



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 7, 2015

Ms. Linda Hight
Records Coordinator
City of Cleburne
P.O. Box 677
Cleburne, Texas 76033-0677

OR2015-08898

Dear Ms. Hight:

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# 562814.

The City of Cleburne (the "city") received a request for thirteen categories of information regarding incident number 14-02810, police department general orders regarding the use of force, specified city ordinances, and use of force reports produced by a named police officer.¹ You state the city has released the requested ordinances. You also state the city has no information responsive to categories two, five, six, and seven of the request.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.108,

¹We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W. 3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); 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).

and 552.130 of the Government Code.³ We have considered the exceptions you claim and reviewed the 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. Section 552.101 encompasses information protected by section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: one that must be maintained as part of the officer’s civil service file and another that the police department may maintain for its own internal use. *See* Local Gov’t Code § 143.089(a), (g). Under section 143.089(a), 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 any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(3). 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). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer’s civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov’t Code § 143.089 143.089(b)-(c).

³Although you raise section 552.305 of the Government Code, we note this is not an exception to public disclosure under the Act. *See* Gov’t Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *See id.*

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. *See id.* § 143.089(g). Section 143.089(g) provides as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Id. In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined section 143.089(g) made these records confidential. *See City of San Antonio*, 851 S.W.2d at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You represent the information submitted in Exhibits 2 and 3 is contained within the internal files maintained by the city's police department (the "department") pursuant to section 143.089(g) of the Local Government Code. Further, you inform us the investigation at issue did not result in disciplinary action. However, we note the information in Exhibit 2 consists of police records regarding incident number 14-2810 maintained independently from the department officer's personnel file. The present request does not specifically seek information from the officer's personnel file. Instead, the requestor seeks, in part, information pertaining to a specified incident. 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, the information in Exhibit 2, which was specifically requested and is also maintained independently of the department's internal personnel file, is not confidential under section 143.089(g) of the Local Government Code, and the city may not withhold the information under section 552.101 of the Government Code on that basis. You state the information in Exhibit 3 is "part of an Internal Affairs Investigation and an internal file of a police officer[.]" You do not state the information in Exhibit 3 is maintained solely in the department's section 143.089(g) files. To the extent this information is maintained solely in the department's internal files, it is confidential under section 143.089(g) of the Local Government Code and must be withheld under

section 552.101 of the Government Code. To the extent the information in Exhibit 3 also exists independently of the department's section 143.089(g) file, it is not confidential under section 143.089(g) of the Local Government Code and may not be withheld under section 552.101 of the Government Code. As you also raise section 552.130 of the Government Code as an exception to disclosure of this information, in the event the information in Exhibit 3 exists independently of the department's section 143.089(g) files, we will address the applicability of section 552.130 to the information.

You also claim the audio and video recordings in Exhibit 2 are confidential under common-law privacy. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find some of the information in Exhibit 2 satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked and indicated in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. However, the city has failed to demonstrate any of the remaining information in Exhibit 2 is highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the city may not withhold the remaining information in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see City of Fort Worth v. Cornyn*, 86 S.W.3d at 327 (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.,* Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413

(1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable 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 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The city asserts the release of the information it has marked in Exhibit 4 could impair an officer's ability to arrest a suspect and would place individuals at an advantage in confrontations with the police. Upon review, we find release of the some of the information at issue would interfere with law enforcement. Thus, the city may withhold the information we have marked in Exhibit 4 under section 552.108(b)(1) of the Government Code. However, the city has failed to demonstrate the applicability of section 552.108(b)(1) to the remaining information; accordingly, the city must release the remaining information in Exhibit 4.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.⁴ Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988). Thus, if the cellular telephone numbers in Exhibit 2 relate to peace officers who elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the numbers from disclosure under section 552.1175 of the Government Code, provided a governmental body does not pay for the cellular service. If the individuals whose information is at issue are not currently licensed peace officers or do not elect to restrict access to the information in accordance with section 552.1175(b), the city may not withhold the cellular telephone numbers under section 552.1175 of the Government Code.

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, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, to the extent the information in Exhibit 3 exists independently of the department's section 143.089(g) files, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.137 of the Government Code 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). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we conclude the city must withhold the personal e-mail addresses in Exhibit 2 under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure.

In summary, to the extent the information in Exhibit 3 is maintained solely in the department’s internal files, it is confidential under section 143.089(g) of the Local Government Code and the city must withhold it under section 552.101 of the Government Code. The city must withhold the information we marked and indicated in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we have marked in Exhibit 4 under section 552.108(b)(1) of the Government Code. If the cellular telephone numbers in Exhibit 2 relate to peace officers who elect to restrict access to their information in accordance with section 552.1175(b), the city must withhold the numbers from disclosure under section 552.1175 of the Government Code, provided a governmental body does not pay for the cellular service. To the extent the information in Exhibit 3 exists independently of the department’s section 143.089(g) files, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The city must withhold the personal e-mail addresses in Exhibit 2 under section 552.137 of the Government Code, unless the owners affirmatively consent to public disclosure. The remaining information must be released.⁵

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

⁵We note the information to be released contains 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 an attorney general decision under the Act. *See id.* § 552.147(b).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 562814

Enc. Submitted documents

c: Requestor
(w/o enclosures)