



November 12, 2001

Ms. Jan Clark  
Assistant City Attorney  
City of Houston - Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2001-5238

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154708.

The Houston Fire Department (the "department") received three requests for the audiotapes from a specified 9-1-1 call. You claim that the audiotapes are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. To the extent that other responsive information exists, we assume that you have released such information. If not, you must do so at this time. Gov't Code §§ 552.301, .302. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the audiotapes are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 excepts information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. Gov't Code § 552.108. You inform us that a citizen complaint related to the 9-1-1 call has led to an investigation. You state that "the [c]ity is not indicating that criminal charges are imminent, or even appropriate, however the possibility does exist." The submitted interoffice memorandum and city complaint form reflect that the department is conducting an internal investigation into administrative and ethical misconduct. Because the department is investigating personnel misconduct rather than a crime, section 552.108 is inapplicable. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (law enforcement exemption from disclosure under statutory predecessor to Public Information

Act was inapplicable in case where no criminal investigation or prosecution resulted from investigation). Therefore, you may not withhold the audiotapes under section 552.108.

You also argue that the audiotapes are excepted from disclosure by section 552.101 in conjunction with section 143.089(g) of the Local Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As a civil service city under chapter 143 of the Local Government Code, you may maintain two different types of personnel files, one that the fire department is required to maintain as part of the fire fighter's civil service file, and one that the fire department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089(g) provides:

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.

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 city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. However, in cases in which a police department takes disciplinary action against a police officer in accordance with chapter 143, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the personnel files maintained under section 143.089(a). Such records are subject to disclosure under the Act. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

You inform this office that the department's internal investigation has not been finalized, and so there has been no disciplinary action that would require the department to place the information in the civil service file maintained under section 143.089(a). As a result, the requested information is not within the personnel files maintained by the department's Civil Service Commission, but rather is maintained in the section 143.089(g) internal personnel file. Consequently, if the requested records are maintained *only* within the internal, section 143.089(g) file, the submitted records are confidential and may not be disclosed. However, if the responsive records exist elsewhere, outside the section 143.089(g) file, the information would be subject to disclosure under the Public Information Act, and must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

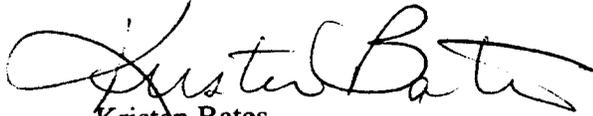
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/seg

Ref: ID# 154708

Enc. Submitted documents

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