



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 25, 2010

Ms. Karen Stead  
Assistant City Attorney  
City of Tyler  
P.O. Box 2039  
Tyler, TX 75710

OR2010-01143

Dear Ms. Stead:

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# 368025 (LegalDesk #AEY-404590).

The City of Tyler (the "city") received a request for a named former police officer's personnel file, including any disciplinary actions and commendations. You state you will release some of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments from the requestor. Gov't Code § 552.304(a) (authorizing person to submit written comments stating reasons why information at issue should or should not be released).

Initially, we address the issue of whether the requestor narrowed its request for information. We note that in this instance the requestor is the Deer Park Police Department ("Deer Park"). The city states that during a telephone conversation with Deer Park on November 2, 2009, Deer Park narrowed its request to reviews, evaluations, counseling records, comments, and use of force reports for the named police officer. *See* Gov't Code § 552.222(b) (allowing governmental body to ask requestor to clarify or narrow request for information). However, Deer Park disagrees with the city's representation and contends that it did not authorize the scope of the request to be narrowed. Whether the scope of the request was narrowed is a

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Accordingly, based on the city's representation, we conclude the city believed the request was narrowed to include only reviews, evaluations, counseling records, comments, and use of force reports for the named officer. Thus, our ruling is limited to this information.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses section 143.089 of the Local Government Code. You state the city is a civil service city under chapter 143 of the Local Government Code.

Section 143.089 of the Local Government Code 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. 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 a police officer, it is required by section 143.089(a)(2) of the Local Government Code 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) of the Local Government Code. *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 police department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 of the Local Government Code prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. Such records are subject to release under the Act. *See id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police 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. Local Gov't Code § 143.089(b). Information that reasonably relates to a police 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.<sup>2</sup> *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex.

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<sup>2</sup>Section 143.089(g) requires a police or fire 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.

App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

Based on your representations and our review of the submitted documents, we agree that the submitted information is properly maintained in the city police department's internal file and is confidential pursuant to section 143.089(g). Therefore, it must be withheld under section 552.101 of the Government Code.

Deer Park contends that it has a right of access to the information by intergovernmental transfer. This office has concluded that information subject to the Act may be transferred between governmental bodies without waiving exceptions to the public disclosure of that information or affecting its confidentiality. See Attorney General Opinion JM-590 (1986); Open Records Decision Nos. 655 (1997), 567 (1990), 561 (1990), 516 (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. See ORD 516. In adherence to this policy, this office has concluded that information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. See Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); ORD 655, 414 (1984). However, the transfer of confidential information from one governmental body to another is prohibited where the relevant confidentiality statute authorizes release of the confidential information only to specific entities, and the requesting governmental body is not among the statute's enumerated entities. See Attorney General Opinions DM-353 at 4 n.6 (1995) (intergovernmental transfer permitted under statutory confidentiality provision only where disclosure to another governmental agency is required or authorized by law), JM-590 at 4-5 (1986) (where governmental body is not included among expressly enumerated entities to which confidential information may be disclosed, information may not be transferred to that governmental body); see also ORD 655, 650 (1996) (concluding that absent a federal law requiring the disclosure of information that is confidential pursuant to section 143.089(g), a city police department may not disclose such information to a federal law enforcement agency as a permissible interagency transfer). The information at issue is held under section 143.089(g), which prohibits the release of information contained in the internal department file to "any agency or person requesting information relating to a . . . police officer." Local Gov't Code § 143.089(g). Therefore, the intergovernmental transfer doctrine cannot operate to allow the city to transfer the information at issue to Deer Park.

Deer Park also contends that it has a special right of access to the submitted information as the authorized representative of the former police officer. We note Deer Park submitted an authorization and release form signed by the officer at issue along with its request for information to the city. Section 552.023 of the Government Code grants a person's authorized representative a special right of access to information held by a governmental

body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests. Gov't Code § 552.023(a). However, section 143.089(g) is not a privacy based exception. Thus, because the submitted records are maintained pursuant to section 143.089(g), the right of access under section 552.023 does not apply to this information.

Deer Park also contends it has a special right of access to the officer's personnel file under section 552.102 of the Government Code as the authorized representative of the officer. In support of this assertion, Deer Park relies on a sentence in section 552.102(a), which reads in part "that all information in the personnel file of an employee of a government body is to be made available to that employee or the employee's designated representative as public information is made available under [the Act]." Gov't Code § 552.102(a). The purpose of section 552.102 is to except from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy. *See Industrial Foundation*, 540 S.W.2d at 683-85. The language in section 552.102(a) on which Deer Park relies is intended to allow a person or person's authorized representative a right of access to information relating to the person that is protected from public disclosure for the purpose of protecting that person's privacy interests. *See* Gov't Code § 552.102(a); *see also, e.g.*, Gov't Code § 552.023. As stated above, the information at issue is confidential pursuant to section 143.089(g) of the Local Government Code, which is not a privacy based exception. Accordingly, section 552.102(a) does not provide Deer Park a right of access to the information.

Deer Park also contends that sections 143.089(e) and (f) of the Local Government Code grant it access to the information at issue. These sections state in relevant part:

(e) The fire fighter or police officer is entitled, on request, to a copy of any letter, memorandum, or document placed in the person's personnel file. The municipality may charge the fire fighter or police officer a reasonable fee not to exceed actual cost for any copies provided under this subsection.

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless the release of the information is required by law.

Loc. Gov't Code § 143.089(e)-(f). Deer Park argues that because it has the written consent of the officer at issue, it should have access to the city police department's internal personnel

file. However, these sections apply to the civil service personnel file maintained by the civil service director under section 143.089(a), not to the internal departmental personnel file maintained by the city police department under section 143.089(g). Loc. Gov't Code § 143.089(a), (g). Therefore, neither section 143.089(e) nor (f) of the Local Government Code provide Deer Park with a right of access to the information at issue.

Finally, Deer Park contends that section 143.1214 of the Local Government Code grants it access to the information at issue. Section 143.1214 requires a police department to maintain information that relates to disciplinary action against an officer that was overturned on appeal or to a charge of misconduct against an officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use and allows the information in this file to be released to another law enforcement agency or fire department. Loc. Gov't Code § 143.1214(b). However, section 143.1214 applies only to municipalities with a population of over 1.5 million. Loc. Gov't Code § 143.101(a). Therefore, section 143.1214 of the Local Government Code is inapplicable to the information at issue.

In summary, the city must withhold the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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](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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/dls

Ref: ID# 368025

Enc. Submitted documents

c: Requestor  
(w/o enclosures)