



November 16, 2001

Ms. Cynthia B. Garcia
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2001-5314

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154965.

The City of Fort Worth (the "city") received a request for information regarding a certain officer, including information about his income, his performance evaluations, and any complaints and investigations filed against him. You claim that the requested information (Exhibits C and D to your brief) is excepted from disclosure under section 552.103 of the Government Code and section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that under section 552.301 of the Government Code a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). You state in correspondence to this office dated September 12, 2001 and September 18, 2001 that the city received the open records request on September 6, 2001, which means your comments and the requested documents were due to this office on September 27, 2001. However, you did not submit your comments and related documents until October 1, 2001, stating, in contradiction of your prior statements, that the city received the open records request on September 10, 2001. Therefore, we are unclear as to when the city actually received the request for information. Accordingly, we

conclude that you failed to comply with the procedural requirements of section 552.301 in timely submitting your comments and related documents to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You assert that Exhibit D is excepted from disclosure under section 552.103. Because section 552.103 is a discretionary exception, it is waived by a governmental body's failure to comply with section 552.301. Open Records Decision No. 473 (1987). Thus, Exhibit D must be released. On the other hand, your section 552.101 assertions are still applicable and do provide a compelling reason to overcome disclosure. Thus, we will consider your claim that Exhibit C is protected under section 552.101.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 143.089 contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. *See Local Gov't Code § 143.089(a), (g)*. The civil service file must contain certain specified items, including documents relating to any misconduct in those cases where the police department took disciplinary action against the peace officer. *See id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the 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 id.* § 143.089(b), (c). Thus, subsections (a)-(c) limit the contents of the civil service file.

Subsection (g) authorizes but does not require the city police department to maintain for its use a separate and independent, internal personnel file on a peace officer. 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. *See City of San Antonio*, 851 S.W.2d at 949. In cases in which a police department takes disciplinary action against a police officer, 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 may not be withheld unless one of the Public Information Act's exceptions applies. *See Local Gov't Code* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

You inform us that the information in Exhibit C relates to an investigation that did not result in disciplinary action against the officer at issue because there was insufficient evidence to sustain the charge of misconduct. Thus, the information may not be placed in the civil service file, and we assume it is instead maintained as part of the city's confidential (g) file. Consequently, the information in Exhibit C is confidential under section 143.089(g) in conjunction with section 552.101 and must be withheld.

In sum, the city waived its claim under section 552.103 by failing to comply with the requirements of section 552.301. Consequently, the city must release Exhibit D. Exhibit C, however, is confidential under section 143.089(g) and section 552.101 and must be withheld accordingly.

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

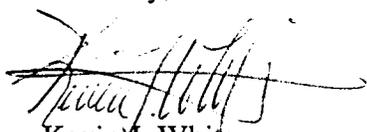
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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 Texas Building and Procurement 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,



Kevin J. White

Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 154965

Enc. Submitted documents

c: Ms. Mimi Coffey
2601 Airport Freeway, Suite 400
Fort Worth, Texas 76111
(w/o enclosures)