ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2005

Ms. Veronica Ocanas
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2005-03421

Dear Ms. Ocanas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222483.

The City of Corpus Christi (the "city") received a request for the complete personnel and administrative files relating to nine city employees, including eight city police officers, and "any information relating to Equal Employment Opportunity Law investigations ... under any name whatsoever." You state that the city will release some of the requested information to the requestor. The city also states that it does not maintain the information responsive to the request for information relating to Equal Employment Opportunity Commission investigations.[1] You claim that the remaining submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.1175, 552.129, 552.130, and

[1]We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Econ. Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561at 8 (1990).

552.136 of the Government Code.[2] We have considered the exceptions you claim and reviewed the submitted information.[3]

You seek to withhold some of the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.[4] Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential, such as section 143.089 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) 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). *See Abbott v. Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or are in the possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local

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[2]Although you also raise section 552.108, you do not submit arguments in support of a claim under this section. Therefore, you have waived any claim of exception from disclosure under section 552.108 of the Government Code. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 586 (1991) (governmental body may waive predecessor to section 552.108). Additionally, although you raise sections 552.1175, 552.129, and 552.136 of the Government Code, we are unable to find any information within the submitted documents that is subject to those exceptions.

[3]We assume that the "representative 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.

[4]We understand that the City of Corpus Christi is a civil service municipality under chapter 143 of the Local Government Code.

Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's 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. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

> 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.

Id. § 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 police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *See City of San Antonio*, 851 S.W.2d at 949 (concluding that "the legislature intended to deem confidential the information maintained by the . . . police department for its own use under subsection (g)"). The court stated that the provisions of section 143.089 governing the content of the civil service file reflect "a legislative policy against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters, except with an individual's written consent." *Id.; see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied)(restricting confidentiality under Local Gov't Code § 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 Local Gov't Code § 143.089(a) and (g) files).

You inform us that some of the submitted information relates to allegations against a police officer that did not result in disciplinary action under chapter 143 of the Local Government Code. Based on your representations and our review of the information in question, we conclude that the city must withhold most of the information submitted as Exhibits A and C, under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code as information made confidential by law.

However, you also inform us that some of the police officers were disciplined, through either suspension, demotion, or removal. Therefore, the conduct of these police officers resulted in disciplinary action as contemplated by chapter 143. Because this information must be placed in the city's civil service file under section 143.089(a), it is subject to disclosure under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). You have submitted as Exhibit D a representative sample of disciplinary information from the section 143.089(a) file of one of the named officers. This information, along with additional information that we have marked, is subject to release. However, information that is subject to public disclosure may still be excepted under the exceptions in chapter 552 of the Government Code. We will now address your claimed exceptions for this information and for the information submitted as Exhibit B.

In addition to information protected under other statutes, section 552.101 also encompasses the common law right of privacy. For information to be protected by common-law privacy it must meet the criteria set out in *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. Therefore, you must withhold the documents in the investigation file except for the summary which must be disclosed pursuant to *Ellen*, 840 S.W.2d at 525. However, the identities of the victims and witnesses to the alleged sexual harassment are protected by the common law privacy doctrine and must be withheld. *Id.* We note that the public interest in the identity of the alleged harasser outweighs any privacy interest the alleged harasser may have in that information; therefore, the city may not withhold this information under section 552.101.

This office has found common law privacy can also protect personal financial information not related to a financial transaction between an individual and a governmental body. *See*

Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the financial information that must be withheld by the city under section 552.101 and common law privacy.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us that the city employee whose records are submitted as Exhibit B made a timely election under section 552.024. However, the submitted election form only allows for the withholding of the home addresses and home telephone numbers of city employees; it does not allow city employees to elect to withhold their social security numbers or family member information. Therefore, pursuant to section 552.117(a)(1), the city must only withhold the submitted home address and home telephone number, which we have marked.

The social security number of the city employee may be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

The requested records also contain information that is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer regardless of whether the officer made an election under section 552.024 of the Government Code or complies with section 552.1175 of the Government Code. This section applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. The city must withhold those portions of the records that reveal the officers' home addresses, home telephone numbers, and social security numbers. The

city must also withhold the officers' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). The city must withhold the information it has highlighted, along with additional information that we have marked in Exhibits A and D, under section 552.117(a)(2).

The submitted information also contains Texas driver's license information. Section 552.130 of the Government Code excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." We have marked the information that the city must withhold in addition to the information it has highlighted pursuant to section 552.130.

In summary, we conclude that most of the information represented by Exhibits A and C is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with common law privacy. Prior to releasing any social security number, you should ensure that the number is not confidential under federal law. We have marked the information, in addition to the information that the city has highlighted, that must be withheld under sections 552.117 and 552.130 of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 222483

Enc. Submitted documents

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(w/o enclosures)