



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8845

OR2003-9123

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192334.

The City of Austin (the "city") received five requests for information concerning the report and findings of an independent investigation of the officer-involved shooting of Sophia King. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code because it is confidential under section 143.089(g) of the Local Government Code. We have considered the exception you claim and have reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code §552.304 (providing for submission of public comments).

Initially, the city indicates that a portion of the submitted information is subject to a previous ruling by this office. In Open Records Letter No. 2003-7002 (2003), this office determined that, other than basic information, offense report number 02-1620377 could be withheld under section 552.108(a)(2) of the Government Code. Because the facts and circumstances surrounding that ruling do not appear to have not changed, you may continue to withhold this document in accordance with our previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). We note, however, that section 552.108 is a discretionary exception and that the city may choose to release all or part of offense report number 02-1620377 that is not otherwise confidential by law. *See* Gov't Code § 552.007.

We next address the assertion of one of the requestors that the city has selectively disclosed a portion of the requested information. Specifically, this requestor contends that "the City of Austin and the Austin Police Department waived any privilege that allegedly prevents disclosure of the internal investigation documents concerning this matter by selectively disclosing portions of the investigation." Section 552.007 of the Government provides that

the Public Information Act “does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, *unless the disclosure is expressly prohibited by law or the information is confidential under law.* [However, p]ublic information made available . . . must be made available to *any* person.” Gov’t Code § 552.007 (emphasis added). In other words, a governmental body may not voluntarily disclose information to one member of the public and then refuse to provide that same information to another member of the public *unless* the information is confidential by law. Here, the city claims that the requested information is confidential under section 143.089(g) of the Local Government Code. Thus, even if we were to assume that the city had in fact previously released some of the requested information to the public, the city would nevertheless be required to withhold the information in this instance if it were found to be confidential. Therefore, we will address the city’s arguments under section 552.101 of the Government Code and section 143.089(g).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. *See* Local Gov’t Code § 143.089(a), (g). 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).¹ *Abbott v. City of 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 in 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 are subject to release under chapter 552 of the Government Code. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer’s alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. *See* Local Gov’t Code § 143.089(b). Information that reasonably relates to an officer’s employment relationship with the police department and that is maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

¹Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

A qualified civil service municipality may elect under subchapter I of chapter 143 of the Local Government to enter into an agreement with a police association regarding “wages, salaries, rates of pay, hours of work, other terms and conditions of employment, [and] other personnel issues.”² Local Gov’t Code § 143.303. When a qualified municipality enters into such an agreement, the agreement “supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, or *other terms and conditions of employment* to the extent of any conflict with the statute” and “preempts any contrary statute, executive order, local ordinance, or rule adopted by the state or a political subdivision or agent of the state including a personnel board, a civil service commission, or a home-rule municipality.” Local Gov’t Code § 143.307(a), (b) (emphasis added). However, an agreement “may not diminish or qualify any right, benefit, or privilege of any employee under this chapter or other law” unless the change is approved by a majority of the police association. *See id.* § 143.307(c).

You inform us that in March 2001 the city and the Austin Police Association entered into an agreement pursuant to subchapter I and have provided us with a copy. *See* Agreement Between The City of Austin and The Austin Police Association March 25, 2001 -- September 26, 2003 (hereinafter “Agreement”). The terms of the Agreement called for the Agreement to expire on September 26, 2003. *See* Agreement, Art. 19, § 1, p 40. However, in its brief to this office, the city states that the “Agreement has been extended and continues in effect,” and we have not been presented with any information that contradicts this statement by the city. *See id.* (authorizing city and police association’s negotiation teams to extend Agreement in thirty day increments for up to 6 months after termination date).

