



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 4, 2009

Mr. Kevin W. Cole
Attorney for the City of Waco
The Cole Law Firm
4101 Wildwood Road
Austin, Texas 78701

OR2009-17209

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# 363282.

The City of Waco (the "city"), which you represent, received a request for all information collected, assembled, or maintained by the city's Finance Department, Budget Office, Manager's Office, and Police Department relating to letters or electronic communications from a named individual concerning city police officers working off-duty jobs for the city's Housing Authority during a specified time period. The city received a second request from the same requestor for all information collected, assembled, or maintained by the city's Finance Department, Budget Office, Manager's Office, and Police Department relating to city police officers providing motorcycle escorts to funerals during a specified time period. You state that the city is releasing a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, and 552.1175 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you inform us that some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-16812 (2009) and 2009-17176 (2009). To the extent any portion of the submitted

¹Although 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 Therefore, we presume that you have withdrawn these exceptions.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.

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.

information was ruled upon in Open Records Letter Nos. 2009-16812 and 2009-17176, as we have no indication that the law, facts, and circumstances on which the prior rulings were based have changed, the city may continue to rely on Open Records Letter Nos. 2009-16812 and 2009-17176 as previous determinations and withhold or release the identical information in accordance with those rulings. *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 rulings, we will address the submitted arguments.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). In this instance, the city received the request for information on September 15, 2009. Thus, the city's fifteen-business-day deadline was October 6, 2009. However, you did not submit the requested information or arguments stating why your claimed exceptions would apply until October 7, 2009. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, we conclude that the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released; the governmental body can overcome this presumption only by demonstrating a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). A compelling reason generally exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you seek to withhold the submitted information under sections 552.103, 552.107, and 552.108 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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 Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (untimely request for decision resulted in

waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, your claims under sections 552.103, 552.107, and 552.108 do not provide compelling reasons for non-disclosure, and the city may not withhold any of the submitted information on the basis of your claims under these sections. However, the need of a governmental body, other than the entity seeking an open records decision, to withhold information under section 552.108 can provide a compelling reason to withhold information from disclosure. *See* Open Records Decision No. 586 (1991). Because the McLennan County District Attorney (the "district attorney") objects to the release of a portion of the submitted information, we will consider the district attorney's arguments under section 552.108. We will also consider your arguments under sections 552.101, 552.117, and 552.1175, as these exceptions are mandatory and cannot be waived.

We next note that the submitted information includes polygraph information pertaining to the requestor's client. 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 1703.306 of the Occupations Code. Section 1703.306 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 the polygraph examinee. Thus, the city has the discretion to release the polygraph information of the requestor's client, 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). Otherwise, the city must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

We now address your arguments against the disclosure of the remaining submitted information. Section 552.101 of the Government Code also encompasses section 143.089 of the Local Government Code. You state 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.³ *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 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 a portion of the submitted information is kept in the city police department's personnel file 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 these 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 information pertaining to city police officers working off-duty jobs for the city's Housing Authority. 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.⁴ However, none of the remaining information at issue is confidential

³Chapter 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.

⁴As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

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 the district attorney's claim under section 552.108 of the Government Code for the remaining submitted information. Section 552.108(a)(1) excepts 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). We note that section 552.108 is generally not applicable to information relating to an internal administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982).

In this instance, the remaining submitted information pertains to city police department reports and an internal affairs investigation involving a city police department officer. However, you explain that the submitted internal affairs records pertain to criminal investigations and prosecutions. You inform this office that the district attorney objects to the release of information related to the district attorney's pending criminal prosecutions against the officers at issue. Based on these representations and our review, we conclude that the release of the information we have marked 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).

We note that 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). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The city must release basic information, including a detailed description of the offense, even if the information does not literally appear on the front page of an offense or arrest report. Thus, with the exception of basic information, we find that the city may withhold the information we have marked on behalf of the district attorney under section 552.108(a)(1).⁵

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

In summary, the city may continue to rely on Open Records Letter Nos. 2009-16812 and 2009-17176 as previous determinations and withhold or release the identical information in accordance with those rulings. The marked polygraph information belonging to the requestor's client is confidential under section 552.101 in conjunction with section 1703.306 of the Occupations Code, but the city has the discretion release the polygraph information pursuant to section 1703.306(a)(1) of the Occupations Code. 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. With the exception of basic information, the city may withhold the remaining information we have marked on behalf of the district attorney pursuant to section 552.108 of the Government Code.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/jb

Ref: ID# 363282

Enc. Submitted documents

c: Requestor
(w/o enclosures)