



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2009

Ms. Evelyn W. Njuguna
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77251-1562

OR2009-15938

Dear Ms. Njuguna:

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# 359437 (HPD PIR# 16010).

The Houston Police Department (the "department") received a request for twenty-one categories of information pertaining to the police-involved shooting death of a named individual. You state the department will provide some of the requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.¹

Initially, we note some of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

You inform us some of the requested information regarding the policies and procedures on the use of taser weapons was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2006-10582 (2006) and 2007-15167 (2007). You also inform us the requested information regarding Course No. 3200 Investigations was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-12619 (2009). In each of those rulings, we concluded the department may withhold some or all of the information under section 552.108(b)(1) of the Government Code. You state the law, facts, and circumstances on which the prior rulings were based have not changed; thus, we agree the department must continue to rely on those rulings as previous determinations and withhold or release the information at issue in accordance with Open Records Letter Nos. 2006-10582, 2007-15167, and 2009-12619. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 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 exception encompasses information other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code for the personnel records submitted as Exhibit 2. The City of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer’s civil service file and another 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 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

Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information 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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the personnel records in Exhibit 2 are maintained in the department's internal files as authorized under section 143.089(g) of the Local Government Code. Based on this representation and our review of the submitted records, we agree the personnel records in Exhibit 2 are confidential pursuant to section 143.089(g).² Accordingly, the department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.³

You claim the internal affairs investigation records submitted as Exhibit 4 are excepted from disclosure under section 143.1214 of the Local Government Code, which is also encompassed by section 552.101. As previously noted, the City of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 provides in part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:

²We note that section 143.089(g) of the Local Government Code requires a police 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.

³As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure for portions of this information.

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state the internal affairs investigation records submitted as Exhibit 4 relate to an investigation that did not result in disciplinary action. You also state this information is maintained by the department in its own files and is not part of a police officer's civil service personnel file. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(f). Based on your representations and our review, we conclude Exhibit 4 is exempted from disclosure under section 143.1214 of the Local Government Code and must be withheld under section 552.101 of the Government Code on that basis.

Section 552.108(a)(1) of the Government Code exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the incident report, audio and video recordings, investigation notes, and other investigation materials submitted as Exhibit 7 pertain to a pending criminal investigation. Based on this representation and our review, we conclude the release of Exhibit 7 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108(a)(2) of the Government Code exempts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or a deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Pruitt*, 551 S.W.2d 706. You assert the incident reports submitted as Exhibits 3, 5, and 6 pertain to concluded criminal investigations that did not result in

convictions or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to Exhibits 3, 5, and 6.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. See 531 S.W.2d at 186-87; Open Records Decision No. 127 (summarizing types of information considered to be basic information). We note basic information described in *Houston Chronicle* does not include information subject to section 552.130 of the Government Code. You claim, however, that portions of the basic information in Exhibit 5 are private and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate or 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. You claim some of the basic information in Exhibit 5 is protected by common-law privacy. Upon review, we agree portions of that information, which we have marked, are highly intimate or embarrassing and of no legitimate public concern. Thus, the department must withhold the marked information from the basic information in Exhibit 5 under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining basic information in Exhibit 5, as well as the basic information in Exhibits 3, 6, and 7, must be released.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); see also Open Records Decision No. 531 at 2 (1989) (quoting *Pruitt*, 551 S.W.2d 706). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." See *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records

Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You assert the department's General Order 500-01 submitted as Exhibit 8 and the various policies, procedures, and training materials submitted as Exhibit 11 are excepted under section 552.108(b)(1). You have provided affidavits from a department executive assistant chief, a department senior police officer, and a department captain who explain how disclosure of Exhibits 8 and 11 would endanger the lives of police officers and other persons, as well as provide aid and support to criminal elements in carrying out their criminal activity, avoiding detection, and hindering law enforcement investigative efforts. Based on these arguments and our review, we agree portions of Exhibits 8 and 11, which we have marked, are protected by section 552.108(b)(1) and may be withheld on that basis. However, some of the information in Exhibit 11 is publicly available on the Internet, and the remaining information in Exhibits 8 and 11 consists of job descriptions, general laws, historical and factual information, reporting procedures, documentation procedures, and other routine administrative policies and procedures of the department. Thus, we find you have failed to establish how public access to the remaining information in Exhibits 8 and 11 would interfere with law enforcement or endanger police officers. Accordingly, the department may not withhold the remaining information in Exhibits 8 and 11 under section 552.108(b)(1) of the Government Code. As you have claimed no other exceptions to disclosure for the remaining information in Exhibit 8, it must be released. We note, however, the remaining information in Exhibit 11 contains information that is, or may be, excepted from disclosure under sections 552.117, 552.1175, 552.130, 552.136, and 552.137 of the Government Code, as well as copyright law.⁴

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, 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 sections 552.024 and 552.1175 of the Government Code.⁵ Gov't Code § 552.117(a)(2). Section 552.117(a)(2) is also applicable to a peace

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

officer's cellular telephone and pager numbers, if the cellular telephone or pager services are paid for by the officer with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(2) exception to personal cellular telephone number and personal pager number of peace officers).

