



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 29, 2010

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

OR2010-01449

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# 368663.

The City of Austin and the Austin Police Department (collectively, the "city") received four requests for information pertaining to the city's investigation of an officer-involved shooting. All four requests seek an unredacted copy of an independent investigation of the shooting incident. The first and second requests also seek statements made during an internal affairs investigation, 9-1-1 calls pertaining to the shooting incident that have not been released, any previously unreleased videotapes, and any disciplinary memoranda.<sup>1</sup> The third request also seeks two specified e-mails and a specified disciplinary memorandum. You state the city has released some responsive information to the requestors and that you have redacted certain information relating to peace officers pursuant to Open Records Decision No. 670 (2001). You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the second requestor modified his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Accordingly, you withdraw your claims under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.108 of the Government Code.

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 143.089 of the Local Government Code. We understand the city is a civil service municipality under chapter 143 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including one that must be maintained as part of the officer's civil service file and another that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). The officer's civil service file must contain certain specified items, including commendations, periodic evaluations by the police officer's supervisor, and documents relating to any misconduct in any instance in which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* § 143.051 *et seq.* 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). *See 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 are in the 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 may not be withheld under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). Information relating to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) provides as follows:

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.

*Id.* § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the police department for its use and the applicability of section 143.089(g) to that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made the records confidential. *See* 851 S.W.2d at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 143.089(g) to "information reasonably related to a police officer's or fire fighter's employment relationship"); Attorney General Opinion JC-0257 at 6-7 (2000) (addressing functions of Local Gov't Code § 143.089(a) and (g) files).

You submitted statements made during an investigation conducted by the city's Internal Affairs Division. You seek to withhold portions of those statements that pertain to allegations that did not result in disciplinary action under chapter 143 of the Local Government Code. Thus, we agree the marked information in the statements made during the internal affairs investigation is confidential under section 143.089(g) of the Local Government Code and must be withheld from disclosure under section 552.101 of the Government Code.

You also seek to withhold portions of the independent investigation of the shooting incident pursuant to the city's and the Austin Police Association's Meet and Confer Agreement (the "agreement") under subchapter I of chapter 143 of the Local Government Code. *See* Local Gov't Code § 143.301 *et seq.* 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."<sup>3</sup> *Id.* § 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. *See id.* § 143.307(c).

You inform us the city and the Austin Police Association entered into the agreement in October 2008 and the agreement remains in effect. You have provided us with a copy of the

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<sup>3</sup>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.

agreement. Article 16 of the agreement establishes an independent investigation process. See Agreement, Art. 16, § 4, p. 45. 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. [a]n employee of the [city];
2. [a]n employee of the Office of the Police Monitor; or
3. [a] volunteer member of the [Volunteer Citizen] Panel.

*Id.* § 4(a), p. 45. The agreement also provides "[t]he 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. 46. 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.

....

(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[.]

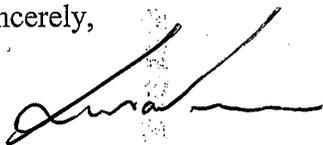
Agreement, Art. 16, § 5 (b), (d), p. 46. You seek to withhold portions of the independent investigation in accordance with section 5 of the agreement. Upon review of the agreement and the information at issue, we agree the city must withhold the information you have marked pursuant to the agreement under the authority given to the city under section 552.101 of the Government Code in conjunction with subchapter I of chapter 143 of the Local Government Code.

In summary, the city must withhold the information you have marked within the internal affairs investigation under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code and the information you have marked in the independent investigation file under section 552.101 of the Government Code in conjunction with the agreement made under subchapter I of chapter 143 of the Local Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 368663

Enc. Submitted documents

c: Requestor (4)  
(w/o enclosures)