



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2011

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

OR2011-15411

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# 433777 (COSA No. W002654).

The City of San Antonio (the "city") received a request for information related to a specified complaint, the requestor's personnel file, and information relating to the requestor's reassignment. You state some information has been released to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we must address the city's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e), within fifteen business days of receipt of the request, the governmental body must submit to this office, among other items, written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld and a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). In this instance, you state the city received the request for information on August 4, 2011. Accordingly, the fifteen-business-day deadline fell on August 25, 2011. The envelope in which the city submitted its comments and the responsive information, however, bears a post office mark reflecting it was mailed on September 8, 2011. *See id.* § 552.308(a) (deadline

under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the city failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that 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. You raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Thus, we will address the applicability of this section to the submitted information.

Section 552.101 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, such as section 143.089 of the Local Government Code. We understand the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files for fire fighters in a civil service city: a civil service file the civil service director is required to maintain and an internal file the fire department may maintain for its own use. See Local Gov't Code § 143.089(a). (g). Section 143.089(a) provides the fire fighter's civil service file must contain:

- (1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;
- (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and
- (3) the periodic evaluation of the fire fighter or police officer by a supervisor.

Id. § 143.089(a). For purposes of section 143.089(a)(2), chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; see Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of chapter 143 of the Local Government Code).

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. 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 fire fighter'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 the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire 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 Exhibits 2 and 3 are maintained in the department's internal personnel files pursuant to section 143.089(g). Upon review, we agree Exhibit 2 and a portion of Exhibit 3 constitute internal files maintained by the department for its own use and thus are confidential under section 143.089(g) of the Local Government Code. Accordingly, the city must withhold this information under section 552.101 of the Government Code. We note the information in Exhibit 2 pertains to the requestor. Although section 143.089(e) provides a fire fighter a right of access to his or her own civil service file maintained under section 143.089(a), this office has determined that fire fighters do not have a right to their own internal files maintained by the department pursuant to section 143.089(g). *See* Open Records Decision No. 650 at 3 (1996) (confidentiality provision of section 143.089(g) contains no exceptions). Thus, because Exhibit 2 and a portion of Exhibit 3 are maintained in the department's internal file pursuant to section 143.089(g), the requestor does not have a right of access to these records under section 143.089.

The remaining information in Exhibit 3, which we have marked, consists of an evaluation of the firefighter at issue and letters written by members of the public thanking the fire fighter for taking part in various activities in his role as an employee of the department. As previously noted, a fire fighter's civil service file must contain evaluations conducted by the fire fighter's supervisor and commendations bestowed by a member of the public. *See id.* § 143.089(a)(1)-(2). In this instance, the request was received by the city, which has access to the files maintained under subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Because these portions of Exhibit 3, which we have marked, consist of evaluations, commendations, congratulations, and honors, they must be maintained in the civil service file pursuant to section 143.089(a)(1). Because a firefighter has a right of access to his own civil service personnel file pursuant to section 143.089(e), the city must release the remainder of Exhibit 3 to the requestor.

In summary, the department must release the information we have marked that must be maintained in the section 143.089(a) file under section 143.089(e) of the Local Government Code. The remaining information must be withheld 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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

Ref: ID # 433777

Enc. Submitted documents

c: Requestor
(w/o enclosures)