OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

July 31, 2002

Mr. Wiley B. McAfee
Police Legal Adviser
Irving Police Department
P.O. Box 152288
Irving, Texas 75015-2288

OR2002-4177

Dear Mr. McAfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166434.

The Irving Police Department (the "department") received two requests from the same requestor for "copies of all documents related to the investigation and firing of the recruits caught cheating on their exam" and "a copy of the tests recruits take during their probationary period." You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. Section 143.089 of the Local Government Code provides in pertinent part:

> (a) The director [of the fire fighters' or 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:
>
> . . . .

> (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 . . . .
>
> . . . .
>
> (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.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including all records from the employing police department relating to misconduct by police officers that resulted in disciplinary action, must be released to the public unless the information comes within one of the Public Information Act's (the "Act") exceptions to required public disclosure. However, documents relating to an 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). Information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

You indicate that the responsive information in Exhibits C and D is part of the department's personnel files and therefore is confidential under section 143.089(g) of the Local Government Code. Based on your contention that this information is contained in the department's personnel files, we agree that Exhibits C and D are confidential under section 143.089(g).

We note that Exhibits C and D consist of information relating to the misconduct of the officers in question that resulted in disciplinary action as prescribed by chapter 143. *See* Local Gov't Code §§ 143.051-.055 (removal, suspension, demotion, and uncompensated duty). While this type of information may be kept in the police department's personnel file, it must also be kept in the civil service personnel file. Local Gov't Code §§ 143.052, .089(a)(2), (3). You contend, however, that these "officers had not yet received civil service protection under section 143.027 of the Texas Local Government Code" and that "the letter

that would normally accompany a termination of a civil service employee was not filed with the director of the civil service." Section 143.027 of the Local Government Code provides in pertinent part:

> (a) A person appointed to a beginning position in the fire or police department must serve a probationary period of one year beginning on that person's date of employment as a fire fighter, police officer, or academy trainee.
>
> ....
>
> (d) A fire fighter or police officer who was appointed in substantial compliance with this chapter and who serves the entire probationary period automatically becomes a full-fledged civil service employee and has full civil service protection.

We note, however, that section 143.089(a) requires the civil service director to maintain a personnel file on each "police officer." Likewise, section 143.089(g) states that a police department may maintain a personnel file on each "police officer." Both subsections refer to "police officer." Therefore, if section 143.089(g) applies to a probationary officer, as you assert, then section 143.089(a) would also apply. Section 143.003 defines a police officer as a member of a police department or other peace officer that was appointed in substantial compliance with chapter 143 or who is entitled to civil service status under other sections of chapter 143.

As you state that the department maintains a section 143.089(g) file on the officers in question, we can assume that these officers were appointed in substantial compliance with chapter 143. Thus, although information regarding the misconduct of these officers that resulted in disciplinary action in the department's personnel files is confidential under section 143.089(g), the information regarding the misconduct of these officers that resulted in disciplinary action must also be maintained in the civil service personnel file and is not confidential under section 143.089(a). The department must refer the requestor to the civil service director as required under section 143.089(g).

In regard to Exhibit E, you claim section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122

where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You state that the requested tests are test items developed by a government body. Having reviewed the submitted tests, we agree that they constitute "test items" as contemplated by section 552.122(b). We also find that the preferred answers to these questions, as well as the officers' responses to these questions, may reveal the questions themselves. Accordingly, the department may withhold the submitted tests, their respective preferred answers, and the officers' responses pursuant to section 552.122(b) of the Government Code.

In summary, we conclude that: 1) Exhibits C and D are confidential under section 143.089(g) of the Local Government Code; 2) Exhibits C and D also concern the misconduct of these officers that resulted in disciplinary action and, thus, must be maintained in the civil service personnel file pursuant to section 143.089(a); and 3) the department may withhold the submitted tests, their respective preferred answers, and the officers' responses pursuant to section 552.122(b) of the Government Code.

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

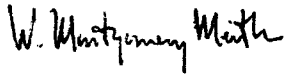
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



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WMM/sdk

Ref: ID# 166434

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