



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2008

Ms. Beverly West Stephens and Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2008-06564

Dear Ms. Stephens and Mr. Weir:

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# 310027.

The City of San Antonio (the "city") received twenty-six requests from the same requestor for information pertaining to named officers. You state that you are withholding social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, 552.119, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We 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.

Initially, we note that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-15685 (2007). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2007-15685 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.101 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 protected by other statutes, including section 143.089 of the Local Government Code.³ You indicate that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code 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 the 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, it is required by section 143.089(a)(2) of the Local Government Code 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) of the Local Government Code. *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. *Id.* Chapter 143 of the Local Government Code prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-.055. Such records are subject to release under the Act. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

³We note that the city submitted additional arguments and representative samples of information after the fifteen-business-day deadline of subsection 552.301(e) of the Government Code. Because the city’s argument under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code can provide a compelling reason to withhold information, we will address the city’s additional argument.

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 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 not be released.⁴ *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that portions of the requested information are maintained in the San Antonio Police Department's internal file pursuant to section 143.089(g) of the Local Government Code. 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) of the Local Government Code and therefore must be withheld pursuant to section 552.101 of the Government Code.

We now address your arguments against disclosure of the remaining requested information, which is maintained in the officers' civil service commission files under section 143.089(a) of the Local Government Code. Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release a biometric identifier of an individual, such as fingerprints, except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). The remaining documents do not contain biometric identifiers for purposes of chapter 560; therefore, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that ground.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

⁴Section 143.089(g) requires a police or fire department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. If you have not already done so, you must refer the requestor to the civil service director at this time.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI, but a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-411.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. We note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See* Gov't Code § 411.082(2)(B) (definition of CHRI does not include driving record information). The city must withhold the CHRI you have marked, and the additional information we have marked, under section 552.101 in conjunction with chapter 411.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. The requestor does not fall within any of the enumerated categories; therefore, the city must withhold the polygraph information we have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. However, none of the remaining information at issue consists of information acquired from a polygraph, and none of the remaining information may be withheld under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *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, protected under common-law privacy), 545 (1990) (common-law privacy protects personal financial information not relating to the financial transactions between an individual and a governmental body). A compilation of an individual's criminal history is also highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Based on your arguments and our review, we find that the submitted information contains information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, no portion of the remaining information is protected under common-law privacy and may not be withheld under section 552.101 of the Government Code on this basis.

Next, we address your argument that some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the home addresses and telephone numbers, social security numbers, and family member information of a peace

officer as defined by Article 2.12 of the Code of Criminal Procedure, regardless of whether the officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2); *see* Open Records Decision No. 622 (1994). We note that section 552.117(a)(2) also encompasses personal cellular telephone and pager numbers, only if the cellular telephone or pager service is paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001). You state that the submitted audio recordings also contain a peace officer's family member information. Upon review, except for the information we have marked for release, we agree that the city must withhold the home addresses, telephone numbers, social security numbers, and family member information you have marked, and the additional information we have marked, under section 552.117(a)(2). The city must also withhold the cellular telephone and pager numbers you have marked under section 552.117(a)(2) if the officers at issue, rather than a governmental entity, pay for these services. *See* ORD 670 at 6; *see also* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Likewise, any family member information contained in the submitted audio recordings must also be withheld pursuant to section 552.117(a)(2). However, if the city lacks the technical capability to redact this information from the submitted audio recordings, the city must withhold the submitted recordings in their entirety. *See* Open Records Decision No. 364 (1983).

You assert that some of the remaining information is excepted under section 552.119 of the Government Code, which provides the following:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. You explain that the submitted information contains photographs of police officers who "are currently assigned to undercover positions" and that "the release of their photographs would endanger their lives and physical safety." Based on this

representation, we agree that the city must withhold the photographs you have marked under section 552.119 of the Government Code.

You assert that some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). We agree that the city must withhold the Texas motor vehicle record information you have marked, as well as the information we have marked, under section 552.130 of the Government Code.⁵

Next, we address your claim that portions of the remaining submitted information are excepted from disclosure under section 552.136 of the Government Code. This section states 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." *Id.* § 552.136. We agree that you must withhold the information you have marked under section 552.136 of the Government Code.

Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137 (b). You do not inform us that the owners of the email addresses at issue have affirmatively consented to their release. Therefore, the city must withhold the e-mail addresses you have marked, and those we have marked, under section 552.137 of the Government Code.

In summary, to the extent the information at issue in the present request is identical to the information addressed Open Records Letter No. 2007-15685, the city must continue to follow that ruling as a previous determination with respect to such information. The city must withhold the police department internal files pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the following under section 552.101 of the Government Code: 1) the CHRI you have marked, and the additional information we have marked, in conjunction with chapter 411 of the Government Code; 2) the polygraph information we have marked in conjunction with section 1703.306 of the Occupations Code; and 3) the information we have marked pursuant to common-law privacy. With the exception of the information we have marked for release, the city must withhold the home addresses, telephone numbers, social security numbers, and family member information you have marked, and the information we have marked, under section 552.117(a)(2). If the officers at issue pay for these services, the city must also withhold the pager and cellular telephone numbers you have marked under section 552.117(a)(2). The city must also withhold the family member information on the submitted audio recordings under section 552.117(a)(2). If the city lacks the technical

⁵As our ruling on this issue is dispositive, we do not address your remaining argument against disclosure for this information.

capability to redact this information, the city must withhold the audio recordings in their entirety. The city must withhold the photographs you have marked under section 552.119 of the Government Code. The city must withhold the information you have marked, and the information we have marked, under sections 552.130, 552.136, and 552.137 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

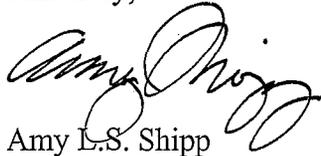
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mcf

Ref: ID# 310027

Enc. Submitted documents

c: Mr. Phillip Stauffer
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(w/o enclosures)