



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2010

Ms. Candice M. De La Garza  
Assistant City Attorney  
City of Houston Legal Department  
P.O. Box 368  
Houston, Texas 77001-0368

OR2010-17746

Dear Ms. De La Garza:

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# 401082 (PIR #'s 17676, 17679, 17683, 17682, 17680, 17678 and 17693).

The City of Houston (the "city") received seven requests for information pertaining to disciplinary action taken against three city fire fighters in relation to a specified incident. The city states it has released the names of the three fire fighters at issue, but claims the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. You raise section 552.101 in conjunction with section 143.1214 of the Local Government Code. 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 fire fighter's or police officer's civil service file that the civil service director is required to maintain, and an internal file that the fire or police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a department investigates a fire fighter's or police officer's misconduct and takes disciplinary action, it is required by section 143.089(a)(2) of the Local Government Code to place 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 fire fighter's or 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.).

Subchapter G of chapter 143 sets forth provisions applicable to municipalities with a population of 1.5 million or more, including the city. *See* Open Records Decision No. 642 (1990). 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 disciplinary action against a fire fighter or police officer to the 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) 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.

...

(e) The requirements of this section are in addition to the requirements of Section 143.089.

Local Gov't Code § 143.1214(b), (c), (e). Thus, section 143.1214(b) makes confidential information in a departmental investigatory file relating 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. Section 143.1214(c) provides that records relating to a disciplinary action against a fire fighter or police officer may be included in the fire fighter's or police officer's personnel file maintained under section 143.089(a) if (1) disciplinary action was actually taken against the fire fighter or police officer; (2) the records at issue show the disciplinary action taken; and (3) the records at issue include a brief summary of the facts on which the disciplinary action was based. *See* Local Gov't Code §§ 143.089(a), .1214(c); *see also id.* §§ 143.051-143.055 (describing "disciplinary action" for purposes of section 143.089(a)).

You state that the submitted information relates to misconduct that resulted in a disciplinary action, and you inform us that the fire fighters at issue are now appealing that disciplinary action. You assert this information does not meet the requirements of section 143.1214(c) for inclusion in the fire fighters' civil service personnel files because "[a]lthough tentative disciplinary action in the way of indefinite suspensions has been administered to all three fire fighters, this disciplinary action is not final as each fire fighter has filed an appeal to the Civil Service Commission."

Upon review, we find the department has "actually taken [disciplinary action] against the fire fighter," notwithstanding the fact that the fire fighters have appealed that action. *See id.* § 143.1214(c); *see also id.* §§ 143.119 (indefinite suspension), .120 (appeal of indefinite suspension). Section 143.1214 does not provide for confidentiality during the pendency of an appeal of imposed disciplinary action. *Id.* § 143.1214. We also find the records at issue show the disciplinary action taken and a summary of the facts on which the disciplinary action was based. *Id.* Thus, the submitted documents meet the requirements set out in section 143.1214(c) for inclusion in the fire fighters' civil service personnel files. *Id.* Further, the submitted documents have been date-stamped by the civil service commission, demonstrating the fire department has already forwarded the records at issue to the civil service commission. *See id.* § 143.119(b) (requiring department head to file with commission written statement giving reason for suspension). In this case, the request was received by the city, which has access to the files maintained under section 143.089(a). *Id.* § 143.089(a). Therefore, the documents responsive to this request that were forwarded to the fire fighters' civil service personnel files may not be withheld under section 552.101 in conjunction with section 143.1214.

We next turn to your argument that the submitted information is excepted under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation was pending or reasonably anticipated on the date the request was received, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4

(1990); Gov't Code § 552.103. The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

We note municipal civil service appeals, such as the one at issue here, are governed by chapter 143 of the Local Government Code. *See* Local Gov't Code §§ 143.057, .127-.131. This office has determined such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991). You state the appeal proceeding was ongoing when the city received the instant requests for information. Further, you state the information at issue directly relates to the issue in the pending appeals. We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the submitted records were either obtained from or provided to the opposing parties. Thus, the submitted information is not excepted from disclosure under section 552.103, and it must be released.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 401082

Enc. Submitted documents

c: Requestors  
(w/o enclosures)