



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 12, 2016

Mr. Frank Garza
City Attorney For City of Kyle
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601 Northwest Loop 410, Suite 100
San Antonio, Texas 78216-5511

OR2016-03448

Dear Mr. Garza:

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# 598053.

The City of Kyle (the "city"), which you represent, received a request for information regarding a named police officer. You state the city will release some information to the requestor. Additionally, you state the city has previously released some of the requested information to the requestor in response to a prior request for information. *See* Gov't Code § 552.232 (prescribing procedures for response to repetitious or redundant request for information). You claim the submitted information is excepted from disclosure under sections 552.027, 552.101, 552.103, and 552.107(2) of the Government Code.¹ You also state release of some of the information may implicate the proprietary interests of a third party, Caldwell Court Reporting ("Caldwell"), and you provide documentation demonstrating you notified Caldwell of the request for information and of its right to submit comments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from the requestor. *See id.* § 552.304

¹Although you raise section 552.101 of the Government Code in conjunction with a hearing examiner order, we note the proper exception to raise in this instance is section 552.107(2) of the Government Code. *See* Gov't Code § 552.107(2).

(interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.²

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Caldwell explaining why its information should not be released. Therefore, we have no basis to conclude Caldwell has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest Caldwell may have in it.

Next, you contend the city is not required to release the requested transcript because this information is commercially available. Section 552.027 of the Government Code provides as follows:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

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.

Gov't Code § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You state the submitted transcript is available to the requestor by written request to the court reporter. *See id.* § 52.047(a) (person may apply for a transcript of the evidence in a case reported by an official court reporter). Upon review, however, we find you have failed to demonstrate the information at issue came from the type of commercial book or publication purchased or acquired by a governmental body for research purposes as contemplated by section 552.027. *See id.* § 552.027(a). Therefore, the information at issue is not subject to section 552.027, and must be released unless it falls within an exception to disclosure. *Id.* §§ 552.006, .021, .301, .302.

Next, we note a portion of the submitted information consists of a transcript and attached exhibits from a public civil service hearing conducted by a hearing examiner. *See* Local Gov't Code §§ 143.010(c) (providing each Fire Fighters' and Police Officers' Civil Service Commission (the "commission") proceeding shall be held in public), .057(f) (providing the hearing examiner has the same duties and powers as the commission); *see also Downs v. City of Fort Worth*, 692 S.W.2d 209 (Tex. App.—Fort Worth 1985, *writ ref'd n.r.e.*) (equating appeals to independent third party hearing examiner with appeals to commission). Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Accordingly, the submitted transcript and attached exhibits are a public record subject to section 551.022 of the Government Code. As a general rule, the exceptions to disclosure found in the Act, such as section 552.103 of the Government Code, do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the city may not withhold this information under section 552.103 of the Government Code. However, we will address your remaining arguments against disclosure of this information, as well as the remaining information. We will also address your argument under section 552.103 for the remaining information.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he 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). The remaining information includes completed investigations and completed evaluations that are subject to section 552.022(a)(1). The city must release the completed investigations and evaluations pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although the city raises section 552.103 of the Government Code for this information, that exception is discretionary in nature and does not make information confidential under the Act. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103. However, the city raises section 552.101 for the information at issue, which can make information confidential for purposes of section 552.022. Additionally, we note portions of the information at issue are subject to sections 552.117, 552.130, and 552.136 of the Government Code.³ Accordingly, we will also consider the applicability of these exceptions to the information subject to section 552.022. Further, we will address the city's arguments against disclosure of the remaining information.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You state some of the submitted information pertains to a civil service appeal hearing. *See* Local Gov't Code § 143.010 (setting out commission appeal procedures). You state the police officer at issue elected to appeal his disciplinary action to an independent third party hearing examiner instead of the commission. *See id.* § 143.1016(a). You assert the hearing examiner issued a protective order pertaining to the information at issue. We note section 552.107(2) applies to information of which "a court by order has prohibited disclosure." Gov't Code § 552.107(2). Upon review, however, we find a hearing examiner is not a court for section 552.107(2) purposes. Therefore, we find section 552.107(2) is not applicable to the information at issue, and the city may not withhold any of the information at issue under section 552.107(2) of the Government Code.

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 covered by section 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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143. *See* Attorney General Opinion JC-0257. 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(b)-(c).

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.

Local Gov't Code § 143.089(g). 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* 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).

