



June 12, 2001

Ms. Stephanie H. Harris  
Assistant City Attorney  
City of Paris  
P.O. Box 9037  
Paris, Texas 75461-9037

OR2001-2484

Dear Ms. Harris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148326.

The City of Paris (the "city") received two requests for information relating to the accidental shooting death of a criminal suspect (the "incident"). The first request is for eight categories of information:

- 1) Videotapes of events which occurred between 11 p.m. Thursday, December 28, 2000 and 2 a.m. Friday, December 29, 2000 from the patrol units of Officer Douglas Ray Murphy and Officer Billy R. Hill,
- 2) Audiotapes and/or transcripts of police radio traffic from 11 p.m. Thursday, December 28, 2000 to 2 a.m. Friday, December 29, 2000,
- 3) Official reports and or narratives relating to events involving the death of Patrick Sean Cooke, 29,
- 4) Autopsy information including photographs and toxicology reports relating to Patrick Sean Cooke,
- 5) Forensic findings including ballistic reports and gun powder residue relating to the death of Patrick Sean Cooke,
- 6) Crime scene photographs and/or crime scene reconstruction materials,
- 7) Witness statements and/or depositions relating to the death of Patrick Sean Cooke, and

8) Personnel and disciplinary documents relating to Officer Billy R. Hill including findings of the Paris Police Department's internal investigation of the death of Patrick Sean Cooke.

The second request is for "all reports subject to [Public Information] Act of the shooting of Patrick Shawn Cook [sic] on 12/28/00." In response to the each request, you have released some of the requested information, including the autopsy report and all front page report information concerning the incident, as is required respectively by section 11, article 49.25 of the Code of Criminal Procedure and section 552.108(c) of the Government Code. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing the first request for information. With respect to the first category of information, you inform us that the Texas Rangers assumed authority over the criminal investigation of the incident shortly after it occurred. You further state that the city forwarded the videotapes to the Texas Rangers. Consequently, the city has neither possession nor control of the responsive videotapes. In addition, you inform us that the city never possessed copies of autopsy photographs requested in category 4, any forensic or ballistic test information requested in category 5 with the exception of a trace evidence report, nor witness statements or depositions as requested in category 7. A governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990). Thus, you need not comply with the request for those items which the city does not possess or control.

We next consider your section 552.108 claim for the information in categories 2, 3, and 6 and the trace evidence report. You have submitted the same information in response to the second request for information concerning the incident. Section 552.108 of the Government Code excepts from required public disclosure

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

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

....

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You indicate that the criminal investigation into the incident did not result in conviction or deferred adjudication because the Lamar County grand jury “declined to act” on March 22, 2001, and that the criminal investigation and any potential prosecution are closed. Accordingly, we conclude that you may withhold the information under section 552.108(a)(2).<sup>1</sup>

Next, we address your claims under section 552.101 in conjunction with section 143.089 of the Local 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. We understand that the city is a civil service city under chapter 143. 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). The civil service file must contain certain specified items, including documents relating to any misconduct in those cases where the police department took disciplinary action against the peace officer. *Id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *Id.* § 143.089(b), (c). A written reprimand must be placed in the confidential departmental file and not in the public civil service file. Attorney General Opinion JC-0257 at 1 (2000). Thus, subsections (a)-(c) limit the contents of the civil service file. *Id.* at 7 (subsection (a) contains an exclusive list of the documents that must be retained in the civil service director’s personnel file).

Subsection (g) authorizes but does not require the city police department to maintain for its use a separate and independent, internal personnel file on a peace officer. 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.

Information in a personnel file maintained by a fire or police department pursuant to subsection (g) is excepted from disclosure under section 552.101 of the Government Code if the information is reasonably related to the fire fighter's or police officer's employment relationship with the fire or police department. *See City of San Antonio v. San Antonio*

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<sup>1</sup>Since section 552.108 is dispositive in this case, we will not consider the city’s claim of exception under section 552.103.

*Express-News*, No.04-99-00848-CV, 2000 WL 1918877 (Tex. App. -- San Antonio, Dec. 20, 2000, no pet. h.) (information reasonably relating to officer's employment relationship with department and maintained in the department's internal file pursuant to section 143.098(g) is confidential). Open Records Decision 562 at 6 (1990). With respect to the request in category 8, you inform us that the city maintains files pursuant to both subsections 143.089(a) and (g). After inspecting the submitted information, we conclude that the three files marked as section 143.089(g) files are reasonably related to the police officer's employment relationship with the city and must be withheld under section 552.101 of the Government Code.

You have submitted the city's file maintained under section 143.089(a) of the Local Government Code, and also a file which you call an "employment file," which is maintained by the city's finance office. In the case of both files, you inform us that you have released most of the information, but claim that portions are excepted from disclosure under Chapter 552 of the Government Code. Information in a police officer's or fire fighter's civil service personnel file can be withheld from disclosure only if it falls within a specific exception provided in the Public Information Act. Open Records Decision No. 562 at 6 (1990). We next address the exceptions you claim for information in these files.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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.

