



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2008

Mr. Mark G. Daniel
Evans, Daniel, Moore & Evans
Sundance Square
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2008-04210

Dear Mr. Daniel:

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# 306328.

The City of Watauga (the "city"), which you represent, received a request for the personnel file and any investigations pertaining to the requestor. You state that the city has released a portion of the requested information. You claim that 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.

Initially, you inform us that one of the responsive investigations was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-10165 (2007). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release the information at issue in accordance with Open Records Letter No. 2007-10165. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Second, we note that the submitted information contains the polygraph information of the requestor, as well as the polygraph information of other individuals. The polygraph results are governed by section 1703.306 of the Occupations Code. In this instance, the city seeks to withhold all of the polygraph results under section 143.089 of the Local Government Code. However, section 1703.306 of the Occupations Code is a more specific statute than

section 143.089 of the Local Government Code. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general statute. *See* Gov't Code § 311.026 (where general statutory provision conflicts with specific provision, specific provision prevails as exception to general provision); *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). Therefore, we will address the applicability of section 1703.306 of the Occupations Code to the submitted information that falls within the scope of this statutory provision.

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. This section encompasses information protected by other statutes. Section 1703.306 of the Occupations Code 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 one of the polygraph examinees. Thus, the city has the discretion to release the polygraph information of the requestor, which we have marked, pursuant to section 1703.306(a)(1). *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permits, but does not require, examination results to be disclosed to examinees). The polygraph information of individuals other than the requestor must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

We will now address your claim under section 143.089 of the Local Government Code for the remaining submitted information.¹ You inform us that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against the fire fighter, 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 a like nature from individuals who were not in a supervisory capacity, in the fire fighter's civil service file maintained under

¹Section 552.101 also encompasses section 143.089 of the Local Government Code.

section 143.089(a).² 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 in possession of the fire department because of its investigation into a fire fighter’s misconduct, and the fire department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. See Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

Based upon your arguments and our review of the submitted information, we understand you to represent that the submitted internal affairs investigation is maintained in the named firefighter’s departmental personnel file maintained under section 143.089(g). You also inform us that the information at issue pertains to an investigation of alleged firefighter misconduct that did not result in disciplinary action against the firefighter at issue. Based on these representations, we agree that the remaining submitted information is confidential pursuant to section 143.089(g) of the Local Government Code, and conclude that it must be withheld under section 552.101 of the Government Code.³

In summary, the city must withhold or release the information that is subject to Open Records Letter No. 2007-10165 in accordance with that ruling. The city has the discretion to release the polygraph information of the requestor pursuant to section 1703.306(a)(1). The city must withhold under section 552.101 of the Government Code (1) the polygraph information of individuals other than the requestor in conjunction with section 1703.306 of the Occupations Code and (2) the remaining submitted information in conjunction with section 143.089(g) of the Local Government Code.⁴

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

²Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. See *id.* §§ 143.051-.055.

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

⁴We note that some of the information being released is generally confidential under section 1703.306 of the Occupations Code. However, the city has the discretion to release this information to the requestor. If the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 306328

Enc. Submitted documents

c: Ms. Samantha Story
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(w/o enclosures)