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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

June 14 1991

Mr. Harvey Cargill, Jr.
City Attorney
City of Abilene
555 Walnut
Abilene, Texas 79604

OR91-282

Dear Mr. Cargill:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12429.

The requestor seeks access to "[a]ny and all findings concerning an investigation conducted by the Abilene Fire Department" regarding an alleged hazing incident, including information regarding

- (1) the number of fire fighters disciplined as a result of the investigation;
- (2) the nature of the disciplinary action;
- (3) the length of the disciplinary action; and
- (4) 'any and all previous infractions by the same individuals.'

You explain that since the fire department investigated the matter by taking only oral, unrecorded statements, there are no documents corresponding to the *general request for information*. The city has produced for our inspection documents taken from the personnel files of the disciplined fire fighters which reveal, with one exception, the basic factual information the requestor seeks access to. The city thus has at its disposal information which complies with the specific terms of the request for information. It is therefore under a duty to disclose such

information unless it falls within an exception under the Open Records Act. The fact that the requestor did not specifically request access to personnel files is of no consequence, since the documents submitted for our review were produced as a direct result of the investigation referred to by the requestor and contain most of the specific items of requested information.¹

You contend that the requested information is excepted by sections 3(a)(1), 3(a)(2) and 3(a)(3) of the Open Records Act. We conclude that only the identity of the victim of the alleged hazing is excepted from public disclosure. We will address each of your arguments in order.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." This provision incorporates the confidentiality provisions of other applicable laws. You claim that the requested information is excepted in this regard by section 143.089(f) of the Local Government Code.

Section 143.089 of the Local Government Code applies in cities that have adopted the provisions of the fire fighters' and police officers' civil service law in accordance with chapter 143 of the Local Government Code or its predecessor, former V.T.C.S. article 1269m. It requires the director of the fire fighters' and police officers' civil service (or his designee) to maintain a personnel file on each fire fighter or police officer and specifies the kinds of information that may and may not be placed in the file, the kinds of information that must be removed from the file under certain conditions, and procedures to allow fire fighters and police officers to review and respond to negative information that is placed in the file.

¹ In a letter dated May 10, 1991, this office requested that the city submit copies of the information sought by the requestor. The documents submitted for our inspection do not contain information corresponding to the last item -- "any and all previous infractions" by the suspended fire fighters. This office therefore cannot rule that your request for a decision of this office under section 7 of the Open Records Act is timely with respect to this information. Information corresponding to the last item of requested information is consequently presumed to be public unless otherwise deemed confidential by law. Unless you can demonstrate to this office compelling reasons why the information should not be released within 14 days of the date of receipt of this letter, the information must be provided to the requestor.

Subsection (f) of section 143.089 provides the following:

(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.* [Emphasis added.]

In Open Records Decision No. 562 (1990) this office concluded that subsection (f) prohibits disclosure of personnel file information only in situations not governed by the Open Records Act or any other law that requires disclosure of personnel file information. The decision determined after examining the legislative history of subsection (f) that the Open Records Act was a "law" within the meaning of the phrase "unless the release of the information is required by law." See Open Records Decision No. 562 (1990) at 5. Subsection (f) therefore does not remove information in personnel files from scrutiny under the Open Records Act and it does not render such information confidential for purposes of section 3(a)(1). Accordingly, the information from the suspended fire fighters' personnel files is not excepted from disclosure by section 143.089(f) of the Local Government Code.

You also contend that the requested information is excepted under section 3(a)(1) by common law privacy. Information will be protected by section 3(a)(1) and common law privacy if it meets two conditions: (1) the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and (2) the information must be of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). As a general rule, personnel file information is available to the public under this standard. Open Records Decision Nos. 562 (1990); 444 (1986).

As previously noted, the items submitted for our inspection comprise the documentation of the suspension of the two fire fighters. The documents include the notices and orders of the suspensions, accompanying cover letters and attachments, and written statements of the suspended fire fighters. The orders contain a summary of the factual basis for the finding of violations of civil service rules and regulations, department standards of conduct, and department general

orders, and refer to the victim of the alleged hazing by name. You offer no explanation as to why the information is protected by common law privacy other than to characterize the incident as a "purely trivial personnel matter which should not be inflated so as to damage an employee's reputation and invade his or her right of privacy." You complain that the media has mischaracterized the event as involving serious misconduct when all that occurred was "horseplay" and "teasing."

This argument is self-defeating. If the incident were purely "trivial" there could be little complaint that disclosure of the disposition of the incident or of the facts would be highly intimate and embarrassing to the suspended fire-fighters. There is, furthermore, a legitimate and substantial public interest in knowing the details of a public employee's performance of his duties, particularly of an employee who is entrusted with protecting the safety of the public. See Open Records Decision Nos. 562 (1990); 470 (1987); 455 (1987). The common law privacy interests of the suspended fire fighters therefore will not provide any basis for withholding the requested information in this instance.

The documents reveal that the chief of the fire department determined that the victim was subjected to loathsome and degrading treatment by fellow fire fighters. We believe a reasonable person would find the details of the incident highly embarrassing to the victim of the hazing and would object to their disclosure. We recognize that the legitimate public interest in knowing the details of the incident requires disclosure of the facts described in the documents, but we do not believe that this requires disclosure of the identity of the victim. You advise that the victim has expressed no interest in filing a complaint or in seeking redress of the matter. The release of the individual's name under these circumstances would not, in our opinion, serve a legitimate public interest, but it would subject the individual to further humiliation. Accordingly, we conclude that only the identity of the victim is protected by common law privacy.

You also claim the requested information is protected by the right of privacy of public employees under the Texas Constitution recognized in *Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (hereinafter *TSEU*). As noted in Open Records Decision No. 562, this right acts primarily as a restraint on the power of the government to

delve into the private affairs of its employees. *See also* Attorney General Opinion JM-1274 (1990). It does not address the public disclosure of information about an individual's actions as a public employee and will not bar the disclosure of the requested information on this occasion. *See* Open Records Decision No. 562 (1990).

Section 3(a)(2) of the Open Records Act, in pertinent part, excepts from disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test for determining whether information is excepted under this provision is the same as that developed for common law privacy under section 3(a)(1). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). We have previously determined that only the identity of the victim may be excepted under section 3(a)(1) by virtue of common law privacy; we need not further address your section 3(a)(2) claim.

Finally, you raise section 3(a)(3) as an exception to disclosure. To secure the protection of section 3(a)(3), the governmental body must establish (1) that litigation - either in a judicial or quasi-judicial proceeding - is pending or reasonably anticipated with regard to a specific matter, and (2) that the requested information "relates" to the litigation. Open Records Decision No. 551 (1990). However, when the parties in litigation with a governmental body have inspected the requested information pursuant to court order or discovery, section 3(a)(3) does not protect the requested information. Open Records Decision Nos. 551 (1990); 511 (1988).

The potential litigants in this instance -- the suspended fire fighters -- have a statutory right to view and receive copies of the documents in question. *See* Local Gov't Code § 143.089(d) and (e). The documents also indicate that they were personally served upon both fire fighters. In view of these facts, we conclude that section 3(a)(3) is inapplicable to the requested information. *Cf.* Open Records Decision Nos. 551 (1990); 511 (1988).

To summarize, we conclude that only the identity of the victim of the conduct leading to the suspension of the two fire fighters employed by the city of Abilene may be withheld from public disclosure. The city must release the remaining

information. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-282.

Yours very truly,


Steve Aragon
Assistant Attorney General
Opinion Committee

SA/mc

Ref.: ID# 12429

Enclosure: Open Records Decision No. 562 (1990)

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