ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 5, 2011

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2011-08220A

Dear Mr. Weir:

Our office issued Open Records Letter No. 2011-08220 (2011) on June 9, 2011. In that ruling, our office noted that the internal affairs investigation at issue resulted in the demotion of the officer at issue, and was therefore required to be placed in the officers civil service file pursuant to section 143.089(a) of the Local Government Code. In subsequent communications with our office you state the investigation at issue resulted in a written reprimand. You ask our office to reconsider the previously issued ruling. Whether the investigation at issue resulted in a demotion or a written reprimand is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Accordingly, based on your representation that the internal affairs investigation at issue resulted in a written reprimand, we will reconsider the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on June 9, 2011. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

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# 427178 (COSA PIR# 2011-7600).

The San Antonio Police Department (the "department") received a request for four categories of information pertaining to a named individual. You claim that 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.* § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The department states it received the request for information on February 3, 2011. Thus, the ten-business-day deadline for requesting a ruling from this office was February 17, 2011, and the fifteen-business-day deadline was February 25, 2011. However, the department did not request a ruling or submit information for our review until March 23, 2011. Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-2 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the department's argument against disclosure under this exception.

Next, we address the requestor's assertion that pursuant to a collective bargaining agreement between the city and the city's police officers' association that was in place from

October 1, 2006 through September 30, 2009, the officer whose information is at issue is not entitled to civil service protection under chapter 143 of the Local Government Code.[1] *See* Agreement Between the City of San Antonio and The San Antonio Police Officers' Association (the "agreement"). Pursuant to section 552.303 of the Government Code, we asked the department whether the agreement was in place and if so, whether the information at issue is covered by the agreement.[2] Additionally, we requested the department send our office a copy of the agreement.

Section 7 of Article 11 of the agreement provides that an assistant chief with the department "shall be subject to overall [c]ity policies and regulations and while appointed this rank shall not be subject to the provisions of [c]hapter 143, Local Government Code, or any provision of this Agreement, unless specifically so provided by this article." Agreement, art. 11 § 7, p. 19. However, section 7 also provides "[u]pon demotion or voluntary return to the previously-held tested rank pursuant hereto, the officer shall receive thereafter the full benefits provided in [c]hapter 143, Local Government Code, and this agreement as if he had served in that rank on a continuous basis throughout his tenure as assistant chief, and any other non tested appointed rank." Agreement, art. 11 § 7, p. 20. Accordingly, we find that pursuant to the agreement, the officer at issue is subject to civil service protection under chapter 143. Accordingly, we will address the department's arguments under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

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 protected by other statutes. The department raises section 552.101 in conjunction with section 143.089 of the Local Government Code for the submitted information. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

The police officer's civil service file must contain specific items, including commendations, periodic evaluations by the officer's supervisor, and documents from the employing department relating to any misconduct in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *See id.*

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[1]We understand that the City of San Antonio is a civil service municipality under chapter 143 of the Local Government Code.

[2]*See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

§ 143.089(a)(1)-(2). 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).[3] *Abbott v. City of 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 in 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 service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in his civil service personnel 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 police officer's employment relationship with the police department and that is 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. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the submitted information relates to an investigation in which no disciplinary action was taken, and is contained in the department's internal files maintained under section 143.089(g) of the Local Government Code. Based upon your representations and our review of the submitted records, we agree the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

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

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[3]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143.

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,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 427178

No submitted documents

c: Requestor