



March 1, 2002

Mr. Steven M. Kean
Senior Assistant City Attorney
Legal Department
City of Tyler
P.O. Box 2039
Tyler, Texas 75710

OR2002-1016

Dear Mr. Kean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159194.

The City of Tyler Civil Service Department (the "civil service") received a written request for the following categories of information:

- All records pertaining to the job performance of former Tyler Police Lt. Richard Drew, including reprimands and commendations.
- All records relating to internal affairs investigations regarding his job performance, including that which lead [sic] up to his permanent suspension.
- All other records regarding his service that are considered public record.
- A schedule of all hearings and meetings regarding his appeal.

You state that some responsive information will be made available to the requestor. You contend that other information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.130 of the Government Code.

You contend that information pertaining to the named officer that is maintained by the Tyler Police Department is made confidential under section 143.089(g) of the Local Government Code and therefore must be withheld from the public pursuant to section 552.101 of the Government Code.¹ We note, however, that records held by the city's police department are not responsive to a records request directed to the city's civil service. Accordingly, in this instance we need not address the public nature of the records maintained pursuant to section 143.089(g).

However, we nevertheless must address your contention that Internal Affairs File #199 constitutes information made confidential under section 143.089(g) of the Local Government Code. Section 143.089 provides in pertinent part:

(a) The director [of the fire fighters' and police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

(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 the 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.

....

(c) A letter, memorandum, or document relating to disciplinary action taken against the fire fighter or police officer or to alleged misconduct by the fire fighter or police officer that is placed in the person's personnel file as provided by Subsection (a)(2) shall be removed from the employee's file if the commission finds that:

(1) the disciplinary action was taken without just cause; or

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(2) the charge of misconduct was not supported by sufficient evidence.

....

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless the release of the information is required by law.

(g) 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.

In Open Records Decision No. 562 (1990), this office discussed the confidentiality of personnel file information maintained by cities that have adopted the police officers' civil service law in accordance with the provisions of chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the creation of two personnel files: one that is maintained by the city's civil service director and the other by the city police department.

Section 143.089(a) specifies certain types of information that must be contained in the civil service file; such records are not made confidential under section 143.089 and thus are subject to release unless an exception to required public disclosure applies. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information 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. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

A police officer's disciplinary records must be contained in the civil service file only if the misconduct results in disciplinary action by the police department "in accordance with this chapter." Local Gov. Code § 143.089(a)(2). Otherwise, those records must be maintained as part of the police department's internal file contemplated under section 143.089(g). *See generally* Attorney General Opinion JC-0257 (2000).

In this instance, you inform us that Internal Affairs Investigation #199 resulted in the indefinite suspension of the named officer, but that the officer is now appealing that disciplinary action. You contend that because of the pending appeal, the records of the internal affairs investigation must be maintained only in the police department's confidential internal personnel file created under section 143.089(g). We disagree. The records

contained in Internal Affairs Investigation #199 were gathered by the internal affairs division of the department. Thus, this information is from the officer's employing department. Furthermore, substantially all this internal affairs file relates to the misconduct that resulted in the officer's indefinite suspension. Therefore, this information is also subject to section 143.089(a)(2) and thus must also be placed in the officer's civil service file until such time as the civil service commission determines that either 1) the disciplinary action was taken without just cause or 2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov. Code § 143.089(c).

Because the civil service commission has not made such a determination, most of the records from Internal Affairs Investigation #199 must be maintained as part of the civil service file, which is subject to required public disclosure under the Public Information Act. *See* Open Records Decision No. 562. We note, however, that contained within this investigation file are original records from other IAD investigations, and a summary of those investigations, that did not result in disciplinary action against the officer. The civil service is prohibited from maintaining those records, which must be maintained only by the city's police department pursuant to section 143.089(g) and are not subject to public disclosure. Accordingly, we have marked these documents, which must be withheld in their entirety. On the other hand, to the extent that the records required to be maintained in the civil service file merely contain references to the previous internal affairs investigations, that information must be released.

