OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 3, 2003

Ms. Jan Clark
Assistant City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2003-3762

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182273.

The City of San Marcos (the "city") received a request for fourteen categories of information related to four named police officers. You state that you have released some of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.[1]

Initially, we will address your assertion that because the requestor has not inspected the information you made available for inspection, the entire request has been withdrawn by operation of law pursuant to section 552.225 of the Government Code. This section limits the time a member of the public may physically inspect public records. *See* Open Records Decision No. 512 (1988). This section does not, however, provide a basis for withdrawing the portion of a request for information that is subject to a request for a decision from this office. The only section of the Government Code that serves as a withdrawal by operation of law is section 552.2615, which provides that a request for a decision is considered to be withdrawn if the requestor does not respond in writing to an itemized statement sent by the

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). 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 thanthat submitted to this office.

governmental body to the requestor within ten days after the statement is sent. *See* Gov't Code § 552.2615. We therefore will disregard your withdrawal, and will address your claimed exceptions for the submitted information.

You contend that the submitted information is made confidential under section 143.089(g) of the Local Government Code and must therefore be withheld from the public pursuant to section 552.101 of the Government Code.[2] 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.
>
> . . . .
>
> (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.

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

Local Gov't Code § 143.089 (a), (f), (g) (emphasis added). 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).

You inform us that the submitted materials consist of investigations that did *not* result in disciplinary action in accordance with chapter 143 of the Local Government Code and are not maintained in the civil service personnel files. *See* Local Gov't Code §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)). Thus, we conclude that the submitted documents are confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code. As we are able to make this determination, we need not address your remaining arguments.

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,

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 182273

Enc. Submitted documents

c: Ms. Frances Perez
504 Lockwood
San Marcos, TX 78666
(w/o enclosures)