



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2010

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2010-04389

Dear Mr. Henrichson:

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# 373987 (McAllen ID No. W001741-120809).

The City of McAllen (the "city") received a request for any correspondence or memoranda regarding the requestor during a specified time period.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.151 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.301(b) of the Government Code requires a governmental body that desires to withhold information under the Act to ask for the attorney general's decision and state the exceptions that apply no later than ten business days after the date of receiving the written request. You state the city received the instant request for information on December 8, 2009. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. You inform us that December 24 and 25, 2009, and January 1, 2010 were city holidays. You also inform us that the city observed skeleton

¹We note the city asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request).

days from December 21 through December 23, 2009 and again from December 28 through December 31, 2009. The city sought clarification from the requestor regarding the request on December 28, 2009, and the requestor responded on January 6, 2010. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Accordingly, as we have no indication that the city acted in bad faith in seeking clarification in this case, we consider the city's ten-day period for requesting a decision under section 552.301(b) to have commenced on January 6, 2010, the date of the city's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, No. 07-0931, 2010 WL 571972, at *3 (Tex. February 19, 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Accordingly, as the envelope containing your brief requesting a decision from this office is postmarked January 19, 2009, we consider the city's request to have been timely made.

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 section encompasses information that other statutes make confidential, such as section 143.089 of the Local Government Code. We understand the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a firefighter: one that must be maintained as part of the firefighter's civil service file and another the fire department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). Under section 143.089(a), 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 which 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. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143). 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 department must forward them to the civil service commission for placement in the civil

service personnel file.² *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).

However, a document relating to a firefighter's alleged misconduct may not be placed in his civil service 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 firefighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to 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 have submitted three documents to this office pertaining to the named individual. We understand that the submitted information is maintained in the city's fire department's internal files pursuant to section 143.089(g). However, you do not inform us whether disciplinary action was taken against the firefighter whose information is at issue. Accordingly, we must rule conditionally. To the extent the information at issue is not related to disciplinary action taken against the firefighter under chapter 143, we conclude that the 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. To the extent the information at issue is related to disciplinary action taken against the firefighter under chapter 143, the information may not be withheld under section 552.101 in conjunction with section 143.089(g) and must be placed in the fire fighter's civil service file under section 143.089(a). To the extent the information at issue may not be withheld under section 143.089(g), we address your remaining arguments.

You also raise section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. We note that subchapter G of chapter 143, which includes section 143.1214, generally applies only to municipalities with a population of 1.5 million or more. *See* Local Gov't Code § 143.101(a). As the city is not a municipality with a population of 1.5 million or more, section 143.1214 is inapplicable. Therefore, none of the information at issue may be withheld under section 552.101 on the basis of section 143.1214.

You also raise section 552.151 of the Government Code, which provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances

²Section 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.

pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

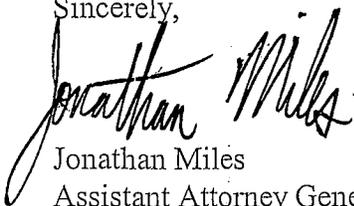
Id. § 552.151. Upon review, we find you have failed to demonstrate that release of the submitted information would subject an employee or an officer of a governmental body to a substantial threat of physical harm. Therefore, we conclude section 552.151 is inapplicable to the submitted information, and the city may not withhold any portion of the submitted information on that basis.

In summary, to the extent the information at issue is not related to disciplinary action taken against the firefighter under chapter 143, we conclude that the 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. To the extent the information at issue is related to disciplinary action taken against the firefighter under chapter 143, the information must be placed in the fire fighter's civil service file under section 143.089(a) and released to the requestor.

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 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 373987

Enc. Submitted documents

c: Requestor
(w/o enclosures)