



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 4, 2009

Mr. Kevin W. Cole  
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Attorney for City of Waco  
4101 Wildwood Road  
Austin, Texas 78722

OR2009-17176

Dear Mr. Cole:

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# 363284.

The City of Waco (the "city"), which you represent, received two requests from the same requestor for the following information: (1) time sheets and any and all documents, recordings, e-mails, memoranda, forms, and other authorized documentation of overtime contracts pertaining to a named city police department officer; and (2) several categories of information pertaining to the off-duty employment by the Waco Housing Authority of seven named city police department officers.<sup>1</sup> You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117 and 552.1175

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<sup>1</sup>We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note that the submitted information includes polygraph information pertaining to the requestor's clients. Section 1703.306 of the Occupations Code provides in relevant part:

(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[.]

Occ. Code § 1703.306. In this instance, the requestor represents four of the polygraph examinees. Thus, the city has the discretion to release the polygraph information of the requestor's clients, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees).

Next, you inform us 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. 2009-16812 (2009). To the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2009-16812, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city may continue to rely on Open Records Letter No. 2009-16812 as a previous determination and withhold or release the identical information in accordance with that ruling. *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). To the extent the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

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<sup>2</sup>Although you initially raised sections 552.102, 552.111, 552.119, and 552.137 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, .302.

<sup>3</sup>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.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The submitted information includes completed reports, vouchers related to the expenditure of public funds, and court-filed documents. These documents fall within the purview of subsections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(17), respectively. The city may only withhold the information subject to subsection 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. The city may only withhold the information subject to subsections 552.022(a)(3) and (a)(17) if it is confidential under other law. You claim the information subject to section 552.022 is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022(a)(3) and (a)(17). *See id.* § 552.007; *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 Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the city may not withhold the information subject to subsection 552.022(a)(3) or subsection (a)(17), which we have marked, under sections 552.103, 552.107 or 552.108 of the Government Code. Additionally, the city may not withhold the information subject to subsection 552.022(a)(1) under sections 552.103 or 552.107 of the Government Code. However, the Texas Supreme Court has held 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 under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 for the information subject to section 552.022. Additionally, because sections 552.101, 552.117, 552.1175, and 552.130 of the Government Code are “other law” for purposes of section 552.022, we will address the applicability of these exceptions for the information subject to section 552.022.<sup>4</sup> We will also consider your claim under section 552.108 of the Government Code for the information subject to subsection 552.022(a)(1), along with the additional claims you make for the remaining submitted 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 made confidential by other statutes, such as section 143.089 of the Local Government Code. We note that the city is a civil service city under chapter 143 of the Local Government Code. 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 the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). The police officer’s civil service file must contain specific items, including commendations, periodic evaluations by the officer’s supervisor, and documents from the employing department relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code.<sup>5</sup> *See id.* § 143.089(a)(1)-(2). In cases in which a police department investigates an 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. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov’t Code § 143.089(f); Open Records

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<sup>4</sup>The Office of the Attorney General will raise a mandatory exception like section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>5</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-.055. An oral or written reprimand does not constitute discipline under chapter 143.

Decision No. 562 at 6 (1990). However, a document relating to an 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 personnel 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 Gen.*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied).

You state some of the submitted information pertaining to two of the officers named in the request is kept in the city police department's personnel files for the officers at issue and is maintained under section 143.089(g). You state this information relates to internal affairs investigations that did not result in disciplinary action against the two officers. We note, however, that the information at issue includes law enforcement records which are also maintained separate and apart from the internal affairs investigations. The present request does not specifically seek information from the officers' police department personnel files. Instead, the requestor seeks several categories of information pertaining to the named officers' off-duty employment. Because the requestor generally asks for information about officers' off-duty employment, both the officers' personnel files and any copies of investigatory materials that the city police department maintains for law enforcement purposes are responsive. The city may not engraft the confidentiality afforded to records under section 143.089(g) to records that exist independently of the internal files. Accordingly, based on the city's representations and our review of the information at issue, the information we have marked is confidential and must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.<sup>6</sup> However, none of the remaining information at issue is confidential under section 143.089(g) of the Local Government, and the city may not withhold any of the remaining information under section 552.101 of the Government Code on this basis.

