



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 2, 2016

Mr. Quentin D. Price
First Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2016-02559

Dear Mr. Price:

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# 596583 (TPIA No. 11-11).

The City of Beaumont (the "city") received a request for information related to a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is a completed investigation subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he 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 [of the Government Code].

Gov't Code § 552.022(a)(1). This information must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law.

You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section 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 of the Government Code. However, you also raise section 552.101 of the Government Code, which protects information made confidential under law, and we note some of the information is subject to sections 552.1175 and 552.130 of the Government Code, which make information confidential under the Act.¹ Thus, we will address the applicability of these exceptions 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. Section 552.101 of the Government Code encompasses 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 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 department took disciplinary action against the fire fighter under chapter 143 of the Local Government Code. *Id.* § 143.089(a).

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).² *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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²Chapter 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).

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 fire fighter's alleged misconduct may not be placed in her 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 explain the submitted information consists of records of an internal affairs investigation that did not result in disciplinary action under chapter 143 of the Local Government Code. You further inform us the submitted information is maintained in the city's fire department's internal personnel files under section 143.089(g). Thus, the submitted information must generally be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. We note, however, the submitted information includes an incident report for the incident specified in the request that may be maintained by the city independently of the internal investigation file. The request for information does not specifically seek information from an internal affairs investigation. Instead, the requestor seeks all information related to the incident at issue. The city may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Thus, to the extent the incident report we have marked is maintained solely in the internal investigation file, it is confidential under section 143.089(g) and must be withheld under section 552.101. However, to the extent the incident report is maintained outside the internal investigation file, the city may not withhold this information under section 552.101 in conjunction with section 143.089(g). In that event, we will address the public availability of the submitted incident report.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information

confidential. Gov't Code § 552.1175. Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). Some of the remaining information pertains to a peace officer not employed by the city. Thus, to the extent the information we have marked consists of the date of birth, telephone number, home address or family member information of a currently licensed peace officer and the officer elects to restrict access to his information in accordance with section 552.1175(b), the city must withhold the information we have marked under section 552.1175. If the individual whose information we have marked is no longer a licensed peace officer or no election is made, the city may not withhold this information under section 552.1175.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). In considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.³ *Tex. Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Accordingly, the city must withhold the dates of birth of all identified individuals we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, including the dates of birth of the individuals at issue if the peace officer is not a currently licensed peace officer or does not elect to restrict access to the information in accordance with section 552.1175(b) of the Government Code.

We note a portion of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 provides information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of Texas or another state or country is excepted from public release. Gov’t Code § 552.130(a). We conclude the city must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the city must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, to the extent the incident report we have marked is maintained outside the internal

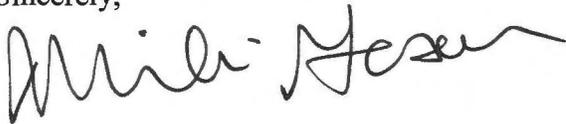
³Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).

investigation file, the city must: (1) withhold the information we have marked under section 552.1175 of the Government Code; (2) withhold the dates of birth of identified individuals we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) withhold the information we have marked under section 552.130 of the Government Code; and (4) 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.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 "Mili Gosar". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 596583

Enc. Submitted documents

c: Requestor
(w/o enclosures)