



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 3, 2016

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P. O. Box 368
Houston, Texas 77001-0368

OR2016-09929

Dear Ms. Evans:

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# 609716 (ORR# 23026).

The City of Houston (the "city") received a request for information pertaining to hearing examiner opinions for the April 2016 Civil Service Reporter.¹ The city states it has made some of the requested information available to the requestor, but claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The city acknowledges, and we agree, it did not comply with the requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(e). Nevertheless, section 552.101 of the Government Code is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the claim of the city under that section.

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 section 143.089 of the Local Government Code. The city states it 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 or firefighter’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). Under section 143.089(a), the police officer’s or firefighter’s civil service file must contain certain specified items, including commendations, periodic evaluations by the officer’s or firefighter’s supervisor, and documents relating to any misconduct in any instance in which the police or fire department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (2000) (written reprimand is not disciplinary action for purposes of Local Gov’t Code chapter 143). In cases in which a police or fire department investigates an officer’s misconduct and takes disciplinary action against the officer or 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 officer’s or firefighter’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 police or fire department because of its investigation into an officer’s or firefighter’s misconduct, and the police or fire 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). However, a document relating to an officer’s or firefighter’s alleged misconduct may not be placed in the civil service personnel file at issue if there is insufficient evidence to sustain the charge of misconduct. Local Gov’t Code § 143.089(b). In addition, a document relating to disciplinary action against an officer or a firefighter that has been placed in the officer’s or firefighter’s personnel file as provided by section 143.089(a)(2) must be removed from the officer’s or firefighter’s file if the civil service commission finds the disciplinary action was taken without just cause or the charge of misconduct was not supported by sufficient evidence. *See id.* § 143.089(c).

Section 143.089(g) authorizes a police or fire department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer or firefighter. *See id.* § 143.089(g). Information that reasonably relates to an officer’s or firefighter’s employment relationship with the police or department and is maintained in a police or fire 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).

The city states some of the submitted information relates to disciplinary actions taken against two police officers and a firefighter. However, the city explains the disciplinary actions were completely overturned by arbitration award findings that the charges of misconduct that resulted in the disciplinary action were not supported by sufficient evidence. Therefore, we understand the city to assert this information is properly maintained in the police and fire department's internal files as authorized by section 143.089(g). However, the submitted information consists of decisions of hearing examiners regarding the appeals of those disciplinary actions. Pursuant to section 143.1016 of the Local Government Code, a police officer or fire fighter may elect to appeal disciplinary actions to an independent third party hearing examiner instead of to the commission. *See* Local Gov't Code § 143.1016(a); *see also id.* § 143.010 (commission appeal procedure). The hearing examiner has the same duties and powers as the commission in conducting the appeal. *Id.* § 143.1016(f). Section 143.011 of the Local Government Code provides, "[e]ach rule, opinion, directive, decision, or order issued by the commission must be written and constitutes a public record the commission shall retain on file." *Id.* § 143.011(c). As the hearing examiner has the same duties and powers as the commission, we find the written decision issued by a hearing examiner also constitutes a public record. *Id.*; *see id.* § 143.057(f); *see also City of Garland v. Byrd*, 97 S.W.3d 601 (Tex. App.—Dallas 2002, pet. denied) (private hearing examiner stands in shoes of civil service commission when rendering decision on discipline); Attorney General Letter Opinion No. 96-018 (1996) (finding hearing examiner appeals must be held in public like commission proceedings because pursuant to section 143.057 hearing examiner has same duties and powers as commission). Thus, the hearing examiners' decisions are subject to section 143.011(c) and are public records. Although the department claims the information at issue is confidential under section 143.089(g) of the Local Government Code, we find section 143.011 expressly makes appeal decisions issued by the commission public, and section 143.1016 assigns the same commission duties to a hearing examiner. Thus, section 143.011 specifically controls the hearing examiners' appeal decisions at issue, not section 143.089(g). We also note a statutory right of access prevails over a claim under common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *see also CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code or common-law privacy. Accordingly, the department must release the submitted information pursuant to section 143.011 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.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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 609716

Enc. Submitted documents

c: Requestor
(w/o enclosures)