You contend that portions of Internal Affairs Investigation #199 and other portions of the officer's civil service file come within various exceptions to required public disclosure. We first note that some of the information at issue is made confidential by statutes found outside the Public Information Act and thus must be withheld from the public pursuant to section 552.101 of the Government Code. Among the documents at issue is criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. However, driving records are not criminal history record information. Gov't Code § 411.082(2)(B). Consequently, although the civil service must withhold all CHRI obtained from the TCIC and NCIC, the civil service must release the officer's driving record information to the requestor.

We additionally note that fingerprints are specifically excluded from the definition of CHRI. Gov't Code § 411.082(2)(A). However, the Seventy-seventh Legislature recently added sections 559.001, 559.002, and 559.003 to the Government Code, effective September 1, 2001. These new statutes provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the civil service must withhold all fingerprint information pursuant to section 559.003 of the Government Code.

Also contained in the civil service file are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). The release of these accident reports is governed by chapter 550 of the Transportation Code. Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the civil service with two of the three pieces of information. Consequently, the civil service must withhold the accident reports in their entirety pursuant to section 550.065 of the Transportation Code.

Finally, we note that the submitted information also contains a declaration of psychological and mental health required by the Texas Commission on Law Enforcement Officer Standards and Education that is confidential pursuant to Section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Therefore, the civil service must withhold the declaration pursuant to section 1701.306 of the Occupations Code.

You also seek to withhold pursuant to section 552.108 of the Government Code the names and other information tending to identify undercover police officers. Section 552.108(b)(1) of the Government Code excepts from required public disclosure “[a]n internal record or

notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution.” We have reviewed your arguments for withholding the information at issue and conclude that you have established how the release of the requested information revealing the identities of undercover police officers would interfere with law enforcement. The civil service may, therefore, withhold the types of information you have highlighted pertaining to undercover police officers pursuant to section 552.108(b)(1).²

Section 552.117(2) of the Government Code requires the civil service to withhold all information that relates to the home address, home telephone number, social security number, and family information of a peace officer as defined by article 2.12, Code of Criminal Procedure. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). Accordingly, we agree that the civil service must withhold all peace officers’ section 552.117 information.³

Finally, we agree that some of the records in the civil service file contain information that must be withheld pursuant to section 552.130(a)(1) of the Government Code, which requires the civil service to withhold “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Also, section 552.130(a)(2) of the Government Code requires the withholding of information relating to “a motor vehicle title or registration issued by an agency of this state.” Consequently, the civil service must withhold all Texas driver’s license numbers and all Texas license plate numbers pursuant to section 552.130.

In summary, records maintained by the city’s police department are not responsive to a records request addressed to the city’s civil service and therefore need not be released. However, Internal Affairs Investigation #199 must be made a part of the civil service file established under section 143.089(a) of the Local Government Code, and is therefore subject to required public disclosure, except to the extent that this file contains original records from other investigations that did not result in disciplinary action. The civil service must withhold from the officer’s personnel file all Peace Officer’s Accident Reports, criminal history information, fingerprints, and declarations pursuant to section 552.101 of the Government Code. The civil service is authorized to withhold pursuant to section 552.108(b)(1) information tending to identify undercover police officers. The civil service is required to withhold pursuant to section 552.117(2) the home address, home telephone number, social security number, and family information of a peace officer as defined by article 2.12, Code

²We note that some of this information is also contained in Internal Affairs File #199.

³We have marked certain information contained in the complaints about the employee that must be withheld under section 552.117(2). The county must also withhold all section 552.117(2) information contained in the requested personnel files.

of Criminal Procedure. All Texas driver's license numbers and all Texas license plate numbers must be withheld pursuant to section 552.130. All of the remaining information at issue must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

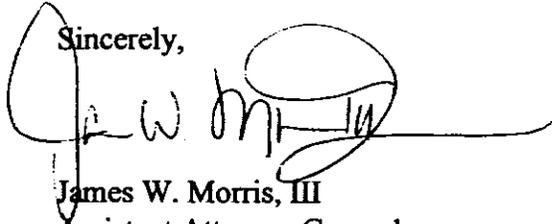
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/sdk

Ref: ID# 159194

Enc: Submitted documents

c: Mr. Jacque Hibern
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(w/o enclosures)