



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 6, 1996

Ms. Tracy B. Calabrese
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

Open Records Decision No. 642

Re: Whether section 143.1214 of the Local Government Code requires the City of Houston Police Department to withhold documents relating to an investigation of a City of Houston fire fighter conducted by the City of Houston Police Department's Public Integrity Review Group when the Public Integrity Review Group has concluded that the allegations were unfounded (RQ-688)

Dear Ms. Calabrese:

The City of Houston Police Department has received a request under the Open Records Act, chapter 552 of the Government Code, for certain files of the City of Houston Police Department's Public Integrity Review Group (the "Public Integrity Review Group" or "PIRG"). The availability of the bulk of the requested files is addressed in Open Records Letter No. 95-0980 (1995). Here we address whether two of the requested files must be withheld under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.

The two files at issue relate to investigations of City of Houston Fire Department personnel by the Public Integrity Review Group. The Public Integrity Review Group was established by executive order of the mayor of Houston¹ to (1) review allegations of non-criminal misconduct against city employees other than police and refer the allegations to the proper department head for investigation, and (2) to investigate allegations against city employees of criminal conduct involving offenses against public administration. The Public Integrity Review Group receives complaints and requests for review or investigations directly from city departments, city employees, citizens, outside public

¹City of Houston, Exec. Order No. 1-19 (Aug. 31, 1992).

agencies, and from anonymous telephone calls and letters. It presents case data and evidence to the district attorney's office for the filing of appropriate criminal charges, where the evidence supports this action.²

The files before us address allegations of criminal conduct. Allegations of bribery of a city employee are addressed in file number 92-0049, which arose from a citizen's complaint that City of Houston Fire Department fire marshals³ were treating certain night clubs unfairly. The Public Integrity Review Group closed the file for lack of evidence, concluding that the allegations were not sustained. File number 93-0065 deals with the alleged theft of fire department property. This investigation began after the chief and assistant chief of the City of Houston Fire Department informed the Public Integrity Review Group about possible thefts. The investigation focused on fire fighters and two civilian employees of the City of Houston Fire Department⁴ and ultimately determined that there were no violations of criminal law. The City of Houston contends that these investigative files are confidential under section 143.1214 of the Local Government Code.

Chapter 143 of the Local Government Code sets forth civil service rules for municipal fire and police departments. Subchapter G of that chapter sets forth provisions applicable to municipalities with a population of 1.5 million or more, including the City of Houston. Section 143.1214 pertains to certain internal records. The statute addresses records of an overturned disciplinary action as well as investigatory records that relate to an overturned disciplinary action or in which a complaint of misconduct is unsustainable. Subsection (a) of section 143.1214 requires department heads to expunge records of an overturned disciplinary action in certain situations and provides as follows:

The department head promptly shall order that the records of a disciplinary action that was taken against a fire fighter or police officer be expunged from each file maintained on the fire fighter or police officer by the department if the disciplinary action was overturned on appeal by the commission, an independent third-party hearing examiner, or a court of competent jurisdiction. Documents that must be expunged under this subsection include all documents that indicate disciplinary action was recommended or taken against the fire fighter or police officer, such as the recommendations of a disciplinary committee or a letter of suspension. This subsection

²See *id.* at 2.

³You inform us that fire marshals are subject to chapter 143 of the Local Government Code.

⁴You inform us that the fire fighters are subject to chapter 143, but that the civilian employees are not.

does not apply if the disciplinary action was only reduced and not overturned nor shall this subsection apply if the fire fighter or police officer is charged with excessive force that results in death or injury and the charge is being investigated by a law enforcement or criminal justice agency other than the department.

Subchapter G provides that a fire fighter or police officer is disciplined by the department head of his or her employing department. *See, e.g.*, Local Gov't Code §§ 143.117(a) (giving disciplinary authority to "[t]he head of the fire or police department" to discipline "fire fighter or police officer under the department head's supervision or jurisdiction"), .119(a) (same), .122(b) (same). There is no indication that the City of Houston Fire Department took any disciplinary action against the fire fighters who were the subjects of the investigations or that such disciplinary action was overturned on appeal. Thus, the requested files are not "records of a disciplinary action that was taken against a fire fighter" and subsection (a) is inapplicable on its face to the requested files.

Subsection (b) of section 143.1214 requires "the department" to maintain certain records and prohibits the public release of those records thus maintained:

The department shall maintain an investigatory document that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer that the department did not sustain, only in a file created by the department for the department's use. The department may not release those documents to any agency or other person except another law enforcement agency or fire department.

Subsection (b) refers to two different types of documents: (1) "an investigatory document that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal," and (2) "any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer that the department did not sustain." Because the City of Houston Fire Department evidently took no disciplinary action after PIRG completed its investigation of the allegations of misconduct, the files at issue do not fall within the first category. Therefore, we must consider only whether they fall into the second category.

