



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 18, 2008

Ms. Doreen E. McGookey  
City Attorney  
City of Sherman  
P.O. Box 1106  
Sherman, Texas 75091-1106

OR2008-08405

Dear Ms. McGookey:

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# 311861.

The Sherman Fire Department (the "department") received a request for various types of personnel records pertaining to a named fire fighter. You state you have provided some of the requested information to the requestor. You claim that the submitted personnel records are excepted from disclosure under sections 552.101 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, was created after the request for information was received. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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 exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with 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 existence of two different types of

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<sup>1</sup> Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note that as the submitted e-mails you have marked under rule 503 are not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* ORD 676 at 4.

personnel files relating to a fire fighter: one that must be maintained as part of the fire fighter'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). The fire fighter's civil service file must contain certain specified items, including commendations, periodic evaluations by the fire fighter's supervisor, and documents relating to any misconduct in which the department took disciplinary action against the fire fighter 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. In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against a 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 like nature from individuals who were not in a supervisory capacity, in the fire fighter'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 fire fighter'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.<sup>2</sup> *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. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that the submitted personnel records are kept in the department's internal personnel files maintained under section 143.089(g). Based on this representation and our review of the submitted documents, we agree that the submitted records maintained in the department's internal files are subject to section 143.089(g) of the Local Government Code.

We note, however, that the requestor is a Department of State Health Services (the "DSHS") investigator who is investigating the fire fighter at issue. The requestor states that she is requesting the personnel records of the named fire fighter pursuant to chapter 773 of the Health and Safety Code. Section 773.0612 provides that the DSHS or its representative "is entitled to access to records and other documents . . . that are directly related to . . . emergency medical services personnel to the extent necessary to enforce [chapter 773 of the Health and Safety Code] and the rules adopted under [chapter 773 of the Health and Safety Code]." Health & Safety Code § 773.0612. The submitted personnel records pertain to a fire fighter who is also an emergency medical technician/paramedic licensed under chapter 773

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<sup>2</sup> You state the department has referred the requestor to the civil service commission as required by section 143.089(g) and that the civil service commission has released the file maintained under section 143.089(a).

of the Health and Safety Code. Because the submitted personnel records are directly related to emergency medical services ("EMS") personnel and the requestor is conducting an investigation under chapter 773, we conclude that section 773.0612 applies to the submitted personnel records.

Section 143.089(g), however, states a fire department "may not release any information contained in the [department's internal personnel] file to any agency or person requesting information relating to a fire fighter." Local Gov't Code § 143.089(g). Thus, the instant situation presents a conflict between section 143.089(g) of the Local Government Code and section 773.0612 of the Health and Safety Code. Where information falls within both a general and a specific statutory provision, the specific statutory provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. *See* Gov't Code § 311.026; *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. 583 (1990), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Furthermore, we note that the Code Construction Act provides that "if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails." *See* Gov't Code § 311.025(a).

You argue the protection given under section 143.089(g) is more specific than the access provision in section 773.0612. Section 773.0612, however, specifically grants the DSHS access only to information related to EMS personnel and only to the extent necessary to conduct an investigation of the person at issue, whereas the general protection given by section 143.089(g) applies to all internal departmental personnel records of all fire fighters. *See* Health & Safety Code § 773.0612; Local Gov't Code § 143.089(g). Therefore, we find that the access provision of section 773.0612 is more specific than the confidentiality provision of section 143.089(g). Furthermore, section 773.0612 was enacted after section 143.089(g).<sup>3</sup> Accordingly, we find section 773.0612 prevails over section 143.089(g); thus, the department may not withhold the submitted personnel records under section 143.089(g). You claim, however, that portions of the submitted personnel records are also excepted from disclosure under sections 411.083 and 552.107 of the Government Code and section 159.002 of the Occupations Code. Accordingly, we must address whether the department's claims under these provisions prevail over the requestor's claim of access under section 773.0612.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the public availability of medical records. Section 159.002 of the MPA provides, in part:

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<sup>3</sup> Act of May 31, 1989, 71<sup>st</sup> Leg., R.S., ch. 1248, § 84, 1989 Tex. Gen. Laws 4996, 5043 (Vernon) (codified as section 143.089 of the Local Government Code); Act of March 25, 1991, 72<sup>nd</sup> Leg., R.S., ch. 14, § 264, 1991 Tex. Gen. Laws 42, 206 (Vernon) (codified as section 773.0612 of the Health and Safety Code).

