



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2008

Mr. Robert J. Gervais
City Attorney
City of Texas City
P.O. Drawer 2608
Texas City, Texas 77592-2608

OR2008-04893

Dear Mr. Gervais:

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# 307367.

The City of Texas City (the "city") received a request for a specified investigation. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code.¹ Section 143.089 provides for the existence of two different types of personnel files relating to a firefighter, including one that must be maintained as part of the firefighter's civil service file and another that the fire department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The firefighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the firefighter's supervisor, and documents relating to any misconduct in any instance in which

¹We understand that the city is a civil service municipality under chapter 143 of the Local Government Code.

the fire department took disciplinary action against the firefighter under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* § 143.051 *et seq.* In cases in which a fire department investigates a firefighter's misconduct and takes disciplinary action against a firefighter, 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 firefighter's civil service file maintained under section 143.089(a). *See Abbott v. 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 are in the possession of the department because of its investigation into a firefighter's misconduct, and the fire department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the firefighter's civil service file if the fire department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the fire department to maintain, for its own use, a separate and independent internal personnel file relating to a firefighter. Section 143.089(g) provides as follows:

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.

Id. § 143.089(g). 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 police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental 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 the records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App. – San Antonio 2000, no pet.) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's

or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You state that the submitted information is a report of an investigation of several complaints and allegations involving city firefighters. You seek to withhold the report under section 143.089(g). You do not indicate, however, whether the report is held in an internal personnel file maintained by the fire department. Nevertheless, to the extent that a copy of the report is held in an internal departmental file, we agree that any such information must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. You inform us, however, that disciplinary action was taken against one of the firefighters to whom the submitted investigation report pertains, which resulted in the firefighter's indefinite suspension. As previously stated, all information pertaining to charges of misconduct that resulted in disciplinary action must be maintained in the firefighter's civil service file under section 143.089(a) of the Local Government Code. In this instance, the request was received by the city, which has access to the files maintained under sections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Although you have not submitted the civil service file maintained under section 143.089(a) for our review, we note that the submitted investigation report must be included in that file. *See Abbott v. Corpus Christi*, 109 S.W.3d at 122. Information contained in the civil service file generally must be released, unless it is shown that some provision of the Act permits the information to be withheld from public disclosure. *See* Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; ORD 562 at 6.

We note that information held in a civil service file may be excepted from disclosure on other grounds. Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but

the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, a portion of the submitted investigation report consists of a sexual harassment investigation. Because there is no adequate summary of the investigation, the information pertaining to the sexual harassment investigation must generally be released, with the identities of the victim and witnesses redacted. Accordingly, the city must withhold the identifying information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*. The remaining information relating to the sexual harassment investigation may not be withheld on that basis under section 552.101.

We note that section 552.117 of the Government Code may be applicable to some of the remaining information.² Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. We have marked information that the city must withhold under section 552.117(a)(1) to the extent that the firefighter concerned timely requested confidentiality for the marked information under section 552.024.

We also note that the remaining information contains a personal e-mail address. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the

²Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, 352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

e-mail address has affirmatively consented to its public disclosure.³ Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a personal e-mail address that the city must withhold under section 552.137 unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary, to the extent the submitted investigation report is held in an internal personnel file maintained by the fire department, any such information must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, under section 143.089(a) of the Local Government Code, a copy of the submitted investigation report must also be placed in the civil service file of the firefighter who was disciplined. In releasing the information held in the civil service file, the city must (1) withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) withhold the information that we have marked under section 552.117(a)(1) of the Government Code to the extent that the firefighter concerned timely requested confidentiality for the marked information under section 552.024 of the Government Code; and (3) withhold the marked personal e-mail address under section 552.137 of the Government Code unless the owner of the e-mail address has consented to its disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body

³Section 552.137 also is a mandatory exception that may not be waived. Gov't Code §§ 552.007, .352; ORD. 674 at 3 n.4.

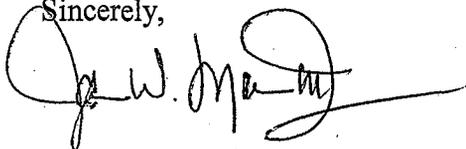
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 challenge 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 Office of the Attorney General 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 307367

Enc: Submitted documents

c: Ms. Kelly Rothrock
3328 Indigo Sky
Texas City, Texas 77591
(w/o enclosures)