



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

July 6, 1990

Mr. R. Clayton Hutchins  
City Attorney  
P. O. Box 530011  
Grand Prairie, Texas 75053

Open Records Decision No. 562

Re: Whether Local Government  
Code section 143.089, in con-  
junction with section 3(a)(1)  
of the Open Records Act,  
protects information about com-  
plaints filed against police  
officers (RQ-1639)

Dear Mr. Hutchins:

The City of Grand Prairie has received two separate requests for information pertaining to a city police officer who was a suspect in the police investigation of a bank robbery that took place in the city. You inform us that the officer was later placed on indefinite suspension by the chief of police for his conduct during an investigation by the department's internal affairs division following the robbery. The requestors specifically seek access to or copies of the following:

- 1) all documents regarding possible or actual infractions committed by the officer;
- 2) the narrative of all complaints filed against the officer and the names of all complainants;
- 3) the officer's written responses to the complaints;
- 4) all documents regarding internal investigations involving the officer;
- 5) all documents relating to the final determination of all complaints and any disciplinary action taken against the officer;
- 6) any commendations and awards given the officer during his tenure with the city.

In compliance with your duty under section 7(b) of the Open Records Act, you have supplied this office with copies of documents contained in the officer's personnel file and the police investigation file compiled following the bank robbery. You argue that the requested information is excepted from disclosure by sections 3(a)(1) and 3(a)(8) of the Open Records Act.

You claim the requested information contained in the officer's personnel file is excepted from disclosure by section 3(a)(1) of the act, which protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You rely in part on section 143.089 of the Local Government Code,<sup>1</sup> which you contend prohibits the disclosure of information contained in a police officer's personnel file. Section 143.089 applies to municipalities that have adopted the fire fighters' and police officers' civil service law in accordance with the provisions of chapter 143 of the Local Government Code. Local Gov't Code § 143.002. Section 143.089 has not been previously interpreted by this office in the context of the Open Records Act. It provides the following:

§ 143.089. Personnel File.

(a) The director [of the fire fighters' and police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public

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1. Section 143.089 was originally enacted as section 15A of article 1269m, V.T.C.S., by Acts 1987, 70th Leg., ch. 300, at 1669. Article 1269m, however, was repealed earlier in the same legislative session and recodified as part of chapter 143 of the Local Government Code. See Acts 1987, 70th Leg., ch. 149, § 49(1), at 1306. This oversight was corrected by Acts 1989, 71st Leg., ch. 1, at 31, and took effect August 28, 1989. The enactment of section 15A was, however, preserved and given effect as part of chapter 143 as of the effective date of the 1987 act. Gov't Code § 311.031(c).

or by the employing department for an action, duty, or activity that relates to the person's official duties;

(2) any misconduct by the fire fighter or the police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and

(3) the periodic evaluation of the fire fighter or police officer by a supervisor.

(b) A letter, memorandum, or document relating to alleged misconduct by the fire fighter or police officer may not be placed in the person's personnel file if the employing department determines that there is insufficient evidence to sustain the charge of misconduct.

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by Subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

(2) the charge of misconduct was not supported by sufficient evidence.

(d) If a negative letter, memorandum, document, or other notation of negative impact is included in a fire fighter's or police officer's personnel file, the director or the director's designee shall, within 30 days after the date of the inclusion, notify the affected fire fighter or police officer. The fire fighter or police officer may, on or before the 15th day after the date of receipt of the notification, file a written response to the negative letter, memorandum, document, or other notation.

(e) The fire fighter or police officer is entitled, on request, to a copy of any letter, memorandum, or document placed in the person's personnel file. The municipality may charge the fire fighter or police officer a reasonable fee not to exceed actual cost for any copies provided under this subsection.

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless the release of the information is required by law.

(g) 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.  
(Emphasis added.)

Local Gov't Code § 143.089.

Section 3(a)(1) of the Open Records Act protects, among other things, information deemed confidential by statute. Section 143.089 does not expressly label particular information in police officers' or fire fighters' personnel files "confidential," but two provisions, subsections (f) and (g), appear to place restrictions on the disclosure of information in personnel files. Subsection (f) appears to do so by requiring the written consent of the police officer or fire fighter prior to the release of any such information. This consent requirement is tempered, however, by the phrase "unless the release is required by law." Subsection (g), meanwhile, states that a fire or police department may not release any information contained in a personnel file maintained by the department but must instead refer all requests for such information to the director of the civil service department. Since we believe these provisions are ambiguous and subject to differing interpretations, we must consult other sources to determine their intended effect.