Section 12 of Article 16 of the Agreement establishes a civilian oversight process. *See* Agreement, Art. 16, § 12, p 33. Exhibit B of the Agreement outlines the process and provides for the hiring of a Police Monitor (the “Monitor”) and the appointment of an Austin Police Review Panel (the “Review Panel”). *See* Ex. B, § I(A), p 1. Pursuant to the Agreement, an independent investigation of alleged police officer misconduct is required if certain conditions are met. *See id.* § I(F)(a)-(c), p 14 (outlining conditions under which independent investigation must occur). However, the law firm selected to conduct an independent investigation must “[a]dhere to the confidentiality provisions set forth in Section G.” These confidentiality requirements provide in part as follows:

Disciplinary files maintained by the Austin Police Department are confidential. The Police Monitor, his staff, and the [Citizen] Review Panel members, may not discuss or release the contents of those files with any person other than members of the Review Panel, the Chief of Police or his designee, the Internal Affairs Division, the City Manager or his Designee, the City of Austin Law Department, and [within certain limitations] the accused employee.

²Subchapter I of the Local Government Code applies in part to municipalities with a population of 460,000 that operates under a city manager form of government. *See* Local Gov’t Code § 143.301. The submitted Agreement indicates that the city is such a qualified municipality.

....

The confidentiality provisions of the Oversight Process are continuous in nature. The Monitor, his staff, the Review Panel, *and the law firms that conduct independent investigations* are subject to these confidentiality provisions even after their association with the Oversight Process has terminated.

Id. § I(G), pp 15-16 (emphasis added).

Pursuant to the Agreement, an independent investigator is required to “[f]ollow the established Standard Operating Procedures for Independent Investigations.” *Id.* § I(F)(d)(6) p 15. You have provided us a copy of the independent investigation standard operating procedures (the “Procedures”) that the Chief of Police and the Police Monitor adopted. *See* Independent Investigations SOP, signed April 23, 2003 (hereinafter “Procedures”).

The Procedures define an independent investigation as “a factual investigation of the specific event of the referred matter *for the use of the Austin Police Department in the administrative investigation* of alleged police misconduct.” *Id.* § 103(A) p 3 (emphasis added). The Procedures further dictate that

All information obtained as a result of the Independent Investigation, *including the findings of the Independent Investigator*, are solely for the use of the Austin Police Department in the administrative investigation of alleged police misconduct and are subject to the disclosure and confidentiality provisions of Section 143.089(g) of the Texas Local Government Code.

Id. § 104(A) p 4 (emphasis added).

The Procedures provide the independent investigator with access to “a complete copy of the completed Internal Affairs investigative file regarding the specific incident in question, with the understanding that . . . the entire file [is] privileged under Section 143.089(g)” but reassert that the investigator “must strictly adhere to all confidentiality provisions set forth by law and in the Oversight process.” *Id.* § 105 p 4. On completion of an independent investigation, the independent investigator is required to “return the Internal Affairs file *and the entire Independent Investigation* file to the Chief of Police or his designee.” *Id.* § 109(D) p 10 (emphasis added). The Procedures further provide that

The Independent Investigation *is considered a confidential Police Department file under [Section] 143.089(g)* and the confidentiality provisions of the Meet and Confer Agreement.

Id. § 109(D)(1) p 11 (emphasis added). Finally, the Procedures discuss release of information collected during the independent investigation and provide that such information

may only be accessed by “persons directly involved with an independent investigation” unless such information is subpoenaed. *Id.* § 110 p 11.

You acknowledge that, under the Agreement, the confidentiality of section 143.089(g) is preserved for all internal affairs complaints and investigations that do not result in discipline under chapter 143.³ However, you state that the city “would like to release the [independent investigator’s] report” on the basis that “Section I, Subsection G does not expressly state that the report of an independent investigator is confidential.”