For our purposes, the relevant language in subsection (b) is as follows:

The department shall maintain...any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer that the department did not

sustain, only in a file created by the department for the department's use. The department may not release those documents to any agency or other person except another law enforcement agency or fire department.

By its terms, subsection (b) applies only when "the department" has not sustained charges against a fire fighter or police officer. It is suggested that the term "department" refers only to the department actually employing the fire fighter or police officer.

In construing subsection (b), a confidentiality statute, we are guided by the rule that the language of a confidentiality statute controls its scope. Attorney General Opinion DM-181 (1992) at 5. A statutory confidentiality provision must be express, Open Records Decision No. 478 (1987); a confidentiality requirement will not be implied from the statutory structure, *see generally* Open Records Decision No. 465 (1987).

We conclude that the term "the department" in subsection (b) refers to the department that investigated the misconduct charge. We believe the express language of the statute supports this conclusion. We find no suggestion in subsection (b) that the term "the department" there referenced can only be the fire fighter's employing department. Indeed, to conclude that the unqualified term "the department" refers only to the department that employs the employee under investigation is to impermissibly imply a construction of subsection (b) from language extrinsic to the statute.

Indeed, an examination of other provisions of subchapter G leads us to our conclusion. While only the employing department is statutorily authorized to discipline a fire fighter or police officer, *see* Local Gov't Code §§ 143.117(a), .119(a), .122(b), the authority to investigate a complaint is granted to *any* municipal agent or employee. *See id.* § 143.123(a)(3) (defining "investigator"). We further note that the term "department head" found in subsection (a) and elsewhere in subchapter G, *see, e.g., id.* §§ 143.102, .117, .119, is noticeably absent in subsection (b), suggesting the legislature intended to cover investigations conducted by a department other than the fire fighter's employing department.⁵ *See Cameron v. Terrel & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (word excluded from statute must be presumed to have been excluded for purpose).

Moreover, to conclude that subsection (b) only applies to documents of the employing department would, we think, lead to the absurd result that the city must disclose records of investigations of unsustained charges when PIRG conducts the investigation, but must not disclose such records when the employing department

⁵We note that PIRG was established by Executive Order in August of 1992, *see supra* note 1, and section 143.1214 became effective in 1993, Act of May 13, 1993, 73d Leg., R.S., ch. 220, 1993 Tex. Gen. Laws 463, 464. Thus, PIRG was conducting investigations of fire fighters and police officers when the legislature introduced and considered the legislation that added section 143.1214.

conducts the investigation. We are bound to construe a statute in a manner that will not lead to a foolish or absurd result when another alternative is available. *City of Wilmer v. Laidlaw Waste Sys. (Dallas), Inc.*, 890 S.W.2d 459, 465 (Tex. App.--Dallas 1994), *aff'd*, 904 S.W.2d 656 (Tex. 1995); *see State Highway Dept. v. Gorham*, 162 S.W.2d 934 (Tex. 1942); *Anderson v. Penix*, 161 S.W.2d 455 (Tex. 1942). We believe the legislature intended subsection (b) to afford confidentiality to the records of unsustained charges against police officers and fire fighters, regardless of which city department conducts the investigation. *Cf. City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied) (in construing Local Gov't Code § 143.089, finding general legislative policy that allegations of misconduct against police officers and fire fighters not be subject to compelled disclosure unless they have been substantiated and resulted in disciplinary action). Therefore, in order to preserve this legislative objective, we believe we must apply subsection (b) to the investigative records of the investigating department, even when the investigating department is not the employing department. *See Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 280 (Tex. 1994) (primary rule of statutory interpretation is that court must construe statute so as to give affect to that intent).

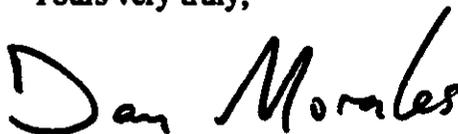
The documents at issue relate to an investigation of alleged misconduct of a fire fighter. As it conducted the investigation of the allegations, the City of Houston Police Department Public Integrity Review Group is a "department" for purposes of section 143.1214(b) of the Local Government Code. Consequently, the documents at issue are "document[s] in the possession of the department that relate[] to a charge of misconduct against a fire fighter . . . that the department did not sustain" that are covered by section 143.1214(b).

In conclusion, City of Houston Police Department Public Integrity Review Group file numbers 92-0049 and 93-0065 are confidential under section 143.1214(b) of the Local Government Code. Consequently, the city must withhold those files from public disclosure under section 552.101 of the Government Code.

S U M M A R Y

Section 143.1214(b) of the Local Government Code requires the City of Houston Police Department to withhold documents relating to an investigation of a City of Houston fire fighter conducted by the City of Houston Police Department's Public Integrity Review Group when the Public Integrity Review Group has concluded that the allegations were unfounded.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, prominent "D" at the beginning.

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