



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2009

Ms. Eileen McPhee
Carls, McDonald & Dalrymple, L.L.P.
Barton Oaks Plaza 2
901 South Mopac Expressway, Suite 500
Austin, Texas 78746

OR2009-01938

Dear Ms. McPhee:

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# 334910 (GT ID No. 1941).

The City of Georgetown (the "city"), which you represent, received a request for (1) any and all websites accessed by a named former city police officer and (2) all investigations of other employees in which the named former officer was involved in any manner. You state information responsive to part one of the request does not exist in the city's records.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that a portion of the submitted information, the recording labeled "CAR VIDEO," is subject to a previous ruling issued by this office in Open Records Letter No. 2008-16764 (2008). In that decision we ruled portions of the video recording must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. It does not appear that the pertinent facts and circumstances have changed since the issuance of that prior ruling. Thus, we determine that the city must continue to rely on our ruling issued to the Georgetown Police Department in Open Records Letter No. 2008-16764

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.

as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We will address your arguments for the remaining submitted information.

We note that the remaining submitted information consists of completed internal affairs investigations that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Although you assert the remaining submitted information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the city may not withhold the remaining information under section 552.103. We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Sections 552.101 and 552.117 of the Government Code represent "other law" for the purposes of section 552.022(a)(1). Therefore, we will consider whether or not these sections are applicable to the remaining information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information that is made confidential by statute. Gov't Code § 552.101. You assert that the information submitted as Exhibit B-1 is subject to section 143.089 of the Local Government Code, which 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). We note that the city is a civil service city under chapter 143 of the Local Government Code.

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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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).⁴ *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.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

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. *Id.* § 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. *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 General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate the information in Exhibit B-1 is contained in the city police department's personnel files of the officers involved and that this information is maintained under section 143.089(g). We have marked the information that is confidential under section 143.089(g) of the Local Government Code. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code. We note that the remaining information you seek to withhold relates to an investigation of misconduct that resulted in suspension of the officer at issue. Therefore, this information is subject to section 143.089(a)(2) and must also be maintained in the officer's civil service file under section 143.089(a). As previously noted, this information is subject to release. *See* Local Gov't Code § 143.089(f); ORD 562 at 6. In this instance, the request was received by the city, which has access to the files maintained under sections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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

⁴Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

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 Open Records Decision No. 339 (1982), we concluded that a sexual assault victim has a common-law privacy interest which prevents disclosure of information that would identify the victim. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Therefore, we agree that the city must withhold the victim's identifying information, which we have marked, in the information submitted as Exhibit B-2, as well as the identifying information found in the submitted recording labeled "Jail Phone Call," pursuant to section 552.101 in conjunction with common-law privacy.

However, the remaining information does not contain identifying information of the victim. Furthermore, we find that there is a legitimate public interest in the remaining information, which relates to the conduct of police officers. As this office has frequently stated, such information is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

We note that portions of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. However, we are unable to determine from the information provided whether the former city peace officer whose information is at issue is currently a licensed peace officer. Thus, we must rule conditionally. If the former employee is currently a licensed peace officer, the city must withhold his personal information, which we have marked, under section 552.117(a)(2) of the Government Code.

If the former employee is not a currently licensed peace officer, section 552.117(a)(1) may apply to the marked information. Section 552.117(a)(1) excepts from disclosure the 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 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117

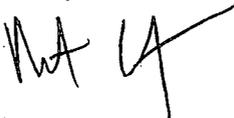
must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold the marked information under section 552.117(a)(1) if the individual in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former employee made a timely election under section 552.024, the city must withhold his personal information under section 552.117(a)(1). If the former employee did not make a timely election under section 552.024, the marked information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, the city must withhold the information we have marked in Exhibit B-1 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the information we have marked, as well as the victim's identifying information found in the submitted recording labeled "Jail Phone Call," under section 552.101 in conjunction with common-law privacy. If the former employee whose information we have marked is currently a licensed peace officer, the city must withhold the marked information pursuant to section 552.117(a)(2) of the Government Code. If the former employee is no longer a licensed peace officer, but has made a timely election under section 552.024 of the Government Code, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 334910

Enc. Submitted documents

cc: Requestor
(w/o enclosures)