We have marked peace officers' social security numbers and home telephone numbers in Exhibit 11. This information must be withheld under section 552.117(a)(2) of the Government Code. We have also marked peace officers' addresses, cellular telephone numbers, and pager numbers in Exhibit 11. It is unclear whether or not the marked addresses are the officers' home addresses. Furthermore, you have not informed us whether the police officers' marked cellular telephone and pager numbers are paid for by the officers. Thus, to the extent the marked addresses are home addresses and the marked cellular telephone and pager numbers are paid for by the officers to whom they belong, the department must withhold this information under section 552.117(a)(2) of the Government Code. To the extent the marked addresses are not home addresses or the officers did not pay for the cellular telephone or pager numbers, the marked addresses, cellular telephone numbers, and pager numbers must be released.

The remaining information contains district attorney employees' social security numbers and telephone numbers. Section 552.1175 of the Government Code provides in relevant part:

(a) This section applies only to:

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(5), (b). We note that section 552.1175 is also applicable to personal cellular telephone and pager numbers, provided the cellular telephone and pager

services are not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1998). We have marked social security numbers, home telephone numbers, and cellular telephone numbers in Exhibit 11 that may be excepted under section 552.1175. You have not informed us whether the marked cellular telephone numbers are paid for by the individuals to whom they belong. To the extent the individuals whose information we have marked are still district attorney employees, they elect to restrict access to their personal information in accordance with section 552.1175, and they have paid for their cellular telephone service, the department must withhold the marked social security numbers, home telephone numbers, and cellular telephone numbers under section 552.1175 of the Government Code. Otherwise, this information may not be withheld under section 552.1175 of the Government Code.⁶

Section 552.130 of the Government Code provides 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. Gov't Code § 552.130(a)(1), (2). Thus, the department must withhold the Texas driver's license and license plate numbers we have marked in Exhibit 11 under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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 have marked a credit card number in Exhibit 11 that the department must withhold under section 552.136 of the Government Code.

⁶To the extent the district attorney employees' social security numbers may not be withheld under section 552.1175, we note section 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.

Section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). The e-mail addresses in Exhibit 11 are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information in Exhibit 11 must be released to the requestor in accordance with copyright law.

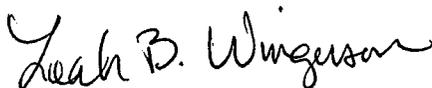
In summary, the department must continue to rely on Open Records Letter Nos. 2006-10582, 2007-15167, and 2009-12619 as previous determinations and withhold or release the information at issue in accordance with those rulings. The department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code; Exhibit 4 under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code; the marked Texas driver’s license and license plate numbers under section 552.130 of the Government Code; the marked credit card number under section 552.136 of the Government Code; the marked e-mail addresses in Exhibit 11 under section 552.137 of the Government Code, unless the owners have consented to their release; and the marked peace officers’ social security numbers and home telephone numbers in Exhibit 11 under section 552.117(a)(2) of the Government Code. To the extent the marked addresses in Exhibit 11 are home addresses and the marked cellular telephone and pager numbers in Exhibit 11 are paid for by the officers to whom they belong, the department must withhold this information under section 552.117(a)(2) of the Government Code. To the extent the individuals whose information we have marked are still district attorney employees, they properly elect to restrict access to their personal information, and they have paid for their cellular telephone service, the department must withhold the marked social security numbers, home telephone numbers, and cellular telephone numbers under section 552.1175 of the Government Code. The department may withhold the marked information in Exhibits 8 and 11 under section 552.108(b)(1) of the Government Code. With the exception of basic information, the department may withhold Exhibit 7 under section 552.108(a)(1) of the Government Code and Exhibits 3, 5, and 6 under section 552.108(a)(2) of the Government Code. In releasing the basic information from Exhibit 5, the department must withhold the

marked information under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released in accordance with copyright law.⁷

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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 359437

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note the remaining information includes social security numbers. Section 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.