



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2013-12471

Dear Ms. Folsom:

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# 493689 (GC No. 20459).

The City of Houston (the "city") received a request for eight categories of information pertaining to a specified arrest. You inform us the city does not have records responsive to category seven of the request for information.¹ You claim the requested 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 information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-09388 (2012). In that ruling, we noted the city had submitted only the requested personnel information for a named officer. Accordingly, we determined that, to the extent the requested information pertaining to a specified incident existed and was maintained by the city on the date it received the request for information, then pursuant to section 552.302

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

of the Government Code, the city must release the information at issue if it had not been released already. We also determined the city must release the information we marked under section 552.022 of the Government Code, but may withhold the remaining information under section 552.103 of the Government Code. However, we note the investigation at issue has since been completed. Therefore, we find the law, facts, and circumstances on which Open Records Letter No. 2012-09388 was based have changed, and the city may not rely on this ruling as a previous determination. *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).

You now seek to withhold the submitted information under sections 552.101 and 552.103 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.103 of the Government Code, this section does not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-6 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Letter No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, to the extent the city released any portion of the submitted information in accordance with Open Records Letter No. 2012-09388, the city may not now withhold such information under section 552.103 of the Government Code. To the extent the submitted information was not previously released in accordance with this prior ruling, we will address your argument under section 552.103. We will also address the applicability of sections 552.101 and 552.130 of the Government Code to all of the submitted information because these sections can make information confidential under the Act.²

We next note the submitted information consists of two completed investigations subject to section 552.022(a)(1) of the Government Code, which provides:

²The 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).

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 unless made confidential under this chapter or 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[.]

Gov't Code § 552.022(a)(1). Although you seek to withhold the information at issue under section 552.103 of the Government Code, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, S.W.3d at 475-6; ORD 665 at 2n.5. Thus, the city may not withhold any of the submitted information under section 552.103 of the Government Code. However, as noted above, because sections 552.101 and 552.130 of the Government Code can make information confidential under the Act, we will address their applicability to this 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. Section 552.101 encompasses section 550.065(b) of the Transportation Code, which states that except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065. Exhibits 2 and 5 include Texas peace officer's crash reports. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See id.* § 550.065(c)(4). In this instance, the requestor has not provided the city with two of the three requisite pieces of information specified by section 550.065(c)(4). Accordingly, the city must withhold the Texas peace officer's crash reports in Exhibits 2 and 5, which we have marked, from the requestor under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code.

Section 552.101 of the Government Code also encompasses section 143.1214 of the Local Government Code. You claim Exhibit 3 and the remaining information in Exhibit 2 is confidential under section 143.1214. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 provides in relevant 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:

- (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 inform us the information at issue relates to an internal investigation of alleged misconduct by police officers employed by the city's police department. You also inform us the allegations at issue were not sustained and no disciplinary action was taken. You state the requestor is not an employee of another law enforcement agency or fire department or a district or United States attorney's office. Further, you assert the information at issue does not meet the requirements of section 143.1214(c) for inclusion in the police officers' civil service personnel files. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). However, we note Exhibit 3 and a portion of the information at issue in Exhibit 2 consists of records that are also maintained independently from the police officers' civil service files. In this instance, the requestor specifically requests this information, which is maintained for law enforcement purposes separate and apart from any internal files. The city may not engraft the confidentiality afforded to records under section 143.1214 to records that exist independently of the internal files. Thus, Exhibit 3 and the information we have marked for release in Exhibit 2 is not confidential under section 143.1214 of the Local Government Code and may not be withheld in conjunction with section 552.101 of the Government Code on that basis. However, based on your representations and our review, we conclude the remaining information in Exhibit 2 must be withheld under section 552.101 in conjunction with section 143.1214.

Section 552.101 of the Government Code also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center (the "NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal and state law. CHRI means "information collected about a person

by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See* Open Records Decision No. 565 at 7 (1990). *See generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See id.* § 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. *See 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. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with subchapter F of chapter 411 of the Government Code. We note, however, section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in criminal justice system). We also note CHRI does not include information relating to routine traffic violations. *See id.* § 411.082(2)(B) (criminal history record information does not include driving record information). Further, we note because the laws governing dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Upon review, we find the information we have marked in Exhibits 3 and 5 constitutes CHRI for purposes of chapter 411. Accordingly, the city must withhold this information under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.³

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code, which provides, in pertinent part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

³We note the requestor, as an attorney for the deceased individual’s estate, may obtain this individual’s CHRI from DPS. *See* Gov’t Code § 411.083(b)(3).

