



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Mr. Robert P. Rose
Assistant City Attorney
City of Austin
Department of Law
P.O. Box 1088
Austin, Texas 78767-1088

OR95-800

Dear Mr. Rose:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33106.

The City of Austin (the "city") received an open records request for information about complaints filed against members of the city's police department since 1990. You state that some of the information requested has been provided to the requestor. You inform us that the city does not maintain some of the information requested. Finally, you contend that some of the information requested is excepted from required public disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Alternatively, you contend that the information may be withheld pursuant to section 552.101 in conjunction with the informer's privilege. The city has submitted to this office a "representative sample" of the requested information. Thus, in reaching our conclusion here, we assume that the "representative sample" of records submitted is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

Regarding the information requested that you contend you cannot release since the city does not maintain the information, we note that a governmental body is not required to make available information that does not exist. The Open Records Act

applies only to information in existence and does not require a governmental body to prepare any new information. Open Records Decision No. 605 (1992). Consequently, you are not required to create records that did not exist at the time the open records request was made.

You urge that section 552.101 of the Government Code, in conjunction with section 143.089 of the Local Government Code, excepts information related to the request for actual copies of all recorded or written complaints filed against the police department or individual police officers along with their dispositions since 1993 in the instance where they are part of a closed file no longer under investigation. You state that records of such complaints are contained in the police department's internal personnel files which are confidential under statutory law. You state that pursuant to section 143.089 of the Local Government Code, records of any disciplinary action taken against an officer must be transferred to that officer's personnel file maintained by the Civil Service Commission and that those records then become public. Consequently, any disciplinary action taken following an investigation of a complaint against an officer would be recorded in the civil service personnel file and would be open to the public.

Section 552.101 excepts from required public disclosure information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 143.089 of the Local Government Code provides for two types of personnel files for police officers and firefighters, a civil service file and an internal file. See Local Gov't Code § 143.089(a) & (g). You assert that the relevant provision in this instance is section 143.089(g) which provides:

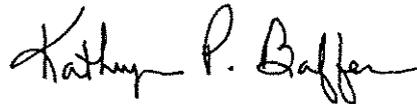
A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Information maintained in the police department's internal personnel files is confidential and is excepted from required public disclosure. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied). As noted by the *City of San Antonio* court, "allegations of misconduct made against a police officer shall not be subject to compelled disclosure under [the Open Records Act] unless they have been substantiated and resulted in disciplinary action." 851 S.W.2d at 949. A request for information that is located in the special police department internal personnel file must be referred to the civil service director or his designee. See Local Gov't Code § 143.089(g); *City of San Antonio*, 851 S.W.2d at 949. You state that you have directed the requestor to the Civil Service Commission.

You state that all complaints made against police officers are placed in the internal police department files whether the complaints are substantiated or unsubstantiated. You inform us that only in the case that disciplinary action is taken against an officer, will that information be transferred to the officer's civil service personnel file and the records made available to the public. Local Gov't Code § 143.089(a); Open Records Decision No. 562 (1990). Therefore, you may withhold from required public disclosure the requested information for actual copies of all written or recorded complaints since they are located in the police department's internal personnel files pursuant to section 552.101 of the Government Code in conjunction with Local Government Code section 143.089. *See* Open Records Decision No. 562 (1990). However, complaints that resulted in disciplinary action which have been transferred to the civil service personnel file may not be withheld from required public disclosure.

Since we have determined that you may withhold the requested information we do not address your informer's privilege argument. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/LRD/rho

Ref: ID# 33106

Enclosures: Submitted documents

cc: Ms. Kathy Mitchell or Mr. Scott Henson
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(w/o enclosures)