As you acknowledge, the confidentiality created by section 143.089(g) is preserved under the Agreement that the city informs us is currently in place. Under the system the city has established, the independent investigator conducts his or her investigation for the police department and presents his or her findings solely to the police department. *See* Procedures §§ 103(A) p 3 (independent investigation is “for the use of the Austin Police Department”), 104(A) p 4 (“[a]ll information obtained as a result of the Independent Investigation, including the findings of the Independent Investigator, are *solely for the use of the Austin Police Department*”) (emphasis added), 109(D) p 10 (independent investigator required to return “*entire Independent Investigation* file to the Chief of Police or his designee.”) (emphasis added), 109(D)(1) p 11 (“Independent Investigation *is considered a confidential Police Department file*”) (emphasis added). The Agreement does not authorize or require the city to disclose to the public information from an independent investigation when no disciplinary action has been taken. Unless and until the city and the police association choose to amend their Agreement, an independent investigation conducted under the Agreement is considered part of the police department’s internal affairs investigation and is subject to section 143.089(g) of the Local Government Code as long as the investigation does not result in disciplinary action under chapter 143. *See* Procedures § 109(D)(1); *see also* Local Gov’t Code § 143.089; *City of San Antonio*, 851 S.W.2d at 949 (information that reasonably relates to officer’s employment relationship with police department and that is maintained in police department’s internal file pursuant to section 143.089(g) is confidential and must not be released).

In this instance, you inform us that the investigation of the incident “did not result in disciplinary action under Sections 143.051-.055 of the Local Government Code” and that the “requested information is contained in the departmental personnel file of a police officer.” No one has informed us of any amendment to the Agreement or Procedures in the time since you requested a ruling from this office that allows for release of the independent investigator’s final report. We therefore conclude that all information relating to the police department’s internal administrative investigation, including records pertaining to the independent investigation that was conducted for the police department, must be withheld pursuant to section 552.101 of the Government Code and are unable to agree that the city is

³*See* Open Records Letter No. 2002-6381 (2002) (addressing issues concerning confidentiality under this Agreement of Police Monitor’s report regarding same officer-involved shooting at issue here).

authorized, under the current system that the city itself has established, to release the independent investigator's report.

Finally, we briefly address the city's assertion that it should be allowed to release a summary of the independent investigator's findings based on the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Morales*, the court addressed the applicability of common law privacy to files of an investigation of alleged sexual harassment and ordered the release of the conclusions of the board of inquiry that conducted the investigation because the public had a legitimate interest in the basic facts concerning an allegation that a public official had committed sexual harassment. See *Ellen*, 840 S.W.2d at 525. However, the question of whether or not information is protected under the test for common law privacy is completely separate from the question of whether the release of the information is prohibited by statutory law. Section 143.089(g) provides that a police department that chooses to maintain a departmental personnel file on an officer “*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.*” Local Gov't Code § 143.089(g) (emphasis added). The mandate in section 143.089 is clear. It contains no exception that allows a police department to release its confidential departmental file if there is a legitimate public interest in it. Thus, while this office believes that the public has a strong legitimate interest in the information at issue here, we are unable to conclude, without a change in the city's Agreement, that this fact does anything to alter the confidential character of the information at issue or of the city's statutory duty not to disclose any part of it. See *In re City of Georgetown*, 53 S.W.3d 328, 340 (Tex. 2001) (Abbott, J. dissenting) (“[I]n contrast to privileges, governmental compliance with confidentiality laws is mandatory, and their protections may not be waived by governmental entities.”); Open Records Decision No. 650 at 3 (1996) (“Subsection (g) contains no exception to this prohibition [against disclosure]; subsection (g) confers no authority to either the civil-service commission director or the affected fire fighter or police officer to consent to the release of information in the department's files.”). Thus, we conclude that the city must withhold the remaining submitted information in its entirety until such a time as the terms of the Agreement are changed or until the facts and circumstances have changed.

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).

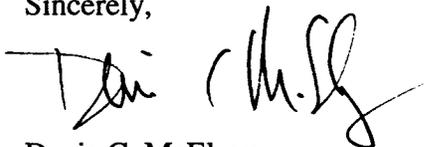
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 192334

Enc. Submitted documents

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