



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 10, 2003

Ms. Mia Settle-Vinson
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR2003-1565

Dear Ms. Settle-Vinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177626.

The Houston Police Department (the "department") received a request for copies of the homicide, internal affairs division, and personnel files pertaining to a specified deceased department officer and his death. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.108, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that section 552.301(e) of the Government Code requires that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples of it if a voluminous amount of the information was requested labeled to indicate which exceptions apply to which parts of the copy. *See* Gov't Code § 552.301(e). You state that the department has been unable to locate the responsive personnel file and that, once it has been located, the department will forward the file to us under separate cover. To date, the department has not submitted the personnel file to us for our review. Therefore, we find that the department failed to request a decision from our office in accordance with section 552.301 with respect to this particular information.

Because the department failed to comply with the procedural requirements of section 552.301 with respect to this information, such information is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that this information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the department claims that this information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.1175 of the Government Code, we have no basis for concluding that any portion of it is so excepted because the department did not submit a copy of the information to us for our review. Accordingly, we conclude that the department must release the requested personnel file to the requestor in its entirety.

However, we caution the department that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing this information, the department should ensure that it does not contain any such confidential information. If the department believes that any portion of this information is indeed confidential and may not lawfully be released, it must challenge this ruling in court as outlined below.

Next, we note that the submitted information includes "Texas Peace Officer's Accident Reports," which are subject to chapter 550 of the Transportation Code. Section 550.065(b) provides that, except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). In this case, we find that the requestor has provided the department with two of the three pieces of information required under section 550.065(c)(4). Accordingly, we conclude that the department must release the accident reports that we have marked pursuant to section 550.065(c)(4) of the Transportation Code.

We further note that the submitted information includes some information that is subject to section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code.¹ Section 773.091 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.

Health & Safety Code § 773.091(b). This confidentiality provision "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." Health & Safety Code § 773.091(g). Accordingly, we conclude that the information that we have marked under section 773.091(b) of the Health and Safety Code is confidential and, thus, excepted from disclosure pursuant to section 552.101 of the Government Code, except for information in these documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, one that the city is required to maintain as part of the department officer's civil service file, and one that the department may maintain for its own internal use. *See* 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 department took disciplinary action against the officer. *See 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 department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See id.* § 143.089(b), (c). Information that

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

reasonably relates to an officer's employment relationship with the department and that is maintained in a department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.-- San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). Thus, subsections (a)-(c) limit the contents of the civil service file.

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

Local Gov't Code § 143.089(g). 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 department for its use and addressed the applicability of section 143.089(g) to that file. In that case, the records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. *See id.* The court determined that section 143.089(g) made these records confidential. *See id.* at 949.

You state that the internal affairs investigation concerning the alleged misconduct of the deceased officer did not result in any disciplinary action. Thus, we understand that the remaining submitted information is maintained within the personnel file maintained by the department for this officer. We, therefore, agree that most of this information is confidential pursuant to section 143.089(g) of the Local Government Code and, thus, must be withheld pursuant to section 552.101. However, while we generally agree that the department's records of internal affairs investigations that do not result in disciplinary action are confidential under section 143.089(g), portions of the remaining submitted information are contained in department offense reports and investigation records separate and apart from those of the internal affairs investigation. We assume the department maintains this

information outside of the department's personnel file for this officer. The department may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of the internal affairs investigation. Accordingly, we conclude that the department may not withhold the information that we have marked in the remaining submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

You claim that this remaining information is excepted from disclosure pursuant to section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) protects records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. *See* Gov't Code § 552.108(a)(2). You state that the criminal investigation associated with this information did not result in conviction or deferred adjudication because the case was closed as a result of the alleged suspect's death prior to charges being filed in this matter. Thus, we understand from your representations that the department contends that this remaining information relates to a case that has concluded in a final result other than conviction or deferred adjudication. Accordingly, we agree that section 552.108(a)(2) is applicable to this particular information.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* 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). *See* Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released to the requestor, we conclude that the department may withhold this remaining information pursuant to section 552.108(a)(2) of the Government Code.

In summary, the department must release the requested personnel file to the requestor in its entirety. The department must release the accident reports that we have marked pursuant to section 550.065(c)(4) of the Transportation Code. The department must withhold the information that we have marked under section 773.091(b) of the Health and Safety Code pursuant to section 552.101 of the Government Code, except for information in these documents pertaining to the presence, nature of injury or illness, age, sex, occupation, and city of residence of the patient. With the exception of basic information that must be released to the requestor, the department may withhold the information that we have marked

pursuant to section 552.108(a)(2) of the Government Code. The department must withhold the remaining submitted information pursuant to section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 177626

Enc. Marked documents

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(w/o enclosures)