



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2011

Mr. David H. Guerra
King, Guerra, Davis & Garcia
P.O. Box 1025
Mission, Texas 78573

OR2011-05931

Dear Mr. Guerra:

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# 415947.

The City of Mission (the "city"), which you represent, received a request for the personnel file of a named city fire fighter. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public 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 claim the submitted information is confidential under section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a fire fighter or police officer, including one that must be maintained as part of the fire fighter's or police officer's civil service file and another the fire department or police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). You inform us the city is a civil service city under chapter 143 of the Local Government Code.

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.). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. Local Gov't Code §§ 143.051-.055.

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 fire fighter's or police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *See* 109 S.W.3d at 122. 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 or police officer's civil service file if the department determines 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 the department to maintain, for its own use, a separate and independent internal personnel file relating to a fire fighter or police officer. 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 section 143.089(g) made those records confidential. *See City of San Antonio*, 851 S.W.2d at 949 (concluding that “the legislature intended to deem confidential the information maintained by the . . . police department for its own use under subsection (g)”). The court stated the provisions of section 143.089 governing the content of the civil service file reflect “a legislative policy against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters, except

with an individual's written consent." *Id.*; see also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet.) (restricting confidentiality under section 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 section 143.089(a) and (g) files).

You state the submitted information relates to misconduct that resulted in the indefinite suspension of the fire fighter at issue. You further state the fire fighter appealed the disciplinary action to an independent hearing examiner, who reduced the disciplinary action to a temporary suspension. You state the city filed suit to reinstate the indefinite suspension and the court ruled against the city. You inform us the city has appealed the court's ruling. We understand you to assert that, because of the appeal, the records are confidential under section 143.089(g). Although the fire fighter's disciplinary action was reduced from an indefinite suspension to a temporary suspension, disciplinary action was, nonetheless, imposed upon the fire fighter as a result of the fire department's internal investigation. Further, we note if the city prevails in its appeal, the fire fighter will be subject to an indefinite suspension. As previously stated, all information pertaining to charges of misconduct that resulted in disciplinary action must be maintained in the fire fighter's civil service file under section 143.089(a). See Local Gov't Code § 143.089(a)(2); see also *id.* §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). The submitted information relates to misconduct that resulted in disciplinary action against the fire fighter at issue. Therefore, this information must be maintained in the fire fighter's civil service file pursuant to section 143.089(a)(2), and, thus, it may not be withheld under section 552.101 in conjunction with section 143.089(g). We note, however, portions of the information are subject to sections 552.101, 552.117, and 552.136 of the Government Code.¹ Accordingly, we will address the applicability of these exceptions to the submitted information.

Section 552.101 of the Government Code also encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if the information (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. See *id.* at 681-82. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has concluded other types of information 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); *see also Morales v. Ellen*, 840 S.W.2d at 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Upon review, we find a portion of the submitted information, which we marked, is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the city must withhold the marked information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Therefore, to the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the information we marked under section 552.117(a)(1). Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, we find the city must withhold the partial credit card number we marked under section 552.136.²

In summary, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the

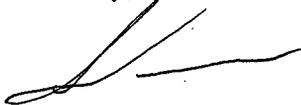
²We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Government Code. The city must also withhold the partial credit card number we marked under section 552.136 of the Government Code. The remaining information 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 415947

Enc. Submitted documents

c: Requestor
(w/o enclosures)