



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2009

Mr. Mark G. Daniel
Evans, Daniel, Moore & Evans
Attorney for City of Watauga
Sundance Square
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2009-07587

Dear Mr. Daniel:

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# 344842 (request numbers 09-103 and 09-137).

The Watauga Police Department (the "department"), which you represent, received two requests for (1) all reports on disciplinary action pertaining to a named officer, (2) all reports of complaints, misconduct, or disciplinary action pertaining to the named officer after the City of Watauga's (the "city") transition to the civil service system in 2005, and (3) information pertaining to the named officer's reason for leaving employment with the department. You state there is no information responsive to item 2. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The department argues the submitted information is confidential under section 143.089(g) of the Local Government Code. 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 other statutes make confidential, such as 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 police officer: one that must be maintained as part of the officer’s civil service file and another the police department may maintain for its own internal use. *See* Local Gov’t Code § 143.089(a), (g). The officer’s civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer’s supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer 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. *Id.* §§ 143.051-.055. 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). *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 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 may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code.² *See* Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the information responsive to item 3 and a portion of the information responsive to item 1 of the request are confidential pursuant to section 143.089(g) because they are maintained in the department’s internal file regarding the named officer’s employment. Based on this representation and our review of the submitted documents, we agree this information is confidential pursuant to section 143.089(g) of the Local Government Code.³

¹You state the City of Watauga is a civil service city under chapter 143 of the Local Government Code.

²Section 143.089(g) requires a police department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director’s designee.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state a portion of the records responsive to item 1 was compiled and placed in the officer's personnel file prior to the city's adoption of chapter 143, and you ask whether section 143.089(g) applies to these documents. Section 143.005 states, in pertinent part:

(a) Each fire fighter or police officer serving in a municipality that adopts this chapter and who has been in the service of the municipality for more than six months at the time this chapter is adopted and who is entitled to civil service classification has the status of a civil service employee and is not required to take a competitive examination to remain in the position the person occupies at the time of the adoption.

Local Gov't Code § 143.005(a). Therefore, officers who have been employed for more than six months when the city adopts chapter 143 are civil service employees and enjoy the full protections of the chapter. The submitted documents show the officer to whom these records pertain was employed by the department for at least six months prior to the city's adoption of chapter 143. Further, you state the officer was still employed by the department after the adoption. Therefore, once the city adopted chapter 143, section 143.089(g) applies to the officer's personnel file that the department maintained for its own use. You inform us the documents at issue were maintained in the officer's departmental personnel file when the city adopted chapter 143.

In addition, in *Wilson v. Andrews*, the supreme court held that although chapter 143 did not provide a police officer with the option to appeal his suspension to a neutral third-party hearing examiner when the city adopted chapter 143, the city was bound by the post-adoption amendment to the chapter providing for such an option. 10 S.W.3d 663, 668 (Tex. 1999). In our case, the documents at issue were compiled prior to the city's adoption of chapter 143. However, after the city's adoption of the chapter, as in *Wilson*, chapter 143 applies and makes the documents at issue confidential under section 143.089(g) and the department must withhold them.⁴

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Emily Sitton', written in a cursive style.

Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 344842

Enc. Submitted documents

c: Requestor
(w/o enclosures)