A court construing an ambiguous statutory provision may consider, among other things, the legislative history of the provision. Gov't Code § 311.023(3). The bill analysis prepared for the legislation proposing what is now section 143.089 states that the statute in its original form was intended not only to prohibit the release of personnel records by a police or fire department, but also to specify what information may and may not be placed in a permanent personnel file. Bill Analysis, H.B. 1368, 70th Leg. (prepared for House Comm. on Urban Affairs) (1987). At the public hearing before the committee of the House of Representatives assigned to review the legislation, however, some concern was expressed about a possible conflict with the Open Records Act. It was suggested that the bill be clarified to avoid such a conflict. Public Hearing on H.B. 1368 before the House Urban Affairs Comm. (March 23, 1987) (testimony of Ron DeLord, President of the Combined Law Enforcement Associations of Texas). The bill was sent to subcommittee, where the phrase "unless the release of the information is required by law" was added to subsection (f). The chairman of the subcommittee testified that the intention of the subcommittee was to clarify the effect of section 143.089 on requests for information made pursuant to the Open Records Act:

Dealing with the open record business, all information that is currently releasable to the public under the open record act would still be maintained under the law. In other words, this bill neither decreases or expands whatever present law says about an open record in the file.

Public Hearing on H.B. 1368 before the House Urban Affairs Comm. (April 6, 1987) (testimony of Rep. Orlando Garcia).

Section 143.089, therefore, accomplishes five things. First, it requires the director of the fire fighters' and police officers' civil service commission or his designee to maintain a personnel file for each fire fighter and police officer. Second, it specifies what kinds of information must be placed in the file, and prohibits the entry and provides for the removal of information about unsustained allegations of misconduct and unjustified disciplinary action. Third, it grants fire fighters and police officers the right to be notified of negative information that is included in the file and an opportunity to respond to such information. Fourth, subsection (f) of section 143.089 prohibits the release of information in the file without the written permission of the fire fighter or police officer unless disclosure is required by the Open Records Act or

other law. Finally, subsection (g) of the statute permits a fire or police department to maintain a separate personnel file for its fire fighters or police officers. The implications of the latter two provisions are discussed below.

We construe subsection (f) to prohibit disclosure of personnel file information only in situations not governed by the Open Records Act or other laws that require disclosure. For example, there may be occasions where particular information in a personnel file would be excepted from disclosure under the Open Records Act, but the custodian of the records may wish to waive the exception and make such information public. In such instances, section 143.089 would require the officer to give his written consent to disclosure of the information before its release.

Subsection (g) of section 143.089 authorizes a fire or police department to maintain a separate personnel file, but prohibits the release of information contained in the department's file. Requests for information from the department's file must be directed to the director of the fire fighters' and police officers' civil service system or his designee. Subsection (g) appears to create a category of information that is not available for either public inspection or exchange with other governmental agencies requesting such information. The question that arises is whether subsection (g) makes particular information confidential for purposes of section 3(a)(1) of the Open Records Act.

Subsection (g) is subject to two differing interpretations. First, it may be argued that the legislature intended the department personnel file to merely duplicate the civil service file since all requests for information from the department's file are to be forwarded to the director of the civil service. This requirement would be unnecessary if the department file were intended to hold different information than the civil service file. Furthermore, since section 143.089 limits the kind of information that may be placed in a personnel file maintained by a civil service department, a harmonious reading of the statute would require the police or fire department personnel file to be likewise limited. On the other hand, the referral requirement can be viewed simply as an accommodation to the public and other agencies requesting personnel information from police and fire departments by directing them to the agency that is authorized to release personnel information.

