



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 2, 2004

Ms. Michele Austin  
Assistant City Attorney  
P. O. Box 1562  
Houston, Texas 77251-1562

OR2004-7502

Dear Ms. Austin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 207508.

The City of Houston (the "city") received a request for copies of complaints the former Fire Chief filed with the Officer of Inspector General ("OIG") in September 2003, and any Houston Fire Department (the "department") memoranda written in the past year regarding criminal background checks. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the city's obligations under section 552.301 of the Government Code in seeking a ruling from this office. In accordance with section 552.301(b), a governmental body seeking a ruling from this office must assert the exceptions to disclosure that apply to the requested information no later than the tenth business day after receiving the written request for information. In addition, within fifteen business days of receiving the request, the governmental body is required to submit (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. *See* Gov't Code § 552.301(e). The city acknowledges that it did not request a ruling from this office within ten business days as required by section 552.301(b) or submit the items required by section 552.301(e) within fifteen business days.

Pursuant to section 552.302 of the Government Code, the city's failure to comply with section 552.301 results in the legal presumption that the information at issue 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); Open Records Decision No. 319 (1982). Section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). Therefore, we will consider your claim under section 552.101.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected under section 143.1214 of the Local Government Code. Section 143.1214 provides in part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to a disciplinary action against a fire fighter or police officer to the [civil service] director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) [of the Local Government Code] only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;

- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state that exhibits 2 and 2a are part of an OIG investigation file maintained by OIG for its own use, but that exhibits 2 and 2a are not held in a civil service personnel file maintained under section 143.089(a) of the Local Government Code. You explain that exhibits 2 and 2a pertain to sustained allegations of misconduct that resulted in disciplinary action, but do not meet the conditions specified by section 143.1214(c) for inclusion in a firefighter's civil service personnel file. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(f). You also inform us that the department has forwarded documents that meet the requirements of section 143.1214(c) to the firefighter's civil service personnel file. Based on your representations and our review of the submitted information, we conclude that exhibits 2 and 2a are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. *See also* Open Records Decision No. 642 (1996) (concluding that files relating to investigations of Houston Fire Department personnel by Public Integrity Review Group of Houston Police Department were confidential under section 143.1214).

You also claim that exhibits 3 and 3a are excepted from disclosure under section 552.101 in conjunction with section 143.1214. You state that exhibits 3 and 3a are part of an investigation that did not result in sustained allegations of misconduct or disciplinary action, and are therefore maintained by OIG only in an internal investigation file for its own use. We note, however, that exhibits 3 and 3a concern the department's internal hiring procedures but do not allege misconduct by any individual fire fighter. Section 143.1214 pertains only to records relating to disciplinary actions and charges of misconduct against a fire fighter and prescribes additional requirements for such records beyond the requirements found in section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.1214. Section 143.089 contemplates two different types of personnel files, a fire fighter's civil service personnel file that is subject to disclosure under the Act, and a confidential internal personnel file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). The confidentiality provisions in sections 143.089 and 143.1214 are intended to protect the rights of individual fire fighters by shielding them from harm that can result from the public disclosure of unsubstantiated claims of misconduct. *See generally In re Jobe*, 42 S.W.3d 174, 179 (Tex. App.—Amarillo 2001, no pet.) (clear intent of section 143.089(g) is to protect privacy interests of fire fighters), *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied) (section 143.089 declares legislative policy decision against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters). However, information that is not reasonably related to a fire fighter's employment relationship with the fire department cannot be deemed confidential by simply placing the information in one of the department's internal personnel files. *See City of San Antonio v. San Antonio*

*Express-News*, 47 S.W.3d 556, 563-64 (Tex. App.— San Antonio 2000, pet. denied). Given the language and purpose of sections 143.089 and 143.1214, we find that exhibits 3 and 3a do not fall within the scope of these sections because they concern an administrative issue that is broad in scope, and you have not established that they are reasonably related to any individual fire fighter's employment relationship with the department. Therefore, the city may not withhold exhibits 3 and 3a under section 552.101 in conjunction with section 143.1214 of the Local Government Code.

Finally, exhibit 3 contains the home telephone number of the former Fire Chief. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the former Fire Chief timely elected to keep his home telephone number confidential, the city must withhold the telephone number from disclosure under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the former Fire Chief did not make a timely election to keep the information confidential.

In summary, you must withhold exhibits 2 and 2a under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. Pursuant to section 552.117(a)(1) of the Government Code, the city must withhold the former Fire Chief's home telephone number from exhibit 3 if the former Fire Chief timely elected to keep this information confidential. The city must release the remaining information in exhibit 3 and the entirety of exhibit 3a to the requestor.

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,



Karen Hattaway  
Assistant Attorney General  
Open Records Division

KEH/krl

Ref: ID# 207508

Enc. Submitted documents

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