



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2004

Ms. Jennifer L. Carter
Maris & Lanier, P.C.
1450 Meadow Park, LB 702
10440 N. Central Expressway
Dallas, Texas 75231

OR2004-5071

Dear Ms. Carter:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 203885.

The City of Forrest Hill (the "city"), which you represent, received a request for information relating to workers compensation as well as promotions and investigations of police officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that the submitted information contains an arrest warrant and supporting affidavit. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make

¹We 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.

a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Code Crim. Proc. art. 15.26 (emphasis added). This provision makes the submitted arrest warrant and supporting affidavit expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the city must release the submitted arrest warrant and supporting affidavit, which we have marked, to the requestor.

We next address the applicability of the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160, to the submitted records. Section 159.002 of the MPA provides in 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). 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. *Id.* §§ 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). We have marked the medical records, which may only be released in accordance with the MPA. *See* 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).

You also contend that portions of the submitted information must be withheld under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. You inform us that Forrest Hill is a civil service city under 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 the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

The civil service file must contain all records of a police officer's commendations, misconduct that resulted in disciplinary action under chapter 143, and periodic supervisor evaluations.² *See id.* § 143.089(a); *see also Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.) (holding that all investigatory materials in case resulting in disciplinary action are “from the employing department” and must be forwarded for inclusion in civil service file when such records are held by or in possession of department because of its investigation into misconduct). However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information contained in the civil service file generally must be released, unless it is shown that some provision of chapter 552 of the Government Code permits the information to be withheld from public disclosure. *See* Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; Open Records Decision No. 562 at 6 (1990).

Section 143.089 also allows, but does not require, a police department to maintain its own personnel file concerning the police officer for the department's own internal use. *See* Local Gov't Code § 143.089(g). Information that reasonably relates to a police 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 be withheld pursuant to section 552.101 of the Government Code. *See id.*; *see also City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied) (“the legislature intended to deem confidential the information maintained by the . . . department for its own use under subsection (g)”); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under section 143.089(g) to “information reasonably related to a police officer's or fire fighter's employment relationship”); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of section 143.089(a) and (g) files).

Exhibit B-3 constitutes an investigation of alleged misconduct by a police officer, and Exhibit B-4 contains several such investigations. Most of these investigations pertain to charges that did not result in discipline under chapter 143. To the extent these investigations did not result in discipline under chapter 143, they must be maintained in the police department's internal personnel files concerning the named officers and are confidential under section 143.089(g). *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556; *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d at 949. Such information must be withheld under section 552.101 as information made confidential by law. We have

²Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

marked the records that must be withheld under section 552.101 in conjunction with section 143.089(g).

We note, however, that the following investigations did result in discipline under chapter 143: 98A28, 99A01, 99A05, 99A08, 02A08b, 01A06, 01A07, and 01A05. Therefore, copies of these investigations must be placed, in their entirety, in the civil service commission files regarding the involved officers. Local Gov't Code § 143.089(a)(2); *Abbott v. City of Corpus Christi*, 109 S.W.3d at 122 (“the fact that the City’s police department chooses to also maintain records on investigations and complaints that result in disciplinary action does not operate to relieve the department of the duty to forward *all* information relating to a sustained disciplinary action to the civil service commission for placement in the subsection (a) personnel file”) (emphasis in original). Records that must be maintained in the civil service files are subject to release under chapter 552 of the Government Code unless an exception to disclosure applies. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

In addition, you have submitted a document listing information about several officers’ promotions as well as the police department’s “IAD control log.” You inform us that the promotions document “was compiled by the City from information contained within the department personnel files *and payroll files* of the officers referenced” and that the “log is regularly maintained by the officer in charge of Internal Affairs investigations, and is *separate and apart from the officers’ personnel files.*” (Emphases added.) You do not inform us that this list or this log is maintained in the department personnel file of any particular officer or officers mentioned in these documents. Because you have not informed us that the submitted list and control log are maintained in any city police department officer’s personnel file created under section 143.089(g), we conclude that section 143.089(g) is not applicable to these documents in this instance, and they may not be withheld under section 552.101 on this basis.

