



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 20, 2020

Ms. Elizabeth Lara
Paralegal
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2020-29159

Dear Ms. Lara:

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# 854836[PIR W033312].

The City of Killeen (the "city") received a request for personnel records of a named individual. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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 state the city is a civil service city under chapter 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 firefighter'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)-(3). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055. 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 fire 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.

Id. 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 firefighter’s personnel file maintained by the fire 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 firefighter for which no disciplinary action was taken. The court determined section 143.089(g) made these records confidential. *See City of San Antonio*, 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 state the submitted information is contained within the city’s fire department’s internal files maintained pursuant to section 143.089(g) of the Local Government Code. However, we note the information at issue includes a hearing examiner’s decision regarding the appeal of the disciplinary action made by the firefighter at issue. Pursuant to section 143.1016 of the Local Government Code, a police officer or firefighter 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 that “[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 submitted hearing examiner’s decision is subject to section 143.011(c) and is a public record. Although you claim the information at issue is confidential under sections 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 examiner’s appeal decision at issue in this ruling, not section 143.089(g) or section 143.1214(a). Therefore, the city must release the submitted decision of the hearing examiner, which we marked, under section 143.011 of the Local Government Code.

Further, we note part of the information at issue pertains to an allegation of misconduct against a firefighter that ultimately resulted in an indefinite suspension of the firefighter at issue. Accordingly, this information, relates to misconduct that resulted in disciplinary action pursuant to section 143.089. Thus, while this information 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). 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 information pertaining to the incident that resulted in the indefinite suspension of the firefighter, which we have marked for release, under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. However, we find the remaining information is confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]”¹ Gov’t Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The city must withhold the submitted dates of birth under section 552.102(a) of the Government Code.

Section 552.117(a)(16) of the Government Code excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a firefighter, volunteer firefighter, or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code, regardless of whether the firefighter, volunteer firefighter, or emergency medical services personnel

¹ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

comply with section 552.024 or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(16). We note section 552.117 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, it is unclear whether the individuals at issue are currently firefighters, volunteer firefighters, or emergency medical services personnel. Accordingly, to the extent the individuals at issue are currently firefighters, volunteer firefighters, or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code, the city must withhold the information we marked under section 552.117(a)(16) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue are no longer firefighters, volunteer firefighters, or emergency medical services personnel as defined by section 773.003, the city may not withhold the marked information under section 552.117(a)(16).

If the information we marked under section 552.117 pertains to an individual who is no longer a firefighter, volunteer firefighter, or emergency medical services personnel, then the information at issue may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). As noted above, section 552.117 protects a personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. Open Records Decision No. 670 at 6 (2001); *cf.* ORD 506 at 5-6. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if a governmental body did not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1).²

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

² Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

In summary, the city must release the submitted decision of the hearing examiner, which we marked, under section 143.011 of the Local Government Code. Except for the information marked for release, the city must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. In releasing the information marked for release, the city must: (1) withhold the submitted date of birth under section 552.102(a) of the Government Code; (2) to the extent the individuals at issue are currently firefighters, volunteer firefighters, or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code, the city must withhold the information we marked under section 552.117(a)(16) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service; (3) to the extent the individuals whose information is at issue are not currently firefighters, volunteer firefighters, or emergency medical services personnel as defined by section 773.003 of the Health and Safety Code and timely requested confidentiality under section 552.024 of the Government Code, withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service; (4) withhold the motor vehicle record information we marked under section 552.130 of the Government Code; and (5) release the remaining information at issue.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Paige Lay
Assistant Attorney General
Open Records Division

PL/jm

Ref: ID# 854836

Enc. Submitted documents

c: Requestor
(w/o enclosures)