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

Fam. Code § 58.007(c), (e). Section 58.007(c) is applicable to records of juvenile delinquent conduct that occurred on or after September 1, 1997. *See id.* § 51.03(a) (defining "delinquent conduct" for purposes of section 58.007). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Upon review, we find portions of the information at issue in Exhibit 3 involve delinquent conduct that occurred after September 1, 1997. We note although the individual whose information is at issue is deceased, section 58.007 is not solely intended to protect the privacy interest of juveniles. Thus, an individual's death does not remove information relating to the deceased individual from the ambit of section 58.007(c). However, we are unable to determine whether the individual at issue was ten years of age or older and under seventeen years of age at the time of the conduct at issue. Accordingly, if this individual was not ten years of age or older and under seventeen years of age at the time of the conduct, section 58.007 is not applicable to the information we have marked in Exhibit 3, and it may not be withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. If the individual was ten years of age or older and under seventeen years of age at the time of the conduct, the marked information is confidential under section 58.007(c) of the Family Code. We note, although the requestor is the authorized representative of a parent of the individual whose information is at issue, the individual reached 18 years of age before his death. Therefore, the requestor no longer has a right of access to the records of his client's adult child under section 58.007(e). *See id.* § 58.007(e). It does not appear that any of the exceptions to confidentiality under section 58.007 apply to the information at issue. Accordingly, if the individual whose information is at issue was ten years of age or older and under seventeen

years of age at the time of the conduct at issue, the city must withhold the information we have marked in Exhibit 3 under section 552.101 in conjunction with section 58.007(c).

Section 552.101 of the Government Code 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 types 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. This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). In addition, this office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See* Open Records Decision No. 545 (1990). Further, we note the common-law right to privacy is a personal right that “terminates upon the death of the person whose privacy is invaded.” *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref’d n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 at 1 (1981) (privacy rights lapse upon death). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.101 in conjunction with common-law privacy. Upon review, we find portions of Exhibit 3 are highly intimate or embarrassing and of no legitimate public concern. Therefore, the city must generally withhold the information we have marked in this exhibit under section 552.101 of the Government Code in conjunction with common-law privacy.

In this instance, however, the requestor may be the authorized representative of one of the individuals whose personal financial information we have marked in Exhibit 3 on that basis, and may have a right of access to information pertaining to that individual that would otherwise be confidential under common-law privacy. *See* Gov’t Code § 552.023(a) (“person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, if the requestor is acting as the authorized representative of one of the individuals whose personal financial information we

have marked in Exhibit 3 under section 552.101 in conjunction with common-law privacy, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibit 3 under section 552.101 in conjunction with common-law privacy.

Section 552.130(a) of the Government Code provides the following:

Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country;
- (2) a motor vehicle title or registration issued by an agency of this state or another state or country; or
- (3) a personal identification document issued by an agency of this state or another state or country or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We note section 552.130 is designed to protect personal privacy, and the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; ORD 272 at 1. Upon review, the city must generally withhold the information we have marked in Exhibits 3, 4, and 5 under section 552.130 of the Government Code. However, the requestor may be the authorized representative of one of the individuals whose information we have marked in Exhibit 3 on that basis, and may have a right of access to information pertaining to that individual that would otherwise be confidential under section 552.130. *See Gov't Code § 552.023(a)*; ORD 481 at 4. Accordingly, if the requestor is acting as the authorized representative of one of the individuals whose information we have marked in Exhibit 3 under section 552.130, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibits 3, 4, and 5 under section 552.130.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). We note section 552.136 also protects privacy. Upon review, the city must generally withhold the information we have marked in Exhibit 3 under section 552.136 of the Government Code. However, the requestor may be the authorized representative of one of the individuals whose information we have marked on that basis, and may have a right of access to information pertaining to that individual that

would otherwise be confidential under section 552.136. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, if the requestor is acting as the authorized representative of one of the individuals whose information we have marked in Exhibit 3 under section 552.136, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibit 3 under section 552.136.

We note some of remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). 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.

In summary, the city must withhold the Texas peace officer's crash reports we have marked in Exhibits 2 and 5 under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code. Except for the information we have marked for release, the remaining information in Exhibit 2 must be withheld under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. The city must withhold the information we have marked in Exhibits 3 and 5 under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. If the individual whose information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code was ten years of age or older and under seventeen years of age at the time of the conduct at issue, the city must withhold this information on that basis. If the requestor is acting as the authorized representative of one of the individuals whose personal financial information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with common-law privacy, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibit 3 under section 552.101 of the Government Code in conjunction with common-law privacy. If the requestor is acting as the authorized representative of one of the individuals whose information we have marked in Exhibit 3 under section 552.130 of the Government Code, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibits 3, 4, and 5 under section 552.130 of the Government Code. If the requestor is acting as the authorized representative of one of the individuals whose information we have marked in Exhibit 3 under section 552.136 of the Government Code, the city may not withhold this information on that basis. Otherwise, the city must withhold all of the information we have marked in Exhibit 3 under section 552.136

of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.⁴

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 493689

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the city might ordinarily be required to withhold some of the submitted information to protect the privacy of the family of the deceased individual at issue. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). However, the requestor has a right of access to the information at issue, which the city might be required to withhold from the public on privacy grounds. *See Gov't Code* § 552.023. Further, the requestor may have a right of access to some of the information being released. *See id.* § 552.023(a); ORD 481 at 4. Accordingly, if the city receives another request for the information at issue from a different requestor, then the city must again seek a decision from this office. We also note the information being released includes the social security number of a living individual. 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. *See Gov't Code* § 552.147(b).