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You have failed to demonstrate how most of the records you marked under the MPA were either created by or under the supervision of a physician or contain the identity, diagnosis, evaluation, or treatment of a patient by a physician. Thus, these records do not constitute medical records for purposes of the MPA, and they may not be withheld on this basis. We agree, however, that the drug test results created by a physician, which we have marked, constitute medical records subject to the MPA. *See* ORD 598.

The MPA specifically makes medical records confidential, while section 773.0612 gives a general right of access to all information related to EMS personnel being investigated by the DSHS. *See* Occ. Code § 159.002(a), (b); Health & Safety Code § 773.0612. Therefore, we find that the confidentiality provisions of the MPA are more specific than the access provision of section 773.0612. Although the provisions of the MPA at issue here were enacted prior to the enactment of section 773.0612, because the MPA is the more specific statute, we find the MPA prevails over section 773.0612 and the department may only release the medical records we have marked in accordance with the MPA.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information

as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Similarly, any CHRI obtained from the DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, information relating to routine traffic violations is not excepted from release under section 552.101 of the Government Code on this basis. *Cf. id.* § 441.082(2)(B). You have marked information related to routine traffic violations that may not be withheld under section 552.101 in conjunction with section 411.083. Furthermore, we find that you have not demonstrated how most of the information you have marked constitutes CHRI for purposes of chapter 411, and it may not be withheld on this basis. However, we have marked information that is CHRI to which chapter 411 of the Government Code applies.

Section 773.0612 gives a general right of access to all information related to EMS personnel being investigated by the DSHS. In contrast, section 411.083 specifically makes criminal history record information confidential. Therefore, we find that the confidentiality provision of section 411.083 is more specific than the access provision of section 773.0612. Furthermore, section 411.083 was enacted after section 773.0612.<sup>4</sup> Accordingly, we find section 411.083 prevails over section 773.0612 and the department must withhold the CHRI we have marked under section 552.101 in conjunction with section 411.083.<sup>5</sup>

You assert that some of the remaining information is excepted under section 552.107 of the Government Code. Section 552.107 generally protects information found to be within the scope of the attorney-client privilege, but does not make information confidential. *See* Gov't Code § 552.107. This office has found that specific statutory right of access provisions prevail over general exceptions to disclosure under the Act. *See* Open Records Decision No. 451 at 4 (1986). Therefore, the requestor's statutory right of access under section 773.0612 prevails over the general exception to disclosure found in section 552.107.

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<sup>4</sup> Act of May 31, 1993, 73<sup>rd</sup> Leg., R.S., ch. 790, § 35, 1993 Tex. Gen. Laws 3088, 3107 (Vernon) (codified as section 411.083 of the Government Code).

<sup>5</sup> We note section 411.110 of the Government Code provides the DSHS is entitled to obtain CHRI from the DPS that relates to a holder of a license or certificate under chapter 773 of the Health and Safety Code. Gov't Code § 411.110(a)(1)(C).

We note that the remaining personnel records contain Texas driver's license information, which is excepted from disclosure under section 552.130 of the Government Code.<sup>6</sup> This section excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Unlike section 552.107, section 552.130 makes information confidential and contains its own release provisions. Thus, section 552.130 is not a general provision under the Act. Additionally, section 552.130 was passed in a later legislative session than section 773.0612.<sup>7</sup> Therefore, notwithstanding the access provision of section 773.0612, because section 552.130 is the more specific statute and was enacted later in time, the department must withhold the information we have marked under section 552.130 of the Government Code.

In summary, the department must withhold the information we have marked under the MPA and sections 411.083 and 552.130 of the Government Code. The department must release the remaining information to the requestor pursuant to section 773.0612 of the Health and Safety Code.

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 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). If the governmental body does not file suit over 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

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<sup>6</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>7</sup> Act of May 30, 1997, 75<sup>th</sup> Leg., R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4575, 4580 (Vernon) (codified as section 552.130 of the Government Code).

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 311861

Enc. Submitted documents

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