The city seeks to withhold the submitted information pursuant to section 143.089(g). You state the submitted transcript and exhibits pertain to a city police officer’s appeal of his indefinite suspension before a hearing examiner. You further state the hearing examiner has not issued a decision regarding the appeal. You state the transcript contains “detailed descriptions of departmental file documents not contained in the [c]ivil [s]ervice [f]ile along with specific exhibits that were in the department file and not the [c]ivil [s]ervice [f]ile.” We note the fact this information references information that is contained in the officer’s confidential section 143.089(g) file does not make the information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (stating statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from the statutory structure), 478 at 2 (1987) (stating as a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Further, we find the submitted transcript and attached exhibits pertain to misconduct by the police officer that resulted in disciplinary action by the city. Thus, although it may be kept in the internal file maintained under subsection 143.089(g), it must also be kept in the civil service personnel file maintained under subsection 143.089(a). *See* Local Gov't Code § 143.089(a)(2). Section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) may be removed from the civil service file if the civil service commission determines (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not supported by sufficient evidence. *See id.* Section 143.089(c), therefore, signifies information relating to an incident that resulted in disciplinary action must be placed in the civil service file during the pendency of the appeal. Additionally, we note portions of the remaining information consist of evaluations, commendations, and investigations of misconduct by the police officer that also resulted in disciplinary action. This information, which we have marked, must also be placed in the officer’s civil service file. In this instance, the request was received by the city, which has access to the files maintained under both subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Accordingly, the city may not withhold the submitted transcript and attached exhibits or the information we have marked in the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Based on your representation that the remaining information is maintained within the city police department’s internal file, we find the remaining information is confidential under

section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code on that basis.⁴

Section 552.103 of the Government Code 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 a 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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

As noted above, the city is a civil service city under chapter 143 of the Local Government Code. You state the remaining information pertains to a police officer who has filed an appeal to his indefinite suspension pursuant to chapter 143 of the Local Government Code. We note municipal civil service appeals, such as the one 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 such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991). You state the appeal of the indefinite suspension was pending on the date the city received the request for information. Based on your representations and our review of the documents at issue, we find the city was a party to pending litigation on the date it received the request for information. Further, you

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

state the information at issue relates to the pending appeal. Upon review, we agree the information at issue is related to the pending litigation. Therefore, we conclude the city may withhold the information we have marked under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code also encompasses information subject to chapter 550 of the Transportation Code. Section 550.065 applies only to a written report of an accident required under section 550.061, 550.062, or 601.004. Transp. Code § 550.065(a)(1)). Chapter 550 requires the creation of a written report when the accident resulted in injury to or the death of a person or damage to the property of any person to the apparent extent of \$1,000 or more. *Id.* §§ 550.061 (operator's accident report), .062 (officer's accident report). An accident report is privileged and for the confidential use of the Texas Department of Transportation or a local governmental agency of Texas that has use for the information for accident prevention purposes. *Id.* § 550.065(b). However, a governmental entity may release an accident report in accordance with subsections (c) and (c-1). *Id.* § 550.065(c), (c-1)). Section 550.065(c) provides a governmental entity shall release an accident report to a person or entity listed under this subsection. *Id.* § 550.065(c).

The remaining information includes a CR-3 accident report. In this instance, the requestor is not a person listed under section 550.065(c). Thus, the submitted accident report is confidential under section 550.065(b), and the city must withhold it under section 552.101 of the Government Code. However, section 550.065(c-1) requires the city to create a redacted accident report that may be requested by any person. *Id.* § 550.065(c-1). The redacted accident report may not include the information listed in subsection (f)(2). *Id.* Therefore, the requestor has a right of access to the redacted accident report. Thus, the city must release the redacted accident report to the requestor pursuant to section 550.065(c-1).

Section 552.101 of the Government Code also 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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from

required public disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 545 (1990) (common-law privacy protects mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked in the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold it under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2) 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 id.* § 552.130. Accordingly, the city must withhold the information we have marked within the remaining information under section 552.130 of the Government Code.

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.” *Id.* § 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. Upon review, we find the city must withhold the information we have marked under section 552.136 of the Government Code.


In summary, with the exception of the submitted transcript and the attached exhibits and the information we have marked that must be placed in the civil service file pursuant to section 143.089(a) of the Local Government Code, the city must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city may withhold the information we have marked under section 552.103 of the Government Code. The city must withhold the marked accident report under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Government Code, but must release the redacted accident report pursuant to section 550.065(c-1) of the Government Code. The city must withhold

the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, the information we have marked under section 552.117(a)(2) of the Government Code, the information we have marked under section 552.130 of the Government Code, and the information we have marked under section 552.136 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.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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/bw

Ref: ID# 598053

Enc. Submitted documents

c: Requestor
(w/o enclosures)