ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2010

Mr. Richard L. Bilbie
Assistant City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2010-17998

Dear Mr. Bilbie:

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# 401342.

The City of Harlingen (the "city") received a request for photographs of five named city fire fighters. You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.119, and 552.151 of the Government Code. We have considered the exceptions you claim and 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 other statutes make confidential. Section 143.089 of the Local Government Code provides for the existence of two different types of personnel files relating to a fire fighter, including one that must be maintained as part of the fire fighter'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 fire fighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter's supervisor, and documents relating to misconduct in any instance in which the fire department took disciplinary action against the fire fighter 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 fire fighter's misconduct and takes disciplinary action against a fire fighter, 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 fire fighter'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 fire department because of its investigation into a fire fighter'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 fire fighter'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 a fire department to maintain, for its own use, a separate and independent internal personnel file relating to a fire fighter. 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, pet. denied) (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).

We understand that the city's fire department (the "department") is subject to chapter 143 of the Local Government Code. You do not inform us, however, whether the submitted information is held in personnel files maintained by the department under section 143.089(g) of the Local Government Code. We note that the confidentiality provided by section 143.089(g) may not be engrafted onto information that is not held in a file maintained under section 143.089(g). Accordingly, we must rule conditionally. Thus, to the extent the submitted information is held solely in personnel files maintained by the department under section 143.089(g) of the Local Government Code, the information must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g). But to the extent it is held outside personnel files maintained by the department, the information at issue is not confidential under section 143.089(g) and may not be withheld on that basis under section 552.101.

To the extent the information at issue is not confidential under section 552.101 in conjunction with section 143.089(g), we will address the other exceptions you claim. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code and *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102).

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See id.* at 685. To demonstrate the applicability of common law privacy, both elements of this test must be established. *See Indus. Found.*, 540 S.W.2d at 681-82. Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

In this instance, the information at issue pertains to fire fighters employed by the department. As this office has stated on many occasions, information concerning public employees and public employment is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's

private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Although you contend that a fire fighter's photograph "has nothing to do with his activities or job performance in the workplace," you have not demonstrated that the information at issue is highly intimate or embarrassing and a matter of no legitimate public concern. We therefore conclude that the submitted information is not protected by common-law privacy and may not be withheld on that basis under section 552.102(a) of the Government Code.

Next, we address your claim under section 552.108 of the Government Code, which provides in part:

> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:
>
> > (1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]
> >
> > (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b)(1)-(2). Section 552.108(b) protects certain specific types of law enforcement records. Section 552.108(b)(1) protects internal records of a law enforcement agency, the release of which would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Section 552.108(b)(2) protects information relating to a concluded criminal case that did not result in a conviction or a deferred adjudication.

A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Although you note that section 552.108(b) protects internal records or notations of a law enforcement agency, you concede that the department is not a law enforcement agency for purposes of section 552.108. Moreover, you do not inform us that any law enforcement agency asserts an interest in the information at issue. We therefore conclude that the city may not withhold the submitted information under section 552.108 of the Government Code.

You also claim section 552.119 of the Government Code, which provides as follows:

> (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:
>
> > (1) the officer is under indictment or charged with an offense by information;
> >
> > (2) the officer is a party in a civil service hearing or a case in arbitration; or
> >
> > (3) the photograph is introduced as evidence in a judicial proceeding.
>
> (b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. By its express terms, this section is applicable only to a photograph of a peace officer. The information at issue pertains to fire fighters. You do not inform us that any of these fire fighters is a peace officer, as defined by article 2.12 of the Code of the Criminal Procedure. We therefore conclude that the city may not withhold the submitted information under section 552.119 of the Government Code.

Lastly, we address your claim under section 552.151 of the Government Code, which relates to a public employee or officer's safety and provides in part:

> Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances 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. You argue that "fire fighters . . . work under dangerous conditions in sometimes dangerous areas[.]" You generally contend that release of the submitted information would endanger the fire fighters whose photographic images are depicted. Having considered your arguments, we find that you have not demonstrated the existence of any specific circumstances indicating that disclosure of the information at issue will subject the fire fighters concerned to a substantial threat of physical harm. We therefore conclude that the city may not withhold the submitted information under section 552.151 of the Government Code.

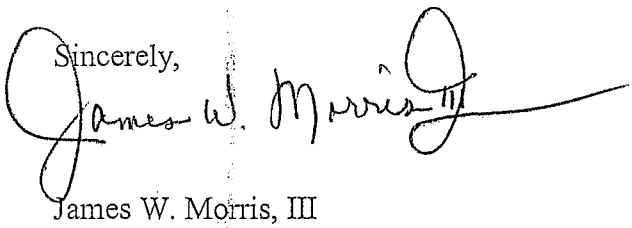
In summary, the city must withhold the submitted information under section 552.101 of the Government Code to the extent it is held solely in personnel files maintained by the department under section 143.089(g) of the Local Government Code. To the extent the

information at issue is held outside departmental personnel files, it is not excepted from disclosure and 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, 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,



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

JWM/em

Ref: ID# 401342

Enc: Submitted documents

c: Requestor
(w/o enclosures)