



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 3, 2011

Mr. Ryan S. Henry
Denton, Navarro, Rocha & Bernal, P.C.
2517 North Main Avenue
San Antonio, Texas 78212

OR2011-07887

Dear Mr. Henry:

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# 419456.

The City of Carrollton (the "city"), which you represent, received two requests for the recording of a specified civil service commission hearing, information pertaining to a specified internal affairs investigation, and information pertaining to disciplinary actions against a named police officer and three former Carrollton Police Department employees. We note you have redacted some personal information of peace officers pursuant to the previous determination issued by this office in Open Records Decision No. 670 (2001).¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.² You state, and submit documentation demonstrating, you have notified the officer at issue of her right to submit comments pursuant to

¹See ORD 670 at 6 (authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without the necessity of requesting attorney general decision under section 552.117(a)(2)); *see also* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination under section 552.301).

²In a letter to this office dated April 19, 2011, you withdraw your claim that section 552.108 of the Government Code excepts the requested information from public disclosure.

section 552.304 of the Government Code.³ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestor. *Id.*

Initially, we note that the submitted information includes both an audio recording from a public civil service hearing conducted by a hearing examiner on behalf of the city's civil service commission (the "commission") and the final decision of the hearing examiner. See Local Gov't Code §§ 143.010(c) (providing each commission proceeding shall be held in public), .057(f) (providing the hearing examiner has the same duties and powers as the commission); see also *Downs v. City of Fort Worth*, 692 S.W.2d 209 (Tex.App.—Fort Worth 1985, writ ref'd n.r.e.) (equating appeals to independent third party hearing examiner with appeals to civil service commission). Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Accordingly, the submitted audio recording is a public record subject to section 551.022 of the Government Code. Furthermore, section 143.011 of the Local Government Code provides that "[e]ach rule, opinion, directive, decision, or order issued by the commission must be written and constitutes a public record the commission shall retain on file." Local Gov't Code § 143.011(c). Accordingly, we find the hearing examiner's final decision is subject to section 143.011 of the Local Government Code and, thus, is a public record. As a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 544 (1990), 525 at 3 (1989), 378 (1983), 161 (1977), 146 (1976). Accordingly, the city must release the submitted audio recording and final decision of the hearing examiner to the requestor.

Next, we note remaining information consists of a completed investigation made by or for city, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed investigation is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other

³We note this office has not received any comments from the named officer.

⁴We 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.

law. Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the remaining information under section 552.103 of the Government Code. However, you also claim the remaining information is excepted from disclosure under section 552.101 of the Government Code. In addition, we note portions of the remaining information may be excepted from disclosure under section 552.117 of the Government Code.⁵ As sections 552.101 and 552.117 are "other law" for purposes of section 552.022(a)(1), we will address the applicability of these exceptions to the remaining 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 that another statute makes confidential. You raise section 552.101 in conjunction with 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 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the officer 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. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, 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 police officer'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 police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). However, information maintained in a police department's internal file pursuant to section 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 assert the remaining information is maintained in the internal files of the Carrollton Police Department (the "department") and must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. You acknowledge the remaining information pertains to an internal investigation of the named officer in which disciplinary action was taken by the department. You explain, and the submitted documents reflect, the officer appealed the disciplinary action to an independent hearing examiner, who found some, but not all, of the charges were sustained. Based on the hearing examiner's findings, you argue the remaining information is confidential under section 143.089(g). Although the independent hearing examiner reduced the severity of the disciplinary action based on his finding that only some of the charges were sustained, disciplinary action was, nonetheless, imposed upon the named officer as a result of the department's internal investigation. As previously stated, all information pertaining to charges of misconduct that resulted in disciplinary action must be maintained in the officer's civil service file under section 143.089(a) of the Local Government Code. *See* 109 S.W.3d at 122. Upon review, we find the remaining information pertains to charges that resulted in disciplinary action for purposes of chapter 143. Therefore, the remaining information must be maintained in the officer's civil service file pursuant to section 143.089(a)(2) and may not be withheld under section 143.089(g). Information contained in the civil service file generally must be released, unless it is shown that some provision of the Act permits the information to be withheld from public disclosure. *See* Local Gov't Code § 143.089(f); Gov't Code §§ 552.006, .021; ORD 562 at 6.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.⁶ Gov't Code § 552.117(a)(2). Section 552.117(a)(2) is also applicable to a peace officer's cellular telephone number, if the cellular telephone service is paid for by the officer with his or her own funds. *See* ORD 670 at 6 (extending section 552.117(a)(2) exception to personal cellular telephone number and personal pager number of peace officers).

We have marked the personal information of the named officer and other department officers in the remaining information. The marked information includes an officer's cellular

⁶"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

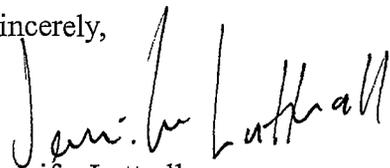
telephone number. You have not informed us whether the marked cellular telephone number is paid for by this officer. Thus, if the marked cellular telephone number is paid for by the this officer, then the city must withhold this information under section 552.117(a)(2) of the Government Code. If the city paid for the cellular telephone number, the cellular telephone number must be released. The remaining information we have marked must be withheld under section 552.117(a)(2) of the Government Code.

In summary, the city must release the submitted audio recording pursuant to section 551.022 of the Government Code and the submitted final decision pursuant to section 143.011 of the Local Government Code. If the officer at issue paid for the cellular telephone number, then the city must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. The city must withhold the other information we have marked in the remaining information under section 552.117(a)(2). 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,



Jennifer Luttrall

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 419456

Enc. Submitted documents

c: Requestor
(w/o enclosures)