



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2006

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2006-02336

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# 243894.

The City of Austin (the "city") received a request for "any and all . . . correspondence between the City Manager and any member, former or present, of the Austin Fire Department from December 15, 2003 to the present date." You state that the city will release some of the requested information to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

We first address the city's responsibilities under the Act. In accordance with section 552.301(e), within fifteen business days of receiving a written request for information, a governmental body is required to submit (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. *See* Gov't Code § 552.301(e)(1)(A). You

¹The city withdrew its assertion of section 552.111 of the Government Code.

²We 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 (1983), 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 than that submitted to this office.

state that the city received the request for information on December 15, 2005. Thus, the city's fifteen-business-day deadline was January 10, 2006.³ Although the city timely submitted written comments in support of withholding the requested information, the city did not submit its representative samples of the information requested until January 11, 2005. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we conclude that the city failed to fully comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Because the city failed to comply with the procedural requirements of section 552.301 in requesting this decision, the information at issue is now presumed public and must be released unless a compelling reason exists to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision Nos. 630 (1994), 150 at 2 (1977). Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. Thus, sections 552.103 and 552.107 do not constitute compelling reasons to withhold information from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 663 (1999); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). We therefore determine the city may not withhold the submitted information under sections 552.103 and 552.107. However, because sections 552.101 and 552.137 can provide compelling reasons for non-disclosure, we will consider your arguments regarding these exceptions.

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 deemed confidential by statute, such as section 143.089 of the Local Government Code. You state that the City of Austin 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 or fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the police or fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department investigates a firefighter's misconduct and takes

³The city informs us that its offices were closed on December 23, 2005, December 26, 2005, and January 2, 2006.

disciplinary action against the firefighter, 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 firefighter's civil service file maintained under section 143.089(a). *Abbott v. 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 firefighter's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 120, 122. Such records are subject to release under the Act. *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the submitted information in Exhibit A is maintained in the fire department's internal file pursuant to section 143.089(g). Based upon your representations and our review, we conclude that this information is confidential pursuant to section 143.089(g) of the Local Government Code and must be withheld under section 552.101.

We now address your arguments under section 552.137 of the Government Code for the remaining submitted information. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Thus, the city must withhold the e-mail addresses we have marked under section 552.137 unless the owners have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, Exhibit A must be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code. The remaining submitted information must be released.

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/segh

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Enc: Submitted documents

c: Mr. Charles E. Catt
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(w/o enclosures)