



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2008

Mr. C. Patrick Phillips
Assistant City Attorney
City of Fort Worth
1000 Throckmorton St., 3rd Floor
Fort Worth, Texas 76102

OR2008-15958

Dear Mr. Phillips:

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# 328155.

The City of Fort Worth (the "city") received a request for the personnel file of a named fire fighter. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code.¹ 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 section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. You state that the city is a civil

¹Although you have marked information in the submitted documents under section 552.117 of the Government Code, you acknowledge the named fire fighter has not made a timely election, and you have withdrawn your claim under this exception. See Gov't Code §§ 552.024, 552.117.

service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a file that must be maintained by the city's civil service director or the director's designee, and another file that may be maintained by the city's fire department 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, section 143.089(a)(2) requires the department 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). *Abbott v. City of 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 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 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 personnel 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 recording pertains to the investigation of alleged misconduct that did not result in any discipline against the named firefighter. You state that the submitted information is maintained in the named fire fighter's departmental personnel file pursuant to section 143.089(g). Based on this representation and our review, we agree that the submitted information maintained in the fire department's internal files is 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 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 that 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).

Section 773.0612 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).² Accordingly, we find section 773.0612 prevails over section 143.089(g); thus, the city 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 552.101, 552.130, and 552.147 of the Government Code. Accordingly, we must address whether the city's claims under these provisions prevail over the requestor's claim of access under section 773.0612.

The submitted information contains a W-4 form. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) renders tax return information confidential. 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); Open Records Decision No. 600 (1992) (W-4 forms). Accordingly, the city must withhold the submitted W-4 form pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

Although section 773.0612 generally allows the DSHS access to information relating to EMS personnel they are investigating, section 6103(a) of title 26 of the United States Code specifically protects W-4 forms and tax return information. This section specifically permits release to certain parties and in certain circumstances that do not include the DSHS's present request. Because these specific provisions prevail over the DSHS's general right of access,

²Act of May 31, 1989, 71st Leg., R.S., ch. 1248, § 84, 1989 Tex. Gen. Laws 4996, 5043 (codified as section 143.089 of the Local Government Code); Act of March 25, 1991, 72nd Leg., R.S., ch. 14, § 264, 1991 Tex. Gen. Laws 42, 206 (codified as section 773.0612 of the Health and Safety Code).

we conclude that the city must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

The submitted personnel file also contains fingerprints. Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under the Act). Section 773.0612 gives a general right of access to all information related to EMS personnel being investigated by the DSHS. In contrast, section 560.003 specifically makes fingerprints confidential and contains its own release provisions. *See id.* § 560.002 (providing for access to fingerprints in certain instances). Therefore, we find that the confidentiality provision of section 560.003 is more specific than the access provision of section 773.0612. Furthermore, section 560.003 was enacted after section 773.0612.³ Accordingly, we find section 560.003 prevails over section 773.0612 and the city must withhold the fingerprints you have marked under section 552.101 in conjunction with section 560.003.

The submitted information contains criminal history record information. Criminal history record information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See Gov’t Code* § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the “DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* 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. Furthermore, 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. We note that driving record information is not made confidential by the confidentiality provisions that govern CHRI. *See id.* § 411.082(2)(B) (definition of CHRI does not include driving record information).

While section 773.0612 generally allows DSHS access to information relating to EMS personnel they are investigating, section 411.083 of the Government Code specifically makes CHRI generated by TCIC or NCIC confidential. Furthermore, section 411.083 was

³Act of May 24, 2001, 77th Leg., R.S., ch. 634, § 2, 2001 Tex. Gen. Laws 1195, 1196.

enacted after section 773.0612.⁴ A portion of the remaining information constitutes CHRI generated by TCIC and NCIC. Because the specific confidentiality provision of section 411.083 prevails over the DSHS's general right of access, the city must withhold this information, which we have marked, pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

You assert that some of the remaining information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy, as well as, section 552.147 of the Government Code. 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 exceptions to disclosure found in section 552.101 of the Government Code in conjunction with common-law privacy, as well as, section 552.147 of the Government Code. Accordingly, the city may not withhold any information under common-law privacy or section 552.147. As the city does not raise any further exceptions against the disclosure of this information, it must be released.

Finally, you claim that the Texas driver's license and motor vehicle information in the submitted personnel records is excepted from disclosure under section 552.130 of the Government Code.⁵ 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 552.147 and common-law privacy, 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 773.0612.⁶ Therefore, because section 552.130 is the more specific statute and was enacted later in time, the city must withhold the information you have marked, in addition to the information we have marked, under section 552.130 of the Government Code.

In summary, the city must withhold the W-4 form we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The city must also withhold the fingerprints you have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. Next, the city must withhold the information we have marked pursuant to section 552.101 in conjunction with chapter 411

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

⁵We note that in this instance the statutory right of access provision constitutes a changed circumstance that makes the previous determinations issued by this office in Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007) inapplicable to the submitted information. *See* Open Records Decision No. 673 (2001) (the elements of law, fact, and circumstances must support the previous decision's conclusion for second type of previous determination to apply).

⁶Act of May 30, 1997, 75th Leg., R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4575, 4580.

of the Government Code. Lastly, the city must withhold the information you have marked, in addition to the information we have marked, under section 552.130 of the Government Code. The remaining information must be released to the requestor.⁷

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 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.

⁷If the city receives another request for the submitted personnel records from a person who would not have a special right of access to portions of the information, the city should resubmit the personnel records and request another decision. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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 cursive script, appearing to read "Greg Henderson".

Greg Henderson
Assistant Attorney General
Open Records Division

GH/jh

Ref: ID# 328155

Enc. Submitted documents

c: Requestor
(w/o enclosures)