



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 19, 1996

Mr. Kevin W. Kapitan
Assistant City Attorney
Police Legal Advisor
Fort Worth Police Department
350 West Belknap, Room 240J
Fort Worth, Texas 76102

OR96-0574

Dear Mr. Kapitan:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 27101.¹

The City of Fort Worth (the "city") received a request for information relating to a police officer who was murdered while off-duty, apparently during a random robbery. The request seeks personnel information including the officer's employment applications, promotions, awards, training, reprimands, disciplinary actions, qualifications, and educational background. You state that the defendant, who has been charged with the officer's murder, "has raised the issue of access to these materials." You contend that the requested information is made confidential under sections 552.101 and 552.102 of the Government Code. You also argue that the information at issue is related to the murder prosecution and so may be withheld from disclosure under sections 552.103 and 552.108.

¹We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon) (codified as amendments to Gov't Code ch. 552). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.* This request was received prior to September 1, 1995.

Section 552.101 of the Government Code excepts from disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that section 143.089 of the Local Government Code makes the deceased officer's personnel file confidential under section 552.101. Section 143.089 provides for the maintenance of a civil service file and what may be kept in that file:

(a) The director or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to substantiate the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

Information in a police officer's civil service file may not be released without the officer's written permission unless required by law. *Id.* § 143.089(f). Information in the civil service file must therefore be released if chapter 552 of the Government Code requires its release. Open Records Decision No. 562 (1990) at 5-6.

However, information that section 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in the department's internal file, as provided in section 143.089(g):

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

The department may keep information in this separate, internal file for its own use. The court in *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), addressed the availability of information that is contained in the department's internal file. The court determined that section 143.089(g) makes records kept in the department's internal file confidential.²

You submitted to this office a file marked "IAD." We assume that this file contains the department's internal file.³ As we have stated, the department's internal file is confidential and thus may not be disclosed to the requestor. *See* Attorney General Opinion JM-851 (1988) (statutory confidentiality provisions do not lapse on death of person to whom records pertain).

²The court addressed whether the internal file was made confidential under section 143.089(g). As to the civil service file governed by sections 143.089(a)-(f), the court stated:

The contents of an individual's personnel file may not be disclosed without the individual's written consent "unless the release of the information is required by law" - an evident reference to the disclosure requirements of the [Open Records] Act. 851 S.W.2d 946, 948.

³You indicate you submitted to this office "personnel files" and "internal affairs files" in file folders marked as such. You submitted 12 different file folders; however, only one folder had identifying markings other than numbers. That folder was marked "IAD", which we assume indicates that the records in the file are part of the department's internal file. If any of the other file folders submitted to this office contain information maintained in the department's internal file, that information also must be withheld from disclosure pursuant to section 143.089(g).

We assume that the other 11 folders you submitted to this office contain the deceased officer's civil service file. Although most of the information in these folders is not excepted from disclosure, some of it appears to be confidential pursuant to law. The file contains home addresses and home telephone numbers of police officers, which are protected from disclosure pursuant to Section 552.117 of the Government Code. Other information must also be withheld under federal law. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information under title 26, section 6103(a) of the United States Code. Open Records Decision No. 600 (1992) at 8-9. Social security numbers that were obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, are confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code.

There appear to be medical and mental health records in the file. Section 5.08(b) of the Medical Practice Act (the "MPA") provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b § 5.08(b). Generally, medical records created by or under the supervision of a physician or maintained by a physician are excepted from disclosure. Open Records Decision No. 600 (1992) at 7. The MPA prohibits the release of medical records except in accordance with the procedures outlined in the MPA. Open Records Decision No. 598 (1991) at 2-4. Chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.004 provides for access to these records only by certain individuals, including a personal representative if the patient is deceased. See Open Records Decision No. 565 (1990).

The file contains polygraph results. Information pertaining to a polygraph examination is confidential under section 19A(b) of article 4413(29cc), V.T.C.S. The polygraph results may thus not be released.

The records at issue also include criminal history information. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information that states obtain from the federal government or other states. Open Records Decision

No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of criminal history information obtained from DPS also apply to criminal history information obtained from other criminal justice agencies).

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain criminal history information from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any criminal history record information generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

The information at issue includes photographs of the deceased officer. Section 552.119 provides an exception from disclosure for photographs of police officers. *See* Open Records Decision No. 502 (1988). However, in Open Records Decision No. 536 (1989), this office reasoned that the exception is inapplicable when the officer in question is deceased. The purpose of the exception is to protect the safety of peace officers, and protecting the photographs of deceased officers would not serve this purpose. *Id.* Thus, the photographs of the deceased officer are not excepted from disclosure pursuant to section 552.119.

Section 552.101 excepts from disclosure information made confidential by common-law privacy. You contend that both sections 552.101 and 552.102 protect the information at issue. Section 552.102 provides an exception for "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test for privacy interests under either section 552.101 or 552.102 is the common-law privacy test set out in *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 432 (1984) at 2. In the *Industrial Foundation* decision, the Texas Supreme Court recognized a common-law right

of privacy in information which is highly intimate and embarrassing to a reasonable person and of no legitimate concern to the public. *Industrial Foundation* at 682. However, an individual's right of common-law privacy is a personal right that does not extend past his own death. Attorney General Opinion H-917 (1976); Open Records Decision No. 272 (1981) at 1. Neither does it appear to this office that the information at issue implicates the privacy rights of individuals other than the deceased officer.

You submitted 12 file folders of documents to this office, however, you did not mark any of the documents to show what portions the city contends are protected from disclosure. Additionally, some of the folders contained duplicative documents and documents that were unreadable. It is the city's responsibility to mark the documents to identify the specific information it believes is subject to an exception. See Open Records Decision No. 419 (1984) at 3. A general claim that an exception applies to entire documents when the exception clearly does not apply to all information in the document is not sufficient. *Id.* Because you did not specifically mark the documents, we did not exhaustively review each and every record submitted to this office. We have, however, included for your convenience a list of various types of information that may be confidential. We note that it is a criminal offense to release confidential information. Gov't Code § 552.352. If you wish this office review information, you must mark the documents to show the *specific portions* that you seek to withhold as confidential and provide reasons for why you believe those portions are confidential.

You also argue that the information at issue is excepted from disclosure under section 552.103 of the Government Code. To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Apparently, litigation is still pending in this case. However, you have not explained to this office nor is it apparent to this office how the deceased officer's civil service file is related to the pending litigation. Since you have not provided information showing how the information is related to pending litigation, section 552.103 is not applicable.

You also contend that the information at issue is excepted from disclosure pursuant to section 552.108, which provides an exception for:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

It is not apparent to this office nor have you explained how release of the deceased officer's civil service file would interfere with law enforcement interests. *See* Open Records Decision No. 287 (1981) at 1. The information at issue is not excepted from disclosure under section 552.108.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/rho

Ref.: ID# 27101

Enclosures: Submitted documents
Confidentiality list

cc: Mr. Michael P. Heiskell
Johnson, Vaughn & Heiskell
600 Texas Street, 2d floor
Fort Worth, Texas 76102-4612
(w/o Submitted documents)