



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2016

Ms. Valecia R. Tizeno
City Attorney
City of Port Arthur
P.O. Box 1089
Port Arthur, Texas 77641-1089

OR2016-13571

Dear Ms. Tizeno:

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# 614458.

The City of Port Arthur (the "city") received a request for the transcript of a specified civil service hearing. 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. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹Although you do not cite section 552.107(2) of the Government Code, we understand you to raise section 552.107(2) based on the substance of your argument.

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 (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.

Initially, 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 state the submitted transcript is available to the requestor by written request to the court reporter. *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 and attached exhibits 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 and attached exhibits are a public record subject to section 551.022 of the Government Code. However, we will address your remaining arguments against disclosure of this information.

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 information at issue under section 552.107(2) of the 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.” *Id.* § 552.101. Section 552.101 encompasses information protected by section 143.089 of the Local Government Code. You state 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 firefighter employed by a civil service city: one that must be maintained as part of the firefighter’s civil service file and another that the fire 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 firefighter’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 fire department investigates a firefighter’s misconduct and takes disciplinary action against a 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). *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 firefighter’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 firefighter’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 fire department to maintain, for its own use, a separate and independent internal personnel file relating to a firefighter. *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).

You seek to withhold the submitted information pursuant to section 143.089(g). You state the submitted transcript and exhibits pertain to a city firefighter's appeal of his indefinite suspension before a hearing examiner. You further state the hearing examiner has not issued a decision regarding the appeal. You state the transcript contains "evidence from internal [fire] department files (g files) concerning previous allegations of misconduct" against the firefighter that did not result in disciplinary action. 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). Further, we find the submitted transcript and attached exhibits pertain to misconduct by the firefighter that resulted in disciplinary action by the city. Thus, although it may be kept in the internal file maintained under subsection 143.089(g), it must also be kept in the civil service personnel file maintained under subsection 143.089(a). *See* Local Gov't Code § 143.089(a)(2). Section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) may be removed from the civil service file if the civil service

commission determines (1) the disciplinary action was taken without just cause or (2) the charge of misconduct was not supported by sufficient evidence. *See id.* Section 143.089(c), therefore, signifies information relating to an incident that resulted in disciplinary action must be placed in the civil service file during the pendency of the appeal. In this instance, the request was received by the city, which has access to the files maintained under both subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Accordingly, the city may not withhold the submitted transcript and attached exhibits in the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must release the submitted information.

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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 614458

Enc. Submitted documents

c: Requestor
(w/o enclosures)