This office has found that the following types of information are excepted from required public disclosure under 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, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Regarding personal financial information, this office has determined that some personal financial information is highly intimate or embarrassing and thus it meets the first part of the *Industrial Foundation* test. *See* Open Records Decision Nos. 600 (1992) (federal tax Form W-4, Employee's Withholding Allowance Certificate; designation of beneficiary of

employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to benefits must be disclosed if it reflects the employee's mandatory contributions to the benefits plan. Open Records Decision No. 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city. *Id.* The city must withhold information concerning an employee's decision to obtain optional insurance coverages that is not wholly or partly paid for by the city. We have marked the information for your convenience.

The civil service personnel file information also contains criminal history record information. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI 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 CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI 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 CHRI 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. Accordingly, the CHRI which we have marked is excepted from required public disclosure by section 552.101 in conjunction with section 411.083.

The employment file contains information which is confidential under section 552.101 in conjunction with section 12.003 of the Human Resources Code. Section 12.003 of the Human Resources Code provides:

- (a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly

permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties. [Emphasis added.]

We have marked those documents in the employment file which must be withheld under section 552.101 in conjunction with section 12.003 of Human Resources Code. *See* Open Records Decision No. 584 (1991).

Some of the civil service personnel records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked sample documents to show which are medical records subject to the MPA.

Certain information contained in the civil service personnel file is confidential under Title I of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission

(the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). We have marked the information that the city must withhold under section 552.101 and the ADA.

The civil service personnel file and employment file include Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. We have marked the information for your convenience.

The civil service personnel file contains information confidential under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. Section 611.002 applies to "[c]ommunications 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." See also Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. See Open Records Decision No. 565 (1990). We have marked the documents that are mental health records that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); see *id.* §§ 611.004, 611.0045.

The civil service personnel file contains statements of psychological and emotional health and medical condition from the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

We have marked the information that is subject to section 1701.306 of the Occupations Code and must be withheld.

The civil service personnel file also contains information confidential under section 552.101 in conjunction with section 81.103 of the Health and Safety Code. Section 81.103 makes certain test result information confidential. Section 81.103(a) provides:

A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.

“Test results” are defined as:

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Health & Safety Code § 81.101(5). We have marked the information which must be withheld under section 552.101 in conjunction with section 81.103(a).

The employment file contains information made confidential under section 552.101 of the Government Code in conjunction with section 855.115 of the Government Code. Section 855.115 provides, in relevant part:

(a) Information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary is confidential under Section 552.101, and may not be disclosed in a form identifiable with a specific individual unless:

(1) the information is disclosed to:

(A) the individual or the individual’s attorney, guardian, executor, administrator, conservator, or other person who the director determines is acting in the interest of the individual or the individual’s estate;

(B) a spouse or former spouse of the individual after the director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;

(C) a governmental official or employee after the director determines that disclosure of the information requested is reasonably necessary to the performance of the duties of the official or employee; or

(D) a person authorized by the individual in writing to receive the information; or

(2) the information is disclosed pursuant to a subpoena and the director determines that the individual will have a reasonable opportunity to contest the subpoena.

(b) This section does not prevent the disclosure of the status or identity of an individual as a member, former member, retiree, deceased member or retiree, or beneficiary of the retirement system.

We have marked the information which must be withheld under section 552.101 in conjunction with section 855.115.

You inform us that the subject city police officer is a peace officer as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the civil service personnel file and employment file records also contain information that is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's current or previous home addresses and home telephone numbers, social security number, and any information revealing whether or not the officer has family members. *See* Open Records Decision No. 622 (1994). The city must withhold the information which we have marked under section 552.117(2).

The civil service personnel file and employment file information also contain driver's license numbers, copies of driver's licenses, and a vehicle identification number. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers, driver's license copies, and vehicle identification number which we have marked in these files under section 552.130.

Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). Some of the submitted information depicts peace officers and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officers have executed any written consents to disclosure. Thus, we agree that you must withhold the photographs depicting peace officers.

You claim that a copy of a birth certificate which appears in the civil service file is confidential under section 552.115 of the Government Code. Section 552.115 excepts from disclosure birth or death records maintained by the bureau of statistics or the Texas Department of Health or a local registration official, subject to certain enumerated exceptions. See Gov't Code § 552.115(a). The city's submitted files are not "maintained by by the bureau of statistics or the Texas Department of Health or a local registration official." *See id.* Therefore, we conclude that section 552.115 is not applicable, and the copy of the birth certificate cannot be withheld under that section.

In summary, with the exception of front page information you are required to release under section 552.108(c) of the Government Code, you may withhold information responsive to categories 2, 3, and 6 and the trace evidence report in the first request, and the entirety of the second request, under section 552.108(a)(2). You must withhold information contained in the police department's internal files under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. You must withhold the marked information in the city's civil service personnel file and employment file under section 552.101 and common law privacy, and in conjunction with the MPA, sections 411.083 and 855.115 of the Government Code, sections 81.103 and 611.002 of the Health and Safety Code, section 12.003 of the Human Resources Code and section 1701.306 of the Occupations Code. In addition, you must withhold the information we have marked under sections 552.117(2), 552.119, 552.130, and under title 8, section 1324a of the United States Code and the ADA . The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

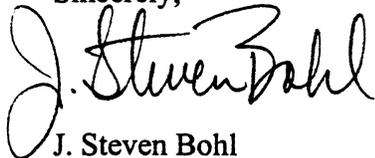
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/sdk

Ref: ID# 148326

Enc: Marked documents

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