



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 11, 1997

Mr. Jason C. Marshall  
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.  
1900 Lincoln Plaza  
500 North Akard  
Dallas, Texas 75201

OR97-0799

Dear Mr. Marshall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105714.

The City of DeSoto (the "city") received a request for:

any documents concerning any suspensions, firings and/or demotions of any DeSoto police officers [i]n the past five months [from the date of Mr. Barrionevo's letter]. Please include the personnel files of the suspended, fired or demoted officer.

any records or documents concerning the 1989 murder investigation of Glen Ralph Coleman and the arrest and investigation of Matthew James McMillian.

You claim that most of the requested information is excepted from disclosure under sections 143.089(g) of the Local Government Code as applied through section 552.101 of the Government Code and section 552.108 of the Government Code. We have considered the exceptions you claim and reviewed 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." This section encompasses information protected by other statutes. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089(g) provides:

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.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records may not be withheld under section 552.101 of the Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

You have submitted files for our review that you state are the department's internal files maintained under section 143.089(g). The department must withhold these files under that section as applied through section 552.101 of the Government Code. We note, however, that if any internal affairs investigation resulted in disciplinary action, then "any record, memorandum, or document relating to" the disciplinary action must be placed in the personnel files maintained by the civil service commission under section 143.089(a).<sup>1</sup> These documents are not protected by common-law privacy or section 552.108 of the Government Code. See *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (where no criminal investigation or prosecution results from internal police investigation of police officer's conduct, section 552.108 is inapplicable); Open Records Decision No. 455 (1987) (legitimate public interest in performance of public employees). Therefore, these records, as well as the other documents encompassed by section 143.089(a), must be released by the civil service commission under section 143.089(f) of the Local Government Code.

We note that there is some information in the personnel files maintained under section 143.089(a) of the Local Government Code that falls within section 552.117 of the Government Code. Section 552.117 of the Government Code exempts from public disclosure information relating to the home address, home telephone number, and social security number of a person certified as a peace officer under article 2.12 of the Code of Criminal Procedure, as well as information revealing whether the peace officer has family members. Section 552.117 requires you to withhold this information for peace officers so certified. If the submitted personnel files do not pertain to certified peace officers, section 552.117 protects this same information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information if the employee

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<sup>1</sup>Due to the fact that the requestor seeks only those personnel files pertaining to officers who have been suspended, fired and/or demoted, we assume that all of these 143.089(a) files will have such documentation.

had not made a request for confidentiality under section 552.024 at the time this request for the documents was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

We also note that there is information in the section 143.089(a) file that is protected by privacy. Section 552.101 encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.101 also excepts information that is confidential under constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

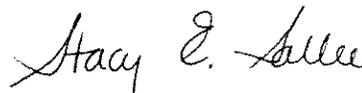
This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have

reviewed the documents submitted for our consideration and have marked the information that must be withheld under constitutional or common-law privacy.

Finally, we address your contention that section 552.108 of the Government Code exempts from disclosure the information regarding a 1989 murder investigation. You state that the city cannot submit the requested information or a representative sample thereof due to the "volume and status as impounded evidence at the Police Department." Section 552.301(b)(3) requires that a governmental body seeking a ruling from this office submit the requested information or, if it is voluminous, a representative sample thereof, to this office for review. Gov't Code § 552.301(b)(3). You have not explained why the city could not make a copy of this file and submit it to this office for review. Therefore, we conclude that the city has not met its burden in establishing the applicability of section 552.108 to the requested information and that the information is presumed to be public. *See* Gov't Code § 552.302; Open Records Decision No. 195 (1978). In the absence of a demonstration that the murder investigation file is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the information. Open Records Decision No. 195 (1978); *see* Gov't Code § 552.352 (distribution of confidential information is criminal offense).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ glg

Ref.: ID# 105714

Enclosures: Marked documents

cc: Mr. Durward Davis  
514 N. Hampton  
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(w/o enclosures)