OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 1, 2003

Sgt. Thomas P. Karlock
Custodian of Records
Galveston Police Department
P.O. Box 568
Galveston, Texas 77553

OR2003-4509

Dear Sgt. Karlock:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183569.

The Galveston Police Department (the "department") received a request for several categories of information pertaining to a named police officer and the department's "General Orders, Standard Operation Procedures, Policy/Procedures, Training manuals and SFST manuals regarding the Departments [sic] policies concerning driving while intoxicated, driving under the influence of drugs to include search and seizure policies." You indicate that the department does not maintain any information responsive to three categories of the request. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dism'd) (governmental body need not create new information in response to request or release information that does not exist at time request is received). You claim that all other requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

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

Initially, we note that the information submitted as Exhibit A-2 includes medical records. 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 deemed confidential by statute. Medical records are made confidential under the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the Occupations Code 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.

Occ. Code § 159.002(b), (c). The medical records we have identified 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 the documents that are medical records subject to the MPA.

We turn now to your arguments. Because your claim regarding section 552.103 is the broadest, we address it first. This exception provides in part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The department represents to this office that several categories of requested information relate to a pending prosecution of the requestor's client on a charge of driving while intoxicated ("DWI") because the officer whose information is at issue will be a witness in that prosecution. The department indicates that release of those categories of information would interfere with the pending prosecution because the requestor could use it to undermine the officer's credibility as a witness. The department does not inform us, however, that it is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. In this instance the department has not provided this office with such a representation. We therefore conclude that none of the submitted information may be withheld pursuant to section 552.103.

We now address your contentions regarding the applicability of section 143.089 of the Local Government Code. You state that the City of Galveston has adopted chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against a police officer, section 143.089(a)(2) requires the department to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).[2] *See Abbott v. Corpus Christi*, No. 03-02-00785-CV, slip op., 2003 WL 21241652, at 7 (Tex. App.— Austin May 30, 2003, no pet. h.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police

[2]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055.

officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 5, 7. Such records are not confidential and are subject to release under the Public Information Act (the "Act") unless an exception under the Act applies. *See City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 948-49 (Tex. App.—Austin 1993, writ denied); *see also* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *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).

You assert that Exhibits A-1, A-2, and A-4 are made confidential by section 143.089(g). Based on our review of your arguments and the documents at issue, we understand you to assert that Exhibits A-1 and A-2 represent the department's internal personnel file concerning this officer, which is confidential under section 143.089(g). We therefore determine that Exhibits A-1 and A-2 must be withheld under section 552.101. However, you have informed this office that Exhibit A-4 consists of documents from the officer's "civil service file." As noted above, the contents of a civil service file are not confidential and must be released unless an exception under the Act applies. Therefore, Exhibit A-4 may not be withheld under section 552.101 on the basis of section 143.089(g).

We note, however, that Exhibit A-4 includes the officer's Employment Eligibility Verification, Form I-9. Section 552.101 also encompasses information made confidential by federal law. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that an I-9 form and "any information contained in or appended to such 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the Form I-9 in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that this document and the information attached thereto is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Exhibit A-4 also includes information concerning personal financial decisions by the named officer. Section 552.101 also encompasses the common law right to privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545

(1990), 373 (1983). For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common law right of privacy. *See* Open Records Decision No. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). In addition, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10. We have marked the information in Exhibit A-4 that must be withheld under section 552.101 in conjunction with common law privacy.

In addition, Exhibit A-4 includes personal information concerning the officer. Section 552.117(2) of the Government Code excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of peace officers regardless of whether the officers request confidentiality under section 552.024.[3] You indicate that the individual at issue was a licensed peace officer on the date the department received this request. We therefore conclude that, under section 552.117, the department must withhold the listed information concerning this individual. We have marked the information that the department must withhold.

Finally, you assert that Exhibit A-8 may be withheld under section 552.108. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 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 state that Exhibit A-8 relates to the pending DWI prosecution. Based on this representation, we conclude that the release of Exhibit A-8 would interfere with the detection, investigation, or prosecution of crime. *See 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) (court delineates law enforcement interests that are present in active cases). Therefore, Exhibit A-8 may be withheld pursuant to section 552.108(a)(1).

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[3]"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

In summary, medical records may only be released in accordance with the MPA. The department's internal personnel file concerning this officer is confidential under section 143.089(g) and must therefore be withheld under section 552.101. Under section 552.101, the department must also withhold the marked personal financial information and Form I-9. The officer's home address and telephone number, social security number, and family member information must be withheld under section 552.117(2). The department may withhold Exhibit A-8 pursuant to section 552.108(a)(1). The remaining information must be released to the requestor.

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).

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,

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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 183569

Enc: Submitted documents

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