



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 12, 2005

Ms. Leann D. Guzman  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2005-08283

Dear Ms. Guzman:

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# 231947.

The Fort Worth Police Department (the "department") received a request for an internal affairs investigative file involving a named police officer. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

Initially, we must address the department's obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See Gov't Code § 552.301(b)*. If a governmental body does not request an attorney general decision as

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988)*.

prescribed by section 552.301, then the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, you have provided two different dates as being the date of the department's receipt of the present request for information. In your request for this decision, you state that the department received the request on June 21, 2005. Elsewhere in your correspondence, however, you state that the date of receipt was June 15. If the department received this request on June 21, then your request for this decision was made within the ten-business-day period prescribed by section 552.301(b). However, if June 15 was the date of the department's receipt of the request, then your request for this decision was untimely under section 552.301(b). Under these circumstances, we are unable to conclude that the department has complied with section 552.301 in this instance. Therefore, the submitted information is presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. As the department's claims under sections 552.101 and 552.130 of the Government Code can provide compelling reasons for non-disclosure, we will consider your arguments.

We first note, however, that some of the submitted information relates to a polygraph examination of the named police officer. Access to information obtained during the course of a polygraph examination is governed by section 1703.306 of the Occupations Code, which provides in relevant part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. In this instance, the requestor is an attorney for the polygraph examinee. Accordingly, under section 1703.306(a)(1), the requestor has a specific right of access to the information that relates to the polygraph examination. *See id.*

We note that the department seeks to withhold some of the information that relates to the polygraph examination under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code, section 261.201 of the Family Code, and

common law privacy.<sup>2</sup> However, where information falls within both a general and a specific provision of law, the specific provision prevails over the general. See *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex.2000) (“more specific statute controls over the more general”); *Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). In this instance, the statutory provision for access to polygraph information under section 1703.306(a)(1) of the Occupations Code is more specific than the general protection afforded to broader categories of information under section 143.089(g) of the Local Government Code, section 261.201 of the Family Code, and common law privacy. Therefore, the information to which the requestor has a right of access under section 1703.306 may not be withheld from him on the basis of section 143.089(g), section 261.201, or common law privacy. Accordingly, the information that relates to the polygraph examination must be released to the requestor under section 1703.306(a)(1). We have marked that information.

You claim that the rest of the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer, including 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.<sup>3</sup> See Local Gov’t Code § 143.089(a), (g). 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-.056. 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

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<sup>2</sup>Common law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

<sup>3</sup>We understand that the City of Fort Worth is a civil service municipality under chapter 143 of the Local Government Code.

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).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. 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.* § 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 that section 143.089(g) made these records confidential. *See City of San Antonio*, 851 S.W.2d at 949 (concluding that “the legislature intended to deem confidential the information maintained by the . . . police department for its own use under subsection (g)”). The court stated that the provisions of section 143.089 governing the content of the civil service file reflect “a legislative policy against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters, except with an individual’s written consent.” *Id.*; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet. h.) (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 inform us that the rest of the submitted information is maintained by the department for internal use under section 143.089(g) of the Local Government Code. Based on your

representation and our review of the information, we conclude that the department must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g). We note, however, that most of the remaining information relates to an instance in which disciplinary action was taken against the named police officer under section 143.056 of the Local Government Code. Because that information also falls within the scope of section 143.089(a)(2) of the Local Government Code, it must also be placed in the officer's civil service file, and the department must refer the requestor to the civil service director or the director's designee for access to information that is subject to section 143.089(a).

In summary: (1) the information that relates to the polygraph examination must be released to the requestor under section 1706.306(a)(1) of the Occupations Code; and (2) the department must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. As we are able to make these determinations, we do not address your other arguments against disclosure.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

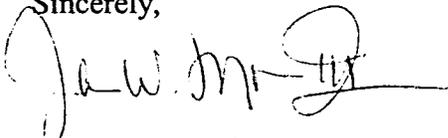
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 231947

Enc: Submitted documents

c: Mr. Richard W. Carter  
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(w/o enclosures)