# Office of the Attorney General
## State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1997

Mr. Kevin W. Kapitan
Assistant City Attorney
Office of the Police Legal Advisor
350 West Belknap
Fort Worth, Texas 76102

OR97-1493

Dear Mr. Kapitan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 107305.

The Fort Worth Police Department (the "department") received a request for several categories of personnel information of a named officer. You state that you have released one document labeled exhibit B. You contend that the remaining requested information is excepted from required public disclosure under sections 552.101, 552.102, 552.108, 552.111, 552.117, and 552.119 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 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 works in conjunction with section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed 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(a)(2) mandates that certain documents relating to the officer must be kept in the civil service file. Section 143.089(a) states that the file must contain:

> (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.

However, you argue that the remaining requested documents are confidential because they are not in the officer's civil service file. Section 143.089(g) of the Local Government Code allows for the maintenance of a separate departmental file in addition to the civil service file provided for in section 143.089(a)(2). This separate file is for the department's own internal use:

> 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.

A request for information contained within the internal file must be referred to the civil service director or his designee. Local Gov't Code § 143.089(g); *see City of San Antonio v. Texas Attorney Gen.,* 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied). Thus, the requested documents that are properly held only within the department's internal file must be withheld.

Our review of the submitted documents, however, reveals that some of the material appears to be the kind of information required to be maintained in the officer's civil service file, *e.g.*, the commendations, several documents relating to the officer's misconduct, and several periodic evaluations. This kind of information is not made confidential by section 143.089 and is subject to release. You assert that these documents, not made confidential by section 143.089, may be withheld under sections 552.102, 552.108, 552.111, 552.117, and 552.119. Thus, we will address whether the department may withhold the information that is not contained within the separate departmental personnel file provided for in section 143.089(g).

Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be

protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy excepts from disclosure private facts about an individual. Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. After reviewing the documents that may be a part of the officer's civil service file, we do not believe that any of this information may be withheld based on a right of privacy. Open Records Decision Nos. 473 (1987) at 3 (even highly subjective evaluations of public employees may not ordinarily be withheld under Gov't Code § 552.102), 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs).

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n 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." Gov't Code § 552.108; *see Holmes v. Morales,* 924 S.W.2d 920 (Tex. 1996). Many of the documents submitted to this office, however, only indirectly relate to law enforcement or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (where no criminal investigation or prosecution results from investigation of police officer for alleged misconduct, section 552.108 is inapplicable); Open Records Decision No. 350 (1982). Thus, the department may not withhold most of the requested information based on section 552.108 of the Government Code. We have marked the information that may be withheld pursuant to section 552.108. We note, however, that information normally found on the front page of an offense report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. *See* Open Records Decision No. 127 (1976) (summarizing the types of information deemed public by *Houston Chronicle*).

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. The requested information merely relates to routine personnel matters. The information may not be withheld under section 552.111.

Section 552.117 provides that information is excepted from disclosure if it relates to a peace officer's home address, home telephone number, social security number, or reveals whether the peace officer has family members. *See* Open Records Decision No. 622 (1994) (section 552.117 excepts from disclosure former home addresses and former home telephone numbers). Thus, you must withhold this information if it exists on the documents that are within the officer's civil service file.

Finally, the records may contain a copy of the officer's photograph. Section 552.119(a) of the Government Code excepts from required public disclosure "a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure," with certain exceptions that do not appear relevant here. A photograph that depicts a peace officer may be released only if the peace officer gives written consent to the disclosure. Gov't Code § 552.119(b). Thus, unless the officer has give his written consent, you must withhold any photograph of the officer contained in the information not made confidential by section 143.089 of the Local Government Code.

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,

Don Ballard

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 107305

Enclosures: Submitted documents

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