The Texas Senate
Committee on Criminal Justice

RQ-0226-GC

April 13, 2000

The Honorable John Cornyn
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

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FILE # ML-41383-00
I.D. # 41383

Dear General Cornyn:

Recently, some questions have been raised by a municipality in my district relating to the interpretation of Section 143.089(g) of the Texas Local Government Code. This provision relates to the personnel file held by the police department in which internal affairs information is contained on individual police officers (herein referred to as the "g file"). This section states:

> *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. Tex. Loc. Gov't Code §143.089(g) (Vernon 1989).*

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Also note that Chapter 143 provides for criminal penalties for violations of the chapter. A violation of Section 143.089(g) is a misdemeanor punishable by a fine, imprisonment, or both. Tex. Loc. Gov't Code §143.016(b) (Vernon 1987).

Specifically, the City is interested in the degree to which the information in the g file may be disclosed within the City organization. Although the provision states that "the department may not release any information" in the g file, the City believes that this does not preclude the City Manager or the City Attorney from viewing the files.

The g file is utilized by the police department to hold the "internal affairs" information on individual police officers. This includes any citizen complaints about an officer, any investigations into the conduct of an officer, and the results thereof. When a complaint is received from a citizen or a problem arises with a particular officer, a notation is placed in the file. Often if an investigation into a matter is taken, a note of this, along with the results, is also placed in the file. As long as no disciplinary action is taken, the contents of the g file are kept confidential.

There are a few decisions related to the confidentiality of the g files, however, none of these speak to the issue discussed here. For example, the Attorney General's Office ruled that the g files could not be released to a federal law enforcement agency. Open Records Decision No. 650 (1996). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex.App.-Austin 1993), the court found that the information contained in the g file was deemed confidential. However, the release contemplated in this case was to a third party outside the city. None of the cases discussing the g files relate to the accessibility of the information by executive officers of a city.

It is the City's belief that the City Manager is ultimately responsible for the police department and, therefore, releasing the information in the g file to him is permissible under Section 143.089(g) because he is charged with the duty to oversee the employees of the police department. Pursuant to certain articles in the City's municipal charter, among the powers and duties of the City Manager is to:

> "Except for the City Secretary-Treasurer, City Attorney and Municipal Court of Record Judge, and Tax Assessor-Collector, appoint and remove any officer or employee of the City except as otherwise provided by this Charter[.]"

Essentially, this provision of the City Charter makes the City Manager in charge of the police department in that he must oversee all the officers and employees, including the Police Chief. In order to carry out the terms of his duties, the City Manager must have knowledge about the performance of the officers. Most of this information is contained within the g file. For example, in order for the City Manager to know if the Police Chief has been properly handling discipline in the department, he must know what complaints have been made about the police officers and how the Chief handles potential disciplinary actions which may be generated by these complaints.

When there is a possible conflict between state law and the local charter, the two must be read together. "A general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17 (Tex. 1990). A reasonable reading of Section 143.089(g) in light of the City's Charter is that because the City Manager has the duty to oversee officers in the police department, he is a part of the department for purposes of reviewing items within the g files.

Furthermore, the statute should not be read so that it results in an absurd conclusion. A construction of a statute that leads to absurd consequences will not be adopted if the language is susceptible to any other meaning. *Roby v. Hawthorne*, 84 S.W. 2d 1108, 1110 (Tex.Civ.App.-Dallas 1935, *writ dism'd*). Also, a statute will not be construed so as to ascribe to the legislature an intention to do an unjust or unreasonable act if it is reasonably susceptible to a construction which will not accomplish such a result. *Anderson v. Penix*, 161 S.W.2d 455, 457 (Tex. 1942).

Several problematic scenarios could result if Section 143.089(g) were interpreted to mean that the g file information could not be shared with key persons within the City. First, if the City Manager does not have access to the g files, he would be unable to provide the oversight of the police department as required by the Charter. Without such oversight, the police department would functionally become a separate entity from the City.

For example, the City Manager could not evaluate the performance of the police chief if he cannot properly review actions that the chief failed to take in disciplining officers who may have abused citizens. Further, without the ability to properly review the police chief's performance, the City Manager could not remove a chief who permits abuse of citizens by the officers.

Without the independent oversight of the City Manager, the police department is also in danger of becoming too powerful. Citizens' complaints of abusive behavior by police officers may go unheeded. Since the proverbial "fox" would be in charge of the "hen house," it would be difficult at best to curb the actions of an abusive police department.

Further, such a situation would invite lawsuits against the City. Because the City Manager would be unable to confirm potential violations within the department, much less correct them, citizens would have to resort to the courts to receive redress for abuse from overzealous police officers.

Second, a strict reading of the statute would provide that even the City Attorney would not be allowed to review the g files. The City Attorney is the legal counsel for the city, including the police department. Among the duties of the City Attorney is representing the police department, which often includes individual police officers, in lawsuits. Often in suits involving police officers, the other litigant will subpoena the officers' g files. If a strict interpretation of the statute is used, the City Attorney could not even review the g file. Under such circumstances, the police department and the individual officers would be faced with defending the contents of the g files from a subpoena without the aid of an attorney. In fact, if the literal interpretation of the provision were taken to its absurd conclusion, even a judge would be prohibited from viewing the content of the g files.

Another problem is that such a strict reading would create a conflict between two state laws. If Section 143.089(g) truly meant that absolutely no release of the information contained in the g file could occur, it would cause a dilemma for cities when a public information request is made for the g file.

Pursuant to the provisions of Chapter 552 of the Government Code, a governmental body that requests an attorney general decision must "submit to the attorney general a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested." Tex. Gov't Code §552.301. Therefore, if a city receives a request for the information, it would be faced with violating Chapter 143 of the Local Government Code when it avails itself of the procedures set forth in Chapter 552 of the Government Code to protect the confidential information.

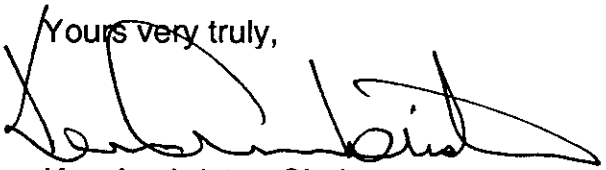
Unfortunately, if a city fails to ask for an opinion from the Attorney General's Office when a request for information is received, Chapter 552 states that "the information requested in writing is presumed to be public information." Tex. Gov't Code §552.302. If the strict interpretation of the law were followed, cities then are faced with the dilemma that if they request an opinion from the Attorney General, they must violate Section 143.089(g). On the other hand, if they fail to send the information to the Attorney General pursuant to a request for opinion, the information would be deemed open.

The problems outlined above are only a few of the troublesome scenarios that are possible if Section 143.089(g) of the Local Government Code were read literally. It is the City's position that preventing officers such as the City Manager and the City Attorney from accessing such information was not the original intent of the statute.

It is my belief that an advisory opinion issued by the Attorney General on the matter is necessary to clarify such questions. Therefore, I respectfully request that you consider submitting to Attorney General Cornyn such a request.

If I can provide any additional information for you, please do not hesitate to let me know. Thank you for your service to the people of the state of Texas.

Yours very truly,



Ken Armbrister, Chairman

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