



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2013

Mr. Stephen A. Cumbie and Ms. Michelle M. Kretz
Assistant City Attorneys
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2013-16213

Dear Mr. Cumbie and Ms. Kretz:

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# 499582 (City PIR Nos. W026881 and W027786).

The City of Fort Worth (the "city") received two requests from different requestors for information pertaining to a specified incident. The first requestor seeks all records, including the internal affairs investigation file, and the second requestor seeks only the internal affairs investigation file. You state you are releasing some of the requested information to the first requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you have marked a portion of the information submitted in response to the second request as non-responsive to this request. However, we note the information you have marked as non-responsive is an exhibit to the requested internal affairs investigation. Therefore, we find this information is responsive to the instant request, and we will address your argument against its disclosure.

Next, you acknowledge, and we agree, the city did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision with

respect to the first request. *See* Gov't Code § 552.301(b). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). We note the information submitted in response to the second request is identical to information submitted in response to the first request. Although you raise sections 552.101, 552.102, and 552.103 of the Government Code for the identical information in responding to the second request, we note you did not raise section 552.102 or 552.103 in responding to the first request. Further, section 552.101 was not timely-raised in response to the first request. Section 552.103 is a discretionary exception to disclosure and may be waived. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). In failing to comply with the requirements of section 552.301, you have waived the city's claim under section 552.103 with respect to the information submitted in response to both requests. Accordingly, the city may not withhold any of the submitted information under section 552.103. However, because your claims under sections 552.101 and 552.102 of the Government Code can provide compelling reasons for non-disclosure under section 552.302 of the Government Code, we will address your arguments under those exceptions.

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 exception encompasses information other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code. 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 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)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. 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. *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 assert the submitted information is maintained in the city's police department's (the “department”) internal file pursuant to section 143.089(g). You state the information at issue pertains to internal affairs investigations of a department officer that did not result in disciplinary action. However, we note the information at issue includes information relating to misconduct that resulted in disciplinary action taken against the department officer, which we have marked. While this information may be kept in the internal file maintained under section 143.089(g), it must also be kept in the civil service personnel file maintained under section 143.089(a). *See* Local Gov't Code § 143.089(a)(2). In this instance, the requests were 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 marked information relating to misconduct that resulted in disciplinary action maintained in the section 143.089(a) file under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code and must release the marked information to the requestors. Accordingly, except for the information relating to misconduct that resulted in disciplinary action, the city must withhold the submitted information from the second requestor under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.¹ However, the submitted information includes an offense report and an incident detail report that are also maintained independently from the officer's personnel file. The first requestor seeks all records pertaining to the specified incident, while the second requestor seeks only the internal affairs investigation file. Thus, because the first requestor generally asks for information about the incident at issue, both the officer's personnel file and any copies of investigatory materials the department maintains for law enforcement purposes are responsive. The city may not engraft the confidentiality afforded to records under

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 143.089(g) to records that exist independently of the internal files. Accordingly, we find the information that is maintained solely in the department's internal investigative file is confidential under section 143.089(g) and must be withheld from the first requestor under section 552.101 of the Government Code.² However, the information that is also maintained independently of the department's internal investigative file is not confidential under section 143.089(g) with respect to the first requestor and may not be withheld from the first requestor under section 552.101 on that basis. Therefore, we will consider whether the information maintained independently of the internal file may be withheld from disclosure.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information the we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. 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 552.130(a)(1) of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by any agency of this state or another state or country is excepted from public release.³ *See* Gov't Code § 552.130(a)(1). Upon review, the city must withhold the driver's license information we have marked under section 552.130(a)(1) of the Government Code.

In summary, except for the information relating to misconduct that resulted in disciplinary action, the city must withhold the submitted information from the second requestor under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. From the first requestor, the city must withhold (1) the information that is maintained solely in the department's internal investigative file under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, (2) the information we have marked under section 552.101 of the Government Code

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

³The 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 (1987).

in conjunction with common-law privacy, and (3) the driver's license information we have marked under section 552.130(a)(1) of the Government Code. The city must release the remaining information to the first requestor.⁴

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 499582

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)

⁴We note the information being released contains confidential information belonging to the requestor's client. However, the requestor has a right of access to this information in this instance. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide her with information concerning herself). Therefore, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.