



August 13, 2002

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-4449

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167057.

The City of Austin (the "city") received a request for all documents produced during the last ten years relating to the use of force by any employee of the city police department. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 143.089 of the Local Government Code provides for the maintenance of civil service files and what may be kept in those files:

(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:

....

(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*

¹We assume that the "sample" of records submitted to this office is true requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This letter does not reach, and therefore does not authorize the withholding of, any other records to the extent that those records contain substantially different types of information than that s

....

(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. [Emphasis added.]

Information that subsections 143.089(b) and (c) prohibit from being placed in the civil service file may be maintained in the police department's internal files, as provided in section 143.089(g). This subsection 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. [Emphasis added.]

The city's police department may keep information in these separate, internal files for its own use. Section 143.089(g) makes records kept in the police department's internal files confidential. *Cf. City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946. (Tex. App.--Austin 1993, writ denied) (police department files).

Chapter 143 addresses the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. Volume 1 of Internal Affairs Investigation 01-141 reflects that an officer received a ten-day suspension. Volume 1 of Internal Affairs Investigation 01-192 reflects that an officer received a 194-day suspension and a fifteen-day suspension. We presume that all records pertaining to these disciplinary actions are also contained in the officers' civil service files in accordance with section 143.089(a), and thus were released to the requestor if related to the use of force. None of the remaining records you submitted to our office reflects an internal affairs investigation that resulted in a disciplinary action contemplated under chapter 143.

Accordingly, we conclude that the submitted records which you state are maintained in the police department's confidential internal file must be withheld from the public pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code to the extent the information is maintained solely in the department's personnel files.

We note, however, that this information contains medical records, access to which is governed by the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Open Records Decision No. 565 at 7 (1990). Section 159.002 of the MPA provides in pertinent part:

(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.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision Nos. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 598 (1991). Unless an access provision of the MPA applies, you must withhold the medical records that we have marked from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

We further note that some of the information in Internal Affairs Investigations 01-141 and 01-192 was apparently obtained from criminal investigations and from the city fire department; therefore, we assume this information also exists outside of the police department's personnel files. To the extent the criminal investigation and fire department documents are maintained by the police department outside of the department's personnel files, the information is not confidential under section 143.089(g). We will therefore address your remaining arguments based on the contingency that the criminal and fire department documents in these internal affairs investigations exist outside of the police department's personnel files.

You do not claim any other exceptions for the information contained in Internal Affairs Investigation 01-141. Therefore, the criminal and fire department records we have marked must be released to the extent they are maintained outside the police department's personnel

files, with the following exceptions. Access to the EMS records at issue is governed by the provisions of section 773.091 of the Health and Safety Code. Open Records Decision No. 598 (1991). Section 773.091 of the Health and Safety Code, the Emergency Medical Services Act, provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Section 773.091(b) thus protects from disclosure the submitted EMS records. *See* Open Records Decision No. 598 (1991). However, information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient is not confidential. Health & Safety Code § 773.091(g).

It does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply in this instance. Accordingly, if the marked EMS records are maintained outside the police department's personnel files, the city must release only the information required to be released under section 773.091(g), and withhold the remaining information in these records under section 552.101.

In addition, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130(a). Therefore, you must withhold the marked driver's license numbers and class of license under section 552.130.

You contend that the records in Internal Affairs Investigation 01-192 are excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] 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

Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that the information at issue relates to a closed investigation in which no conviction or deferred adjudication has resulted. Based on your representation, we find that section 552.108 is applicable to the records relating to the criminal investigation.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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). Thus, if the information related to the criminal investigation in Internal Affairs Investigation 01-192 is maintained outside the police department's personnel files, the city must release basic front page offense information, but may withhold from disclosure the remaining records related to the criminal investigation based on section 552.108(a)(2).

With regard to the remaining submitted information, we note that juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007 of the Family Code. The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred.² The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

The submitted incident report number 00-0012256 includes information involving juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this report is confidential pursuant to section 58.007(c)

² See Fam. Code § 51.02(2) (defining "child" for purposes of title 3 of Family Code).

of the Family Code. You must withhold incident report number 00-0012256 from disclosure in its entirety under section 552.101 of the Government Code.

We now address your claims under section 552.108 for the remaining submitted information. Section 552.108 also states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have marked information which you state relates to pending criminal investigations. Based upon your representation, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle*, 531 S.W.2d 177 (court delineates law enforcement interests that are present in active cases). Therefore, with the exception of basic information as discussed above, you may withhold this information from disclosure under section 552.108(a)(1).

With regard to basic information, however, we note that the peace officer's home address and home telephone number contained in incident report number 00-4503781 are subject to section 552.1175 of the Government Code. Section 552.1175 states in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

We have marked the information in this incident report that is subject to section 552.1175. However, you do not inform this office, nor does any of the submitted information indicate, whether the peace officer has elected confidentiality for information about him in accordance with the above-cited subsection 552.1175(b)(1) and (2). If so, the information we have

marked in incident report number 00-4503781 must be redacted in accordance with section 552.1175. If not, we conclude that the city may not withhold this information.

Finally, you have marked additional documents which you state pertain to criminal investigations that did not result in conviction or deferred adjudication. Therefore, we find that, except for basic information, you may withhold this information under section 552.108(a)(2).

In summary, you must withhold the information you state is maintained in the police department's confidential internal file pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, except that any criminal investigation and fire department documents in Internal Affairs Investigation 01-141 that are maintained by the city outside of the police department's personnel files must be released, apart from information made confidential by section 773.091 of the Health and Safety Code and section 552.130 of the Government Code. Such information maintained outside the police department's personnel files and contained in Internal Affairs Investigation 01-192 may be withheld under section 552.108, with the exception of basic information. We have marked information in these two internal affairs investigations that may only be released in accordance with the MPA. You must withhold incident report number 00-0012256 under section 552.101 in conjunction with section 58.007 of the Family Code. You may withhold the remaining information that you have marked as pertaining to pending criminal investigations under section 552.108(a)(1), except that the officer's home address and telephone number must be withheld under section 552.1175 if the officer elected confidentiality for this information. Information you have marked as pertaining to criminal investigations that did not result in conviction or deferred adjudication under section 552.108(a)(2), with the exception of basic information relating to each investigation.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 167057

Enc. Submitted documents

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