



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2008

Ms. Doreen E. McGookey
City Attorney
City of Sherman
P.O. Box 1106
Sherman, Texas 75091-1106

CORRECTED COPY

OR2007-16118A

Dear Ms. McGookey:

This office issued Open Records Letter No. 2007-16118 (2007) on December 6, 2007 pertaining to the City of Sherman (the "city"). We have examined this ruling and determined that we made an error. Due to an administrative error, the initial correspondence pertaining to the third request for information was separated from the representative sample of responsive documents you sent at a later date. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 6, 2007. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

The city received a request for information pertaining to the internal affairs investigations of four named fire fighters, a second request for a copy of the recording of the predetermination hearing involving a named fire fighter, and a third request for information pertaining to all personnel administrative investigations and pre-determination meetings from January 1, 2007 to the present.¹ You claim that the information responsive to the first request

¹We note that the city asked for and received clarification regarding the third request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.² You claim that the information responsive to the second request is excepted from disclosure under section 552.101 of the Government Code. You claim that the information responsive to the third request is excepted from disclosure under sections 552.101 and section 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.³

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 other statutes make confidential. You contend that a portion of the submitted information is confidential under 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 fire fighter's civil service file that a city's civil service director is required to maintain, and an internal file that the 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 fire fighter's misconduct and takes disciplinary action against the fire fighter, 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 fire fighter's civil service file maintained under section 143.089(a).⁴ *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 fire fighter'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

²We note that although you raise section 552.111 of the Government Code, you make no argument to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, because the information at issue is not subject to section 552.022 of the Government Code, the information is properly addressed here under section 552.107, rather than rule 503.

³We 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 than that submitted to this office.

⁴Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See Local Gov't Code §§ 143.051-.055.

chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a fire fighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. *Id.* § 143.089(b). Information that reasonably relates to a fire fighter's employment relationship with the fire department and that is maintained in the fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the information at issue is contained in the department's internal files created pursuant to section 143.089. However, the submitted information reflects that the fire fighters at issue received disciplinary actions as contemplated under chapter 143, including "voluntary demotions" and "voluntary suspensions." *See* Loc. Gov't Code § 143.054(e). All records pertaining to these disciplinary actions, which we have marked under section 143.089(a), must be placed in the fire fighters' civil service files. The remaining submitted information for which you claim 143.089(g) pertains to alleged misconduct that did not result in disciplinary action. Accordingly, the city must withhold the remaining information you have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

Section 552.107 of the Government Code protects information within the attorney-client privilege. *Id.* § 552.107. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to

a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We note that communications with third party consultants with which the city shares a privity of interest are protected. *See Open Records Decision Nos. 464 (1987), 429 (1985); see also Wu v. Nat'l Endowment of the Humanities*, 460 F.2d 1030 (5th Cir. 1972).

In this instance, you state that some of the submitted information consists of communications between city counsel, outside counsel, and a consultant hired by outside counsel. You state that the information at issue has remained confidential. Upon review, we determine that the information we have marked may be withheld under section 552.107 of the Government Code.

We note that some of the remaining submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, 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. Gov't Code § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employees made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. In this case, you do not inform us nor provide documentation showing if or when the employees at issue elected confidentiality under section 552.024. Thus, if the employees at issue timely elected to keep their personal information confidential, you must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) if the employees at issue did not make timely elections.

In summary, with the exception of the information we have marked under section 552.101 of the Government Code in conjunction with section 143.089(a) of the Local Government Code, the city must withhold the information you have marked under section 552.101 of the

Government Code in conjunction with section 143.089(g) of the Local Government Code. The city may withhold the information we have marked under section 552.107 of the Government Code. If the employees at issue timely elected to keep their personal information confidential, you must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) if the employees at issue did not make timely elections. The remaining submitted information must be released to the requestors.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 296574

c: Ms. Kathy Williams
Herald Democrat
P.O. Box 1128
Sherman, Texas 75090
(w/o enclosures)