We turn now to your other arguments for the investigations that resulted in discipline, the promotions list, the control log, and the information submitted as Exhibit B-1. We begin by noting that some of this information is subject to section 552.022 of the Government Code. This section provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)-(3). Investigations 98A28, 99A01, 99A05, 99A08, 02A08b, 01A06, 01A07, and 01A05 constitute completed investigations; the requested promotions list includes "the name, . . . ethnicity, [and] title" of public employees; and the records submitted in Exhibit B-1 include vouchers relating to the receipt or expenditure of public funds. All of these records are expressly public under section 552.022.

You claim that this information is excepted from disclosure under section 552.103 of the Government Code. However, this section constitutes a discretionary exception, which is intended to protect the interests of a governmental body, as distinct from exceptions that are intended to protect the interests of third parties or information deemed confidential by law. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Therefore this exception does not constitute other law that makes information confidential for purposes of section 552.022, and the listed information may not be withheld on that basis.

We understand you to assert that release of the information that is subject to section 552.022 would violate the privacy rights of the individuals to whom the records pertain. Section 552.101 of the Government Code also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); 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); and identities of victims of sexual abuse, *see* Open Records

Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the records that are subject to section 552.022 and find that all of the information at issue is of legitimate public concern. Therefore, none of this information may be withheld under section 552.101 on the basis of common law privacy. *See* Open Records Decision Nos. 600 at 9 (1992), (noting legitimate public interest in essential facts about financial transaction between individual and governmental body), 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

We note, however, that the marked vouchers include information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.³ Pursuant to section 552.117(a)(2), the city must withhold the listed information for anyone who is a licensed peace officer employed by the city. Pursuant to section 552.117(a)(1), the city must also withhold personal information that pertains to a current or former employee who made a timely election to keep such information confidential. We have marked the information in the vouchers that must be withheld under section 552.117 if it applies.

The vouchers also include bank account numbers. Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Thus, pursuant to this section the city must withhold the account numbers we have marked.

In addition, the records subject to section 552.022 include the e-mail address of a member of the public. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government

³The term peace officer is defined in article 2.12 of the Texas Code of Criminal Procedure.

employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. We also note that section 552.137 does not apply to a business's general e-mail address or website address. The e-mail address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual at issue consents to release of this e-mail address, the city must withhold it in accordance with section 552.137. The remaining records that are subject to section 552.022 must be released, and we have marked them accordingly.

We turn now to your arguments under section 552.103 for the remaining information, which is not subject to section 552.022. Section 552.103 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). A 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 Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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.

You inform us and provide documentation showing that, prior to the city's receipt of this request, the city and several of its employees were named as defendants in a lawsuit filed by the requestor. We therefore find that you have established that litigation was pending on the date the city received this request. Furthermore, having reviewed your arguments and the remaining submitted information, we find that it is related to the pending proceeding for

purposes of section 552.103. Therefore, the city may generally withhold the remaining submitted information pursuant to section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information that has either been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we have marked an arrest warrant and supporting affidavit, which must be released in accordance with article 15.26 of the Code of Criminal Procedure. The marked medical records may only be released in accordance with the MPA. In addition, we have marked the records that must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The records that are subject to section 552.022, which we have marked, must generally be released in accordance with that provision. However, prior to releasing these records, the city must redact the bank account numbers and e-mail address we have marked as well as the information that is subject to section 552.117 if that provision applies. The remaining submitted information, which is not subject to section 552.022, may be withheld under section 552.103 unless all other parties to the pending litigation have previously had access to it.

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

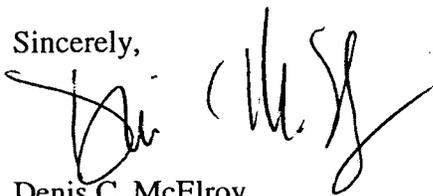
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/krl

Ref: ID# 203885

Enc. Submitted documents