibit 13 and the additional information we have indicated in Exhibit 3 that pertains to living individuals must be withheld under section 552.102(a).

We note portions of the remaining information in Exhibits 3 and 13 are subject to section 552.117 of the Government Code.⁶ Section 552.117(a)(1) 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(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note the information at issue in Exhibit 3 pertains to a city employee who is now deceased. Because the protection afforded by section 552.117 includes "current or former" employees, the protection generally does not lapse at death, as it is also intended to protect the privacy of an employee's family members. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked in Exhibits 3 and 13 must be withheld under section 552.117(a)(1). The city may not withhold this information under section 552.117 for those individuals who did not make a timely election to keep the information confidential.

Section 552.136 of the Government Code states, "Notwithstanding 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." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). We note the purpose of section 552.136 is to protect the privacy interests of individuals. As noted above, because the right of privacy lapses at death, information that pertains solely to deceased individuals may not be withheld under section 552.136. *See Moore*, 589 S.W.2d at 491; *see also Attorney General Opinions JM-229, H-917; ORD 272 at 1*. You explain the submitted employee identification numbers are also used as employees' credit union bank account numbers. We note some of the information in Exhibit 3 consists of the employee identification numbers of deceased employees. If the employee identification numbers we have indicated in Exhibit 3 pertain to accounts in which a living individual has an interest, the city must withhold this information under section 552.136. If no living person owns an

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470.*

interest in the information at issue, the city may not withhold the employee identification numbers in Exhibit 3 under section 552.136, and they must be released. The city must withhold the employee identification numbers we have indicated in Exhibit 3 and marked in Exhibit 13 that pertain to living individuals under section 552.136.

We note the remaining information in Exhibit 13 appears to be subject to copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see 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, with the exception of the basic information, the city may withhold Exhibits 5 through 12 under section 552.108(a)(1) of the Government Code. The city must withhold Exhibit 2 pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. To the extent the information we have marked in Exhibit 4 corresponds to an alarm system location, the name of the occupant of an alarm system location, or the type of alarm system used, we conclude the city must withhold this information under section 552.101 of the Government Code in conjunction with section 1702.284 of the Occupations Code. The city must withhold the types of information we have indicated in Exhibit 3 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the information you have marked in Exhibit 13 and the additional information we have indicated in Exhibit 3 that pertains to living individuals under section 552.102(a) of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the information we have marked in Exhibits 3 and 13 must be withheld under section 552.117(a)(1) of the Government Code. If the employee identification numbers of deceased individuals we have indicated in Exhibit 3 pertain to accounts in which a living individual has an interest, the city must withhold this information under section 552.136 of the Government Code. The city must withhold the employee identification numbers we have indicated in Exhibit 3 and marked in Exhibit 13 that pertain to living individuals under section 552.136 of the Government Code. The city must release the remaining responsive information; however, 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Lindsay E. Hale". The signature is written in black ink and is positioned above the typed name.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/tch

Ref: ID# 497138

Enc. Submitted documents

c: Seven Requestors
(w/o enclosures)