



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2006

Ms. Julia Gannaway
Lynn, Pham & Ross, L.L.P.
University Center II
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OR2006-08955

Dear Ms. Gannaway:

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# 256234.

The City of Waxahachie (the "city"), which you represent, received seven requests from two requestors for information relating to various named Waxahachie Police Department (the "department") officers and a specified investigation. You state that the city does not maintain information responsive to certain parts of the requests.¹ You state that information from the officers' civil service files maintained by the city pursuant to section 143.089(a) of the Local Government Code will be provided to the requestors, with portions of the information redacted pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001).² You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²See Open Records Decision No. 670 at 6 (2001) (authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without necessity of requesting attorney general decision under section 552.117(a)(2)); see also Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301).

of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note your assertion that the city sent a letter to one of the requestors seeking to clarify one of her requests.³ You inform us that the requestor did not respond to the city's letter. If a request for information is unclear, the governmental body may ask the requestor to clarify the request. *See* Gov't Code § 552.222(b). Because the requestor has not responded to the request for a clarification, the city need not respond to the request for which it sought a clarification. Should the requestor respond, the city must seek a ruling from this office before withholding any responsive information from the requestor. *See* Open Records Decision No. 663 (1999) (providing for tolling of ten business day time limit to request attorney general decision while governmental body awaits clarification).⁴

Next, we note that a portion of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed investigation made for the city. A completed investigation under section 552.022 must be released unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Section 552.107 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 676 (2002) (governmental body may waive section 552.107); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found at rule 503 of the Texas Rules of Evidence. Additionally, section 552.101 is also "other law"

³The request at issue seeks "all e-mails between Waxahachie Police Chief Charles Shaffer, and/or the following officers: Sgts. Ricky Wilson, Mitch Bartley, Rodney Guthrie, officer Chris Eadler and/or the [Texas Municipal Police Association (the "TMPA")] and/or relating to the police association, and/or relating to former Waxahachie police officer and arson suspect Dennis Hickman and/or pending or proposed litigation by the TMPA against the city . . . and/or the murder/arson case from October 2005."

⁴Based on this conclusion, we need not reach your claimed exceptions for the information potentially responsive to this request.

for purposes of section 552.022, and information that is subject to section 552.022(a)(1) can be withheld under section 552.108. Therefore, we will address your arguments under rule 503 and sections 552.101 and 552.108.

Rule 503 of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the completed investigation was a communication between the city's outside counsel, a representative of the city's outside counsel, and the city's Chief of Police that was made for the purpose of rendering legal services to the city. You indicate that this communication was intended to be confidential, and that confidentiality has been maintained.

Based on your representations and our review of the information at issue, we agree that the completed investigation is protected by the attorney-client privilege. We therefore conclude the city may withhold this information pursuant to rule 503 of the Texas Rules of Evidence.⁵

We next address the exceptions to disclosure claimed by the city for the remaining information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory or by judicial decision.” Gov’t Code § 552.101. This section encompasses information deemed confidential by statute, such as section 143.089 of the Local Government Code. You inform us that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code makes certain information maintained by a civil service police department confidential. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that the 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 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). *Abbott v. City of 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 in 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.⁶ *Id.* Information contained in the civil service file generally must be released, unless it is shown that some provision of the Act 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).

However, subsection (g) of section 143.089 authorizes city police departments to maintain for their own use a file on a police officer that is separate from the file maintained by the city civil service commission. Local Gov’t Code § 143.089(a), (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 Gen.*, 851 S.W.2d 946, 949 (Tex.

⁵As our ruling on this issue is dispositive, we need not address your remaining arguments for withhold this portion of the submitted information.

⁶Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov’t Code §§ 143.051-.055.

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).

You state that the remaining information is maintained by the department under section 143.089(g). Based on your representations and our review of the information at issue, we conclude that this information is confidential pursuant to section 143.089(g). Therefore, the city must withhold the remaining information under section 552.101 of the Government Code.

In summary, the city may withhold the submitted completed investigation under rule 503 of the Texas Rules of Evidence. The remaining submitted information must be withheld under section 552.101 of the Government Code 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, 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); *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 Office of the Attorney General 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. 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

LJJ/dh

Ref ID# 256234

Enc. Submitted documents

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