



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 15, 2003

Mr. Stephen R. Alcorn
Assistant City Attorney
City of Grand Prairie
P. O. Box 53404
Grand Prairie, Texas 75053-4045

OR2003-3281

Dear Mr. Alcorn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181083.

The City of Grand Prairie Fire Department (the "department") received a request for any and all evidence in the case involving the requestor. You state that the requestor has been provided a copy of all of his conversations, and that his personnel file is available to him. You also inform us that other items have been released to the requestor. You have provided this office with copies of documents you have released to the requestor. You also state that certain information has been forwarded to the Texas Municipal League.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address the department's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental

¹We note that a governmental body is not required to obtain information not in its possession. Open Records Decision No. 558 (1990).

body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The department does not state when it received the request for information. The request, which you submitted for our review, shows on its face that it was faxed to the city on February 18, 2003. However, the department did not request a decision from this office or submit the requested information until March 12, 2003. Additionally, you did not submit to this office a videotape which is responsive to the request. You state in your brief that the city hired an outside firm to conduct an investigation on the requestor and that the videotape was created by the investigative firm. You further state that "all information, including video information, is held by the company and not in possession and control of the City." However, the investigative report addressed to the city dated December 11, 2002, which you submitted to this office, shows that the videotape was included as an enclosure with the report. We therefore cannot agree that you do not have a copy of the videotape. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." As the videotape is information collected, assembled, or maintained by the department in connection with the transaction of official business, it is subject to the Public Information Act. Consequently, the department failed to request a decision within the ten-business-day period mandated by section 552.301(a) of the Government Code, failed to timely submit the requisite information as required by section 552.301(e), and failed to include a copy of the videotape as mandated by section 552.301(e) 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 information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.103 is a discretionary exception under the Public Information Act and does not demonstrate a compelling reason to withhold information from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App. Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, you have not demonstrated a compelling reason to withhold the information under section 552.108. *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (discretionary exceptions in

general). *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold information from disclosure provides compelling reason under section 552.108). Thus, the submitted information may not be withheld under section 552.103 or 552.108. However, as section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness, we will address your arguments under that exception. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

We must first address the videotape, which you did not submit to this office for review. Because you have not submitted this information, we have no basis for finding it confidential. *See* Gov't Code § 552.352. Thus, we have no choice but to order any such information released, to the extent it exists, per section 552.302 of the Government Code. If you believe any such information is confidential and may not lawfully be released, you must challenge this decision in court as outlined below.

You state in your brief that the city “has a civil service system for police and fire personnel, and has adopted local rules consistent with Chapter 143 of the Local Government Code.” You argue that all investigation files related to workers’ compensation benefits and fraud and “any drafts of disciplinary documents or letters in which [the requestor] will be informed of any disciplinary hearings against him” should be withheld under Chapter 143 in conjunction with section 552.101 of the Government Code.² Section 143.089 of the Local Government Code 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:

....

- (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

....

²Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

(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
- (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 fire 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 fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

A firefighter's disciplinary records must be contained in the civil service file only if the misconduct results in disciplinary action by the fire department "in accordance with this chapter." Local Gov't Code § 143.089(a)(2). Otherwise, those records must be maintained as part of the fire department's internal file contemplated under section 143.089(g). *See generally* Attorney General Opinion JC-0257 (2000). In this instance, the submitted information indicates that the requested information relates to an investigation that resulted in the indefinite suspension of a particular firefighter, but that the firefighter has a right to appeal that disciplinary action. You have not informed us, however, in which file the submitted information is maintained. If the submitted information is maintained in the fire department's confidential internal personnel file created under section 143.089(g), then it must be withheld. The department must refer the requestor to the civil service director. Local Gov't Code § 143.089(g).

We note, however, that a firefighter's civil service file must contain documents relating to any misconduct in those cases where the department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). The submitted information relates to the misconduct that resulted in the firefighter's indefinite suspension. Therefore, this information is also subject to section 143.089(a)(2) and while it may be kept in the fire department's personnel file, it also must be forwarded and placed in the firefighter'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't Code § 143.089(c). Therefore, if the information is not maintained in the fire department's internal personnel file, and is maintained only in the firefighter's civil service file, then it must be released.

Nevertheless, we note that certain information within the submitted materials is confidential and excepted from public disclosure.³ Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.

Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state, a personal identification document issued by an agency of this state, or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

However, section 552.023 of the Government Code gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. Sections 552.117 and 552.130 are intended to protect an individual's privacy. Thus, as the requestor here has a special right of access to the information that relates to him, the department must release to the requestor the information that ordinarily would be protected by sections 552.117 and 552.130.

To summarize, we conclude that if the department maintains the submitted information in the fire department's internal personnel file under section 143.809(g) of the Local Government Code, then the department must withhold that information. However, if the submitted information is maintained in the city's civil service file under section 143.089(a)(2), then that information must be released to the requestor. You must also release the videotape 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 Dep't of Pub. 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 cursive script, appearing to read "Sarah Swanson".

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 181083

Enc. Submitted documents