Next, we address your claim under section 552.108 of the Government Code for the remaining submitted information that is not subject to subsections 552.022(a)(3) and (a)(17). Section 552.108 of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

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<sup>6</sup>As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (b)(2). Generally, subsection 552.108(a)(1) is mutually exclusive of subsection 552.108(b)(2). Section 552.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution. In contrast, section 552.108(b)(2) applies only to information that relates to a concluded criminal investigation or prosecution that did not result in conviction or 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 that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In this instance, you claim that the submitted information is excepted from disclosure under sections 552.108(a)(1) and (b)(2). You inform this office that the McLellan County Criminal District Attorney (the "district attorney") objects to the release of information related to the district attorney's pending criminal prosecutions against six of the officers named in the request. Thus, we understand you to argue that the remaining submitted information is excepted from disclosure under section 552.108(a)(1). Based on these representations and our review, we conclude that the release of the information we have marked, which pertains to these six named officers, 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. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Thus, we find that the city may withhold the information we have marked under section 552.108(a)(1).<sup>7</sup> However, you have informed our office that the district attorney does not object to the release of any information pertaining to the remaining officers at issue. Thus, you have not demonstrated how any portion of the remaining information pertains to the detection, investigation, or prosecution of crime. Therefore, the city may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

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<sup>7</sup>As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

Next, we address your argument under section 552.103 of the Government Code for the remaining information not subject to subsections 552.022(a)(1), (a)(3), or (a)(17) of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 must provide relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information; and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You inform us that four of the officers named in the instant requests have been indefinitely suspended from the city's police department. You also inform us that these four officers have filed appeals pursuant to Chapter 143 of the Local Government Code. We note that municipal civil service appeals, such as the ones at issue here, are governed by chapter 143 of the Local Government Code. *See Local Gov't Code §§ 143.057, .127-.131.* This office has determined that such appeal proceedings constitute litigation for purposes of section 552.103. *Cf. Open Records Decision No. 588 (1991).* You indicate the appeal proceedings were ongoing on the date the city received these requests for information. Further, you state that the information at issue directly relates to the issues in the pending appeals. Thus, we agree that section 552.103 is applicable to the information at issue.

Accordingly, the city may withhold the information we have marked under section 552.103 of the Government Code.<sup>8</sup>

We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We next address whether any of the remaining information, which is subject to section 552.022, is excepted from disclosure. We note the remaining information contains confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center and subject to chapter 411 of the Government Code. Section 552.101 of the Government Code encompasses information that is made confidential by statute. 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, 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 -.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find that the information we have marked consists of CHRI which must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Next, section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

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<sup>8</sup>As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(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), (b). We note that section 552.1175 is also applicable to a peace officer's personal cellular telephone number if the officer personally pays for the service. Cf. Open Records Decision No. 670 at 6 (2001) (analyzing section 552.117, an analogous provision of the Government Code, and extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024); Open Records Decision No. 506 at 5-6 (1988) (analyzing section 552.117 and determining that it is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked information that may be excepted from disclosure under section 552.1175. To the extent the individuals whose information we have marked are peace officers and they elect to restrict access to their personal information in accordance with section 552.1175, the city must withhold the personal information we have marked under section 552.1175. See, e.g., Open Records Decision No. 678 (2003). To the extent the individuals at issue do not qualify as peace officers or do not elect to keep this information confidential, it may not be withheld on this basis and must be released.

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 [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a)(1), (2). Accordingly, the city must withhold the Texas motor vehicle record information we have marked in the remaining information pursuant to section 552.130 of the Government Code.

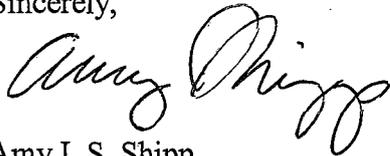
In summary, the city may release the marked polygraph information belonging to the requestor's clients pursuant to section 1703.306(a)(1) of the Occupations Code. The city may continue to rely on Open Records Letter No. 2009-16812 as a previous determination

and withhold the information responsive to the instant requests that was previously ruled on in accordance with this prior ruling. The city must withhold the information we have marked under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The city may withhold the information we have marked pursuant to sections 552.103 and 552.108 of the Government Code. The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. To the extent the individuals whose information we have marked are peace officers and they elect to restrict access to their personal information in accordance with section 552.1175, the city must withhold the personal information we have marked under section 552.1175. The city must withhold the information we have marked pursuant to section 552.130 of the Government Code. The city must release the remaining information.

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](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,



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

ALS/rl

Ref: ID# 363284

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)