The legislative history of section 143.089 does not ultimately resolve this point, but it lends some support to

the latter view. Supporters of the bill enacting subsection (g) testified that the bill was intended to allow a police or fire department to compile a separate personnel file for its own use without limiting the kind of information that could be placed in it, unlike the civil service personnel files maintained under subsection (a) of section 143.089. Testimony of Ron DeLord on H.B. 1368, supra. The department personnel file, then, might contain unfounded negative information relating to the police officer or fire fighter, precisely the kind of information that could not be included in the civil service personnel file. If such unsubstantiated negative information could be obtained from the department file, the cleansing effect of section 143.089 would be lost. Ideally, the language of subsection (g) should expressly provide for this contingency, but in the absence of direction from the statute, we must resort to the public record that informed the legislature during the enactment of section 143.089.

With these considerations in mind, we believe that subsection (g) may be reasonably construed to permit a police or fire department to maintain personnel files on its employees and officers that contain more and different information than appears in the civil service personnel files for the same employees.. Such additional information must, in our opinion, be reasonably related to the police officer's or fire fighter's employment relationship with the police or fire department. See Open Records Decision Nos. 332 (1982); 55 (1974) (under section 3(a)(2) of the Open Records Act, any information bearing on a person's qualifications for, terms of, and separation from employment is part of the person's personnel file).

Subsection (g) prohibits the disclosure of (1) information that is maintained in the police officer's or fire fighter's civil service personnel file and (2) any other information that is reasonably related to a police officer's or fire fighter's employment relationship. The governmental body must show that information in a department personnel file is reasonably related to the individual's employment relationship with the department if the information does not disclose this fact on its face. Information in the department file that is not reasonably related to the individual's employment relationship remains subject to disclosure under the Open Records Act.

To summarize, section 143.089 authorizes the maintenance of separate personnel files by a civil service department of a city and a police or fire department of the city. It does not diminish the public's right under the Open Records Act to obtain access to information in fire

fighters' or police officers' personnel files maintained by a civil service department under subsection (a) of the statute, but merely imposes specific procedural requirements with respect to certain information in those files. Information in a police officer's or fire fighter's civil service personnel file can be withheld from disclosure only if it falls within a specific exception provided in section 3 of the act. Information in a personnel file maintained by a fire or police department pursuant to subsection (g) of the act is excepted from disclosure under section 3(a)(1) of the Open Records Act if the information is reasonably related to the fire fighter's or police officer's employment relationship with the fire or police department.

The briefs accompanying your requests for a decision from this office do not indicate whether the personnel information supplied for our review is extracted from the civil service personnel file or the police department personnel file. In your brief you quote subsection (f) of section 143.089, which prohibits the director of the civil service from releasing information from the civil service personnel file without the police officer's written permission unless the release is required by law. We will therefore assume that the information is taken from the civil service file.

As our previous discussion emphasized, subsection (f) does not remove information from scrutiny under the Open Records Act. It merely requires that the consent of the individual be obtained when disclosure of information in the civil service file is not required by the Open Records Act. Information in the civil service personnel file is subject to disclosure unless an exception under the Open Records Act applies. We must therefore examine the information to determine whether any of it is protected by sections 3(a)(1), 3(a)(2), or 3(a)(8), the other exceptions you claimed for the information.

Section 3(a)(1) excepts information protected by constitutional or common-law privacy. You have not demonstrated how any of the information in the personnel file threatens the officer's constitutional or common-law privacy interests, other than to suggest that employees are granted a right of personal privacy and that disclosure of information in the file would constitute an unreasonable intrusion of that right. In support of this proposition you rely on the case of Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d 203 (Tex. 1987), which held that public employees enjoy a right of personal privacy under the Texas Constitution that is protected from unreasonable intrusion by the public

employer. The court's decision acts primarily as a restraint on the government's ability to delve into the personal affairs of its employees. It does not address the public disclosure of information about a public employee's actions as a public employee. Nor does it prevent governmental entities from acquiring information about an employee's personal affairs that was gathered by the public agency in pursuit of a compelling governmental objective. Further, the court's decision does not address the public interest in preserving the credibility and effectiveness of the police force.<sup>2</sup>

As stated earlier, section 3(a)(1) excepts information protected by common-law or constitutional privacy. The test for common-law privacy is whether information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information is of no legitimate concern to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). This office has previously determined that under this standard, personnel file information, particularly information maintained by law enforcement agencies, will generally be available to the public. Open Records Decision No. 444 (1986).

