



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 24, 2014

Mr. Jeffrey Giles  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2014-06841

Dear Mr. Giles:

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# 520885 (City GC No. 21173).

The City of Houston (the "city") received a request for several categories of information pertaining to the city fire department's (the "department") guidelines and policies, information related to firefighter injuries and deaths during a specified time period, department thermal imaging cameras, department training records, and department dispatch records. You state you will release some of the requested information. You further state the city does not possess information responsive to some of the request.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

Initially, you state some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-14753 (2013). You state the law, facts, and circumstances on which the prior ruling was based have not changed. Accordingly, to the extent the information responsive to the current request is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter No. 2013-14753 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the remaining information at issue is not encompassed by the previous determination, we will address your arguments against disclosure.

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).<sup>3</sup> *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

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<sup>3</sup>Chapter 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).

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

Section 552.101 also encompasses information protected by the Texas Homeland Security Act (the "HSA"), which added sections 418.176 through 418.182 to chapter 418 of the Government Code. Section 418.176 provides in relevant part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Gov't Code § 418.176(a)(1)-(2). The fact that information may generally be related to emergency preparedness does not make the information per se confidential under the provisions of the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). As with any confidentiality statute, a governmental body asserting this section must adequately explain how the

responsive information falls within the scope of the provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You seek to withhold the portion of the department's guidelines related to weapons of mass destruction. You explain the purpose of these guidelines is to provide a resource for the member of the department to mitigate terrorist incidents involving weapons of mass destruction that utilizes chemical, biological, radiological, explosives, or other substances capable of producing mass casualties. Upon review, we find the information you have marked pertains to the staffing requirements and tactical plan of the department and was collected, assembled, or maintained by the department for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity during the specified event. Therefore, we find the information you have marked falls within the scope of section 418.176, and the city must withhold it under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.<sup>4</sup>

Section 552.101 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 Nos. 455 (1987), 470 (1987) (illness from severe emotional and job-related stress). 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 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).

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

We note some of the information at issue in Exhibit 2 pertains to deceased individuals; 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 marked consist of information pertaining to living individuals that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the types of information we have indicated under section 552.101 of the Government Code in conjunction with common-law privacy. However, you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and of no legitimate public concern; thus, the city may not withhold any of the remaining information at issue 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."<sup>5</sup> 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 city must withhold the information we have indicated that pertains to living individuals under section 552.102(a).

We note a portion of the remaining information is subject to section 552.117 of the Government Code. 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 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 individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked must be withheld under section 552.117(a)(1). The city may not withhold this information under section 552.117 if this individual did not make a timely election to keep the information confidential.

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<sup>5</sup>The 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.*

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. We understand the submitted employee identification numbers are also used as employees' credit union bank account numbers. We note some of the submitted information consists of the employee identification numbers of deceased employees. If the employee identification numbers we have indicated 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 interest in the information at issue, the city may not withhold the employee identification numbers at issue under section 552.136, and they must be released.

In summary, to the extent the information responsive to the current request is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2013-14753 as a previous determination and withhold or release the identical information in accordance with that ruling. The city must withhold the information labeled "training records" pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Additionally, the city must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The city also must withhold the types of information we have indicated pertaining to living individuals under section 552.101 of the Government Code in conjunction with common-law privacy. Next, the city must withhold the information we have indicated pertaining to living individuals under section 552.102(a). Next, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Next, if the employee identification numbers of deceased individuals we have indicated 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. Finally, the city must withhold the employee identification numbers we have indicated that pertain to living individuals under section 552.136 of the Government Code. The remaining information must be released.

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 black ink, appearing to read "Lee Seidlits". The signature is written in a cursive style with a large initial "L".

Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/tch

Ref: ID# 520885

Enc. Submitted documents

c: Requestor  
(w/o enclosures)