



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 1, 2015

Ms. Kaye H. Edwards
City Attorney
City of Big Spring
310 Nolan Street
Big Spring, Texas 79720-2657

OR2015-25053

Dear Ms. Edwards:

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# 588896.

The City of Big Spring (the "city") received a request for the transcript of a civil service hearing prepared by a named court reporting service involving the requestor. You claim the submitted information is excepted from disclosure under sections 552.027, 552.101, and 552.107(2) of the Government Code.¹ You also state release of the information may implicate the proprietary interests of a third party, Caldwell Court Reporting ("Caldwell"), and you provide documentation demonstrating you notified Caldwell of the request for information and of its right to submit comments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Caldwell as well as the requestor. *See id.* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and the submitted comments and reviewed the submitted information.

¹Although you raise section 552.101 of the Government Code in conjunction with a hearing examiner order, we note the proper exception to raise in this instance is section 552.107(2) of the Government Code. *See* Gov't Code § 552.107(2).

Initially, we note although you have submitted the requested transcript, you inform us that certain evidentiary exhibits referenced in the transcript have been “excluded” from your submission, and thus, you have submitted only photocopies of the envelopes containing these exhibits. We further note you have submitted as Exhibit C information you state is contained in the internal file of the requestor maintained by the city under section 143.089(g) of the Local Government Code. *See* Local Gov’t Code § 143.089(g). You indicate some of the information contained in Exhibit C may have been contained in the evidentiary exhibits referenced in the transcript at issue. However, you state Exhibit C was provided to this office only “for reference,” and you do not seek a ruling with respect to this information. Accordingly, on the basis of your representations and our review of the submitted documents and the request letter, we understand you to indicate the evidentiary exhibits referenced in the transcript are not responsive to the request. This ruling does not address information that was not submitted by the city and is limited to the information the city has submitted for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, you contend the city is not required to release the requested transcript because this information is commercially available. Section 552.027 of the Government Code provides as follows:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov’t Code § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You inform us the city obtained the transcript at issue from a court reporter, and the “transcript will be useful for research in preparing the [city’s] post-hearing brief and documenting statements of the parties.” You further state that the requestor has contacted the court reporter and received a quote for the requested transcript, but has not withdrawn his public information request to the city. *See id.* § 52.047(a) (person may apply for a transcript of the evidence in a case reported by an official court reporter). Upon review,

however, we find you have failed to demonstrate the information at issue came from the type of commercial book or publication purchased or acquired by a governmental body for research purposes as contemplated by section 552.027. *See id.* § 552.027(a). Therefore, the information at issue is not subject to section 552.027, and must be released unless it falls within an exception to disclosure. *Id.* §§ 552.006, .021, .301, .302.

Next, we note the submitted information consists of a transcript from a public civil service hearing conducted by a hearing examiner. *See* Local Gov't Code §§ 143.010(c) (providing each Fire Fighters' and Police Officers' Civil Service Commission (the "commission") proceeding shall be held in public), .057(f) (providing the hearing examiner has the same duties and powers as the commission); *see also Downs v. City of Fort Worth*, 692 S.W.2d 209 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (equating appeals to independent third party hearing examiner with appeals to commission). Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Accordingly, the submitted transcript is a public record subject to section 551.022 of the Government Code.

You argue, however, that "the transcript contains substantial information related to complaints against a firefighter, specifically the [requestor] in this case, for which no disciplinary action was taken," and therefore, disclosure of this information is strictly prohibited by section 143.089(g) of the Local Government Code. 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. Section 552.101 encompasses information protected by section 143.089 of the Local Government Code. You indicate the city is a civil service city covered by section 143 of the Local Government Code. Section 143.089 provides for the maintenance of two different types of personnel files for each police officer employed by a civil service city: 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). Under section 143.089(a), 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. *Id.* §§ 143.051-.055. A letter of reprimand does not constitute discipline under chapter 143. *See* Attorney General Opinion JC-0257. 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).

Section 143.089(g) authorizes a police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. *See id.* § 143.089(g). 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.

Local Gov’t Code § 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 section 143.089(g) made these 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).

The city seeks to withhold portions of the submitted transcript pursuant to section 143.089(g). However, the city does not inform us the transcript is maintained in the department’s internal files pursuant to section 143.089(g). Further, we note the fact this information references information that is contained in the firefighter’s confidential

section 143.089(g) file does not make the information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (stating statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from the statutory structure), 478 at 2 (1987) (stating as a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Accordingly, we find the city has failed to demonstrate the applicability of section 143.089(g) to any information in the submitted transcript, and it may not be withheld under section 552.101 on that basis.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). You state the submitted information pertains to a civil service appeal hearing. *See* Local Gov’t Code § 143.010 (setting out commission appeal procedures). You state the firefighter at issue elected to appeal his disciplinary action to an independent third party hearing examiner instead of the commission. *See id.* § 143.1016(a). You assert the hearing examiner issued a protective order pertaining to the information at issue. We note section 552.107(2) applies to information of which “a court by order has prohibited disclosure.” Gov’t Code § 552.107(2). Upon review, however, we find a hearing examiner is not a court for section 552.107(2) purposes. Therefore, we find section 552.107(2) is not applicable to the information at issue, and the city may not withhold any of the submitted information under section 552.107(2) of the Government Code.

Finally, we note Caldwell asserts that compelling the copying of civil service transcripts by a governmental body discourages governments from using Caldwell’s services and “threatens [the author’s] ability to earn a living.” Caldwell additionally asserts that Caldwell is subject to the Certified Shorthand Reporter’s Professional Code of Conduct (the “code”), and that section 8 of the code requires Caldwell to “preserve the confidentiality and ensure the security of information, oral or written, entrusted to [Caldwell] by any of the parties in a proceeding.” Caldwell also argues that permitting the requestor to obtain a copy of the transcript at issue directly from the city prohibits Caldwell from fairly distributing the costs of its services and from collecting all fees it is permitted to collect.

Upon review of Caldwell’s arguments, we find Caldwell has not raised any exception to disclosure or directed our attention to any law that would make the transcript at issue confidential in the hands of the city, or otherwise prohibit its release to the requestor. Accordingly, as no further arguments against disclosure have been made, the city must release the submitted transcript to the requestor.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/eb

Ref: ID# 588896

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Caldwell Court Reporting
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(w/o enclosures)