



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

Mr. Brad Norton
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8845

OR2004-3201

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 199785.

The City of Austin Civil Service Administrator and the Office of the Police Monitor (collectively, the "city") each received a request from the same requestor for any information concerning a named police officer. You state that you will release some information to the requestor. However, you claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service

file maintained under section 143.089(a).¹ *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *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 Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

A qualified civil service municipality may elect under subchapter I of Chapter 143 of the Local Government Code to enter into an agreement with a police association regarding “wages, salaries, rates of pay, hours of work, other terms and conditions of employment, [and] other personnel issues.”² Local Gov’t Code § 143.303. When a qualified municipality enters into such an agreement, the agreement “supercedes a previous statute concerning wages, salaries, rates of pay, hours of work, or *other terms and conditions of employment* to the extent of any conflict with the statute” and “preempts any contrary statute, executive order, local ordinance, or rule adopted by the state or a political subdivision or agent of the state including a personnel board, a civil service commission, or a home-rule municipality.” *Id.* § 143.307(a), (b) (emphasis added). However, an agreement “may not diminish or qualify any right, benefit, or privilege of any employee under this chapter or other law” unless the change is approved by a majority of the police association. *Id.* § 143.307(c).

You inform us that in March 2001 the city and the Austin Police Association entered into an agreement pursuant to subchapter I and have provided us with a copy. *See* Agreement Between The City of Austin and The Austin Police Association March 25, 2001 -- September 26, 2003 (hereinafter “Agreement”). The terms of the Agreement called for the Agreement to expire on September 26, 2003. *See* Agreement, Art. 19, § 1, p 40. However, in its brief to this office, the city states that the “Agreement has been extended and continues in effect,” and we have not been presented with any information that contradicts this statement by the city. *See id.* (authorizing city and police association’s negotiation teams to extend Agreement in thirty day increments for up to 6 months after termination date).

¹ Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

²Subchapter I of Chapter 143 of the Local Government Code applies in part to a municipality with a population of 460,000 that operates under a city manager form of government. *See* Local Gov’t Code § 143.301. The submitted Agreement indicates that the city is such a qualified municipality.

Therefore, we conclude that at the time the city submitted this request for a ruling, the Agreement was still in effect.³

Section 12 of Article 16 of the Agreement establishes a civilian oversight process. Agreement, Art. 16, § 12, p. 33. Exhibit B of the Agreement outlines a process in which the Police Monitor (the “Monitor”) acts as an observer and advisor during investigations by the department’s Internal Affairs Division (the “division”) and is authorized to receive complaints from the public and to refer such complaints to the division. *Id.* Ex. B, § I(B)(3)(a)-(d), pp. 2-3. The Agreement gives the Monitor access to department disciplinary information, including otherwise confidential departmental files. *Id.* § I(B)(3)(e), p. 3. The Monitor is also authorized under the Agreement to attend witness interviews and request that the division contact a particular witness or collect certain evidence. *Id.* § I(B)(3)(f)-(g), pp. 3-4. Additionally, the Agreement states that the Monitor may request that the Citizen Review Panel review certain complaints. *Id.* § I(C)(4)(b)(i)-(ii), p. 10-11. However, the Agreement forbids the Monitor from having any direct, independent contact with any witness and from asking questions or otherwise interfering with the department’s disciplinary process. *Id.* § I(B)(3)(g)-(h), p. 3. The Agreement provides that the division “is solely responsible for investigating a complaint except when an independent investigation is authorized pursuant to this Oversight process.” *Id.* § I(B)(3)(g), p. 4. Furthermore, the Agreement mandates that the Monitor and her staff and the Citizen Review Panel are subject to the Agreement’s confidentiality requirements. *Id.* § I(B)(3), p. 2. These confidentiality requirements provide as follows:

Disciplinary files maintained by the Austin Police Department are confidential. The Police Monitor, his staff, and the [Citizen] Review Panel members, may not discuss or release the contents of those files with any person other than members of the Review Panel, the Chief of Police or his designee, the Internal Affairs Division, the City Manager or his Designee, the City of Austin Law Department, and [within certain limitations] the accused employee.

Id. § I(G), p. 15. The Agreement also provides that “the City shall maintain all Internal Affairs complaints and investigations in personnel files maintained by the department for the department’s use pursuant to the Texas Local Government Code, Section 143.089(g), except as herein amended.” Agreement, Art. 16, § 12, p. 33.

You inform us that certain information, which you have marked, is part of the departmental personnel files maintained pursuant to section 143.089(g). This information does not contain disciplinary action as defined by chapter 143. We therefore conclude that these documents

³ We note that since the time that this request for a ruling was submitted to our office, the city and the Austin Police Association have entered into a new agreement pursuant to subchapter I. However, in determining whether the information at issue here must be released to the requestor, we have ruled on the circumstances as they existed at the time of the request.

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. You do not claim that the remaining submitted information is maintained in the department's internal file. To the extent that information is placed in the department's internal file, it is confidential and cannot be released. To the extent that information is placed in the civil service director's file, it is subject to disclosure. However, information that is subject to public disclosure may still be excepted from disclosure under the exceptions in chapter 552 of the Government Code. Therefore, we will address your arguments regarding the remaining submitted information in the event that information is placed in the civil service file.

Section 552.101 encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). Two of the submitted use of force reports concern juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information at issue is confidential pursuant to section 58.007(c) of the Family Code. You must withhold from disclosure the two reports that we have marked in their entirety under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace,

illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked portions of the remaining submitted information that are highly intimate and embarrassing and of no legitimate public concern. However, we conclude that the remaining information is not highly intimate or embarrassing for purposes of common-law privacy. You must withhold the information we have marked under section 552.101 and common-law privacy.

To summarize: To the extent any of the submitted information is placed solely in the department's personnel file, it is confidential under section 143.089(g) of the Local Government Code; to the extent the information is placed in the civil service file, it must be released except as follows. You must withhold the two reports we have marked under section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. You must withhold the information we have marked under section 552.101 of the Government Code and common-law privacy.

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

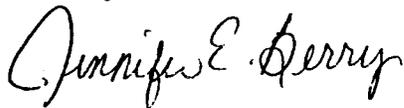
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 199785

Enc: Submitted documents

c: Mr. Joshua Saegert
Joseph A. Turner, P.C.
1504 West Avenue
Austin, Texas 78701
(w/o enclosures)