Section 3(a)(1) will also protect information on the basis of "false light" privacy if the governmental body determines that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that there is serious doubt about the truth of the information. Open Records Decision No. 397 (1983). Nothing you have submitted suggests that either the city or the police department harbors serious doubts about the truth of the information contained in the file. Moreover, the procedures outlined in section 143.089 are designed to permit the removal of unsubstantiated

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2. In reaching its decision, the supreme court emphasized that the right of personal privacy for public employees is not absolute. It identified public agencies where, because of their direct involvement with the compelling state goal of protecting the safety of the public, employees could expect a lesser degree of personal privacy -- i.e., police and fire departments. 746 S.W.2d at 206.

allegations of misconduct, thereby avoiding questions of false light privacy.

Information may also be protected by constitutional disclosural privacy under section 3(a)(1). The disclosure of information about personal matters that involve the most intimate aspects of human affairs may be permissible if there is a legitimate state interest that outweighs the individual's privacy interests. Open Records Decision No. 455 (1987). The information in the personnel file does not, in our opinion, involve the most intimate aspects of human affairs but in fact touches on matters of legitimate public concern. Accordingly, we conclude that nothing in the personnel file may be withheld on the basis of common-law privacy or state or federal constitutional privacy.

You also claim the requested information is excepted by section 3(a)(8) of the Open Records Act, which protects

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

In order to secure the protection of this exception, the governmental body must demonstrate that release of the requested information will unduly interfere with law enforcement and crime prevention. See Ex parte Pruitt, 551 S.W.2d 706, 709 (Tex. 1977).

This office has previously concluded that section 3(a)(8) will not protect general personnel information such as a law enforcement officer's age, law enforcement background, and previous experience and employment. See Open Records Decision No. 329 (1982). Neither will it except certain information concerning complaints filed against the officer such as the names of the officer and the complainant and the final disposition of the complaint. See Open Records Decision No. 208 (1978). The details of the complaint, however, may be excepted if disclosure would unduly interfere with law enforcement or crime prevention.

In your letter requesting this decision you stated that the investigation of the bank robbery in Grand Prairie continues. The chief of the Grand Prairie Police Department confirmed that, as of the writing of this decision, the status of the case was unchanged but that the active

investigation of the case was assumed by the Federal Bureau of Investigation. The ongoing nature of the investigation convinces us that the release of much of the information relating to the investigation at this time would unduly interfere with the department's continuing responsibility to assist in the investigation of this crime and, therefore, may be withheld pursuant to section 3(a)(8). Those items from the personnel file that relate to the investigation of the bank robbery may be withheld. Of the items from the police investigation file submitted for our review, the information in the offense report prepared following the robbery that is described as public information in Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) and summarized in Open Records Decision No. 127 (1976) must be released. All items that may be withheld under section 3(a)(8) are marked accordingly. Also, a copy of a polygraph examiner's report included in the personnel file may be withheld pursuant to section 3(a)(1) of the Open Records Act in conjunction with section 19A of the Polygraph Examiners Act, article 4413(29cc), V.T.C.S. See Open Records Decision No. 316 (1982). That information is also marked.

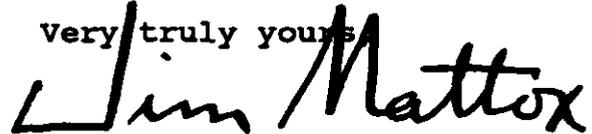
#### S U M M A R Y

Section 143.089 of the Local Government Code, pertaining to police officers' and fire fighters' personnel files, does not make information contained in personnel files maintained by civil service departments pursuant to subsection (a) of the statute confidential for the purposes of section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S. Information in personnel files maintained by a police or fire department pursuant to subsection (g) of section 143.089 may be withheld from disclosure under section 3(a)(1) of the Open Records Act if it is reasonably related to the police officer's or fire fighter's employment relationship with the department.

Some of the information contained in the personnel file of a police officer employed by the Grand Prairie Police Department and who is a suspect in the investigation of a bank robbery may be withheld pursuant to section 3(a)(8) of the Open Records Act. A polygraph examiner's report contained in the personnel file may be withheld under section

3(a)(1) of the Open Records Act in conjunction with section 19A of article 4413(29cc), V.T.C.S. With the exception of the first page of an offense report prepared following the bank robbery, the police investigation file compiled following the robbery may be withheld in its entirety.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

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