



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2006

Ms. Cary Grace
City Attorney
City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767

OR2006-01440

Dear Ms. Grace:

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# 242221.

The City of Austin (the "city") received two requests for all evidence collected and submitted for laboratory analysis by the Austin Police Department in the investigation of the shootings of two named individuals. You state that you have released some information to the requestor. You claim that the remaining requested 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 considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 143.089(g) 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. *See* 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 *Abott 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 id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document 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. *See Local Gov't Code* § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 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.” Local Gov't Code § 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. *See id.* § 143.307(c).

You inform us that in April 2004 the city and the Austin Police Association entered into an agreement pursuant to subchapter I, and that agreement remains in effect. You have

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

² Subchapter I of the Local Government Code applies in part to municipalities 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.

provided us with a copy of the agreement. *See Agreement Between The City of Austin and The Austin Police Association* (hereinafter "Agreement"). Article 16 of the Agreement establishes an independent investigation process. *See Agreement, Art. 16, § 4, p. 37.* This section provides in part:

(a) . . . "Independent Investigation" means an administrative investigation or inquiry of alleged or potential misconduct by an officer, authorized by the Chief of Police or City Manager and conducted by a person(s) who is not

1. an employee of the City of Austin;
2. an employee of the Office of the Police Monitor; or
3. a volunteer member of the [Volunteer Citizen] Panel.

Id. § 4(a), p. 37. The Agreement also provides that the "provisions of Section 143.089(g) of the Texas Local Government Code are expressly modified to the extent necessary to permit public release of a final report prepared by an investigator who conducts an Independent Investigation authorized by the Chief of Police or City Manager concerning police conduct." Agreement, Art. 16, § 5(a), p. 37. Furthermore, the Agreement applies "to any Independent Investigation whether completed prior to or after the effective date of this Agreement and applies to every position and rank within the Austin Police Department." Agreement, Art. 16, § 5(c), p. 38. *See also* Agreement, Art. 4, §§ 2 and 3, pp.3-4.³ Section 5 continues:

(b) The public release of information authorized by this Section shall not contain or reveal evidentiary facts, or other substantive investigative information from the file, except to the extent that such information is at the time of such release no longer protected from public disclosure by law, or is already public as a matter of fact by lawful or authorized means or by the officer's own release. For example, the names of officers in an investigation may not be released, but could be released if those officers have elected to enter the public debate and discuss their involvement, or if the public has been informed of identities by lawful or authorized means in the course of grand jury or other legal proceedings. The public statements authorized in this agreement are subject to review by the City of Austin Law Department to insure compliance with this Agreement and to determine whether the release of such information may be prohibited by other law.

...

³ One of the independent investigations at issue was completed prior to the enactment of the current Agreement.

(d) Section 143.089(g) of the Texas Local Government Code is modified and superceded to the extent necessary to permit the public release of the following information only:

(4) A final report from an Independent Investigator, whether or not recommended by the [Volunteer Citizen] Panel. This section shall also apply to any Independent Investigation completed prior to ratification of this agreement.

Agreement, Art. 16, § 5 (b), (d), pp. 37, 38. The submitted information is drug test documentation, and you inform us that under the Agreement it has the same confidential character as records in the departmental file kept under section 143.089(g). We also understand you to represent that these documents were not involved in disciplinary action under sections 143.051-.055 of the Local Government Code. Based on your representations and our review of the documents at issue, we agree that the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code, and it must be withheld under section 552.101 of the Government Code on that basis.

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).

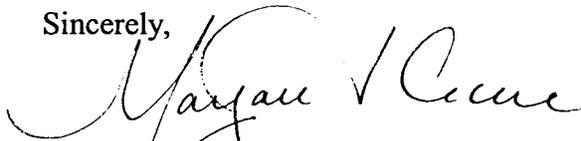
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Margaret Cecere
Assistant Attorney General
Open Records Division

MC/segh

Ref: ID# 242221

Enc. Submitted documents

c: Mr. David Fisher
605 North Highway 95
Elgin, Texas 78621
(w/o enclosures)