



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2013

Mr. C. Tyler Atkinson
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2013-17902

Dear Mr. Atkinson:

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# 502371 (PIR No. W027401).

The City of Fort Worth (the "city") received a request for information related to a specified incident and the personnel file of the involved city police officer.¹ You state the city will release some of the requested information to the requestor. You state the city has withheld military discharge records under section 552.140 of the Government Code in accordance with Open Records Decision No. 684 (2009).² You further state the city will redact a social

¹You inform us the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including military discharge records under section 552.140 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

security number under section 552.147(b) of the Government Code.³ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information submitted in Exhibit C-7. *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). Because your claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure under section 552.302 of the Government Code, we will address your arguments under that exception for the information that was not timely submitted. We will also address your arguments for the records that were timely submitted.

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. 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 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; *see* Attorney General Opinion

³Section 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 a decision from this office. *See* Gov't Code § 552.147(b).

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. *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 information in Exhibit C-1 is maintained in the city police department's internal file pursuant to section 143.089(g). You state the information at issue pertains to internal affairs investigations of a city police officer that did not result in disciplinary action. Therefore, the city must withhold Exhibit C-1 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 information made confidential by section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person[.]

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a), (b). Portions of the submitted information consist of information acquired from a polygraph examination. The requestor does not fall within any of the categories of individuals who are authorized to receive the submitted polygraph information under section 1703.306(a). Accordingly, the city must withhold the polygraph information

you have marked in Exhibit C-2 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.⁴

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") or the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. See 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. See Open Records Decision No. 565 at 7 (1990); see also generally Gov't Code ch. 411 subch. F.

Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. See *id.* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. See *id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. See generally *id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with subchapter F of chapter 411 of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to a person's current involvement with the criminal justice system. See *id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Further, CHRI does not include driving record information. See *id.* § 411.082(2)(B).

Upon review, we find the information we have marked constitutes CHRI for purposes of chapter 411. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law.⁵ However, the remaining information is not CHRI and the city may not withhold it under section 552.101 on that basis.

⁴As we reach this conclusion, we do not address your remaining claim regarding this information. We note a duplicate copy of this information was also submitted in Exhibit C-3.

⁵We note a duplicate copy of this information was also submitted in Exhibit C-6.

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). This office also has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 455 at 9 (employment applicant's salary information not private), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find most of the information you have marked in Exhibits C4 and C7 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. However, we find you have failed to demonstrate how some of the information you seek to withhold constitutes private information pertaining to an identified individual. Accordingly, except for the information that we have marked for release, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁶ The remaining information may not be withheld under section 552.101 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 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 one of the dates you have marked is not an employee's date of birth; we have marked this information for release. Accordingly, except for the information we have marked for release, the city must withhold the information you have marked under section 552.102(a) of the Government Code.

⁶As we reach this conclusion, we do not address your claim under section 552.136 of the Government Code for this information.

Section 552.108(a)(2) of the Government Code excepts “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note, however, section 552.108 is generally not applicable to the records of an administrative investigation that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution). In *Fort Worth v. Cornyn*, the Third Court of Appeals agreed with this office’s long time interpretation of section 552.108(b) stating “the type of internal records that could interfere with law enforcement are those that would divulge a police department’s methods, techniques, and strategies.” *See* 86 S.W.3d at 326. Further, the Court stated, “when a police department acts as an employer, its concerns are similar to those of other governmental agencies—to hire the most qualified applicants—and, when acting in such a capacity, its activities do not ‘relate to law enforcement.’” *Id.* As a general rule, section 552.108 is not applicable to a law enforcement agency’s personnel records. *See id.* at 329 (section 552.108(b) not applicable to documents obtained by police department for purpose of evaluating applicant’s fitness for employment); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer’s file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff’s department), 350 at 3-4 (1982). The information you seek to withhold under section 552.108 was created as part of an employment application background check and is contained in the officer’s personnel file. Upon review, we find you have failed to demonstrate the applicability of section 552.108 to the information at issue. Accordingly, the city may not withhold the information you have marked in Exhibit C-5 under section 552.108(a)(2) of the Government Code.

You seek to withhold some of the remaining information under section 552.117 of the Government Code. Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or

section 552.1175 of the Government Code to keep such information confidential.⁷ Gov't Code § 552.117(a)(2). We note section 552.117(a)(2) does not protect an employee's work telephone number. Accordingly, with the exception of the work telephone numbers we have marked for release, the city must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130. Upon review, we determine the city 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.

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"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136.⁸ Accordingly, the city must withhold the insurance policy number you have marked in Exhibit C-4 under section 552.136 of the Government Code.⁹

In summary, the city must withhold (1) Exhibit C-1 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; (2) the polygraph information you have marked in Exhibit C-2 under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code; and (3) the marked CHRI under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law. Except for the information we have marked for release, the city must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the employee's date of birth you have marked under section 552.102(a) of the Government Code; and (3) the information you have marked, and the additional information we have marked, under section 552.117(a)(2) of the Government Code. The city also must withhold

⁷Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

⁸*See* ORD 684 at 9 (2009) (insurance policy number is an access device number for purposes of section 552.136)

⁹Section 552.136(c) authorizes a governmental body to redact information protected by section 552.136(b) without requesting a decision. *See* Gov't Code § 552.136(d)-(e) (providing requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general, and governmental body withholding information pursuant to section 552.136(c) must provide notice to requestor).

(1) the motor vehicle record information you have marked and the additional information we have marked under section 552.130 of the Government Code and (2) the insurance policy number you have marked in Exhibit C-4 under section 552.136 of the Government Code. The city must release the remaining information.

Finally, you request that this office issue a "previous determination" that would permit the city in the future to withhold from disclosure employee dates of birth under section 552.102(a) of the Government Code without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 502371

Enc. Submitted documents

c: Requestor
(w/o enclosures)