ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2011

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

OR2011-14549

Dear Mr. Weir:

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# 432248 (ORRs W002019 and W002270).

The City of San Antonio (the "city") received two requests for a named officer's civil service records. You state you have released some of the requested information to the requestors. 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 an attorney submitted on behalf of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2010-15251 (2010). In that ruling, we concluded that portions of the information at issue in Exhibit 3 must be withheld under section 552.101 of the Government Code in conjunction with former section 51.14 of the Family Code and under section 552.130 of the Government Code, and the remaining information at issue in Exhibit 3 must be released. Therefore, as to Exhibit 3, we have no indication the law, facts, and circumstances on which Open Records Letter No. 2010-15251 was based have changed. Accordingly, with respect to Exhibit 3, the city must continue to rely on Open Records Letter No. 2010-15251 as a previous determination and withhold or release such information in accordance with this ruling. *See* Open Records

Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we note, with respect to Exhibit 4, the city states, and provides documentation showing, that since the date of the previous ruling, the internal affairs investigation that had resulted in an indefinite suspension was overturned on appeal by an arbitrator. Therefore, as to Exhibit 4, we find the facts and circumstances have changed, and the city may not rely on Open Records Letter No. 2010-15251 as a previous determination for this information. Accordingly, we will consider your arguments against disclosure for Exhibit 4.

Next, we must address the city'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), 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* Gov't Code § 552.301(b). Pursuant to section 552.301(e), 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 state 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 city received the requests for information on June 30, 2011 and July 14, 2011. Thus, the ten-business-day deadlines for requesting rulings from this office were July 15, 2011 and July 28, 2011, and the fifteen-business-day deadlines were July 22, 2011 and August 4, 2011. However, you did not request a ruling from this office, state the claimed exceptions, or submit the information required by section 552.301(e) until August 2, 2011, which was after both ten-day-deadlines and one of the fifteen-day-deadlines had passed. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city 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 requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally,

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). You assert Exhibit 4 is excepted from disclosure under section 552.101 of the Government Code. Because section 552.101 can provide a compelling reason to withhold information, we will address your claims under this exception.

Next, we address the attorney's comments that Exhibit 4 is presumed public because the city has previously released this information to the public. The attorney argues that because the city has previously released Exhibit 4 to the public, the city may not now treat the information at issue as confidential. Section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. *See* Gov't Code § 552.007. Section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The city argues that the information at issue is confidential under section 552.101 of the Government Code. Thus, regardless of whether the city previously released any of the information at issue in Exhibit 4, we must address whether the information is made confidential by law and must now be withheld pursuant to section 552.101 of the 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 made confidential by other statutes. We understand that 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 police officer's civil service file that the 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). In cases in which a department investigates a police officer's misconduct and takes disciplinary action against a police officer, it is required by section 143.089(a)(2) of the Local Government Code 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) of the Local Government Code. *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.* Chapter 143 of the Local Government Code prescribes the following types of disciplinary actions: removal, suspension, demotion, and

uncompensated duty. *See* Local Gov't Code §§ 143.051-.055. Such records are subject to release under the Act. *See id.* § 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). In addition, section 143.089(c) states that a document relating to alleged misconduct or disciplinary action against an officer must be removed from the officer's civil service file if it is found that the disciplinary action was taken without just cause. *See id.* § 143.089(c). Information that reasonably relates to a police officer's employment relationship with the 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. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that Exhibit 4 is an administrative investigation that resulted in the indefinite suspension of the officer at issue. You explain, however, that the indefinite suspension was overturned on appeal by an arbitrator. The supporting documentation you provided further shows the arbitrator ordered the officer's "full reinstatement with full back pay, and his personnel file will be cleaned in accordance with [section 143.089(c) of the Local Government Code]." Thus, we understand you to contend that the internal investigation information in Exhibit 4 must be removed from the officer's civil service file and placed in the city police department's internal personnel file, which is maintained under section 143.089(g). Based on these representations and our review of the information at issue, we agree that Exhibit 4 is confidential pursuant to section 143.089(g). Accordingly, the city must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

In summary, with respect to the information in Exhibit 3, the city must continue to rely on Open Records Letter No. 2010-15251 as a previous determination and withhold or release Exhibit 3 in accordance with this ruling. The city must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local 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

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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/ag

Ref: ID# 432248

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)