



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2009

Ms. Courtney Alvarez
City Attorney
City of Kingsville
P.O. Box 1458
Kingsville, Texas 78364

OR2009-05919A

Dear Ms. Alvarez:

This office issued Open Records Letter No. 2009-05919 (2009) on May 4, 2009. Since this time, we have determined that Open Records Letter No. 2009-05919 is incorrect. When this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2009-05919. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act"))).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 351763.

The Kingsville Police Department and the City of Kingsville (collectively the "city") received a request for a named police officer's personnel file, specified internal affairs files, and evidence of receipt of the police department policy manual by department police officers. You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117,

552.1175, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that some of the submitted information was created after the date of the request. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release that information.

Section 552.101 excepts from 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 another statute makes confidential. You claim the submitted information is confidential under section 552.101 in conjunction with section 143.089 of the Local Government Code. 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. *See* Local Gov't Code § 143.089(a), (g). You inform us the city is a civil service city under chapter 143 of the Local Government Code.

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-.055. 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, pet. denied). 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 police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil

¹While you also raise section 552.147 of the Government Code, we note section 552.147(b) 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 under the Act.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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).

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.

Local Gov't Code § 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 those 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.) (restricting confidentiality under section 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 section 143.089(a) and (g) files).

You explain the submitted information is from the police department's confidential internal files concerning several police officers. Based on your representations and our review, we agree that some of the information at issue is confidential pursuant to section 143.089(g) of the Local Government Code. We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. We note, however, the remaining information relates to misconduct that resulted in disciplinary actions against the requestor's client and other officers. You inform us that the requestor's client is now appealing the disciplinary actions related to him. Although you contend this information must be maintained in the police department's confidential internal file created under section 143.089(g) because of the pending appeals,

we note that an officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-143.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). Section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) must be removed if the civil service commission determines that (1) the disciplinary action was taken without just cause, or (2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov't Code § 143.089(c). Section 143.089(c) therefore signifies that complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. Because the remaining information relates to misconduct that resulted in disciplinary actions against the requestor's client and other officers, this information must be maintained in the civil service files pursuant to section 143.089(a)(2), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 143.089(e) grants a right of access to a police officer for "any letter, memorandum, or document placed in the person's personnel file." *See id.* § 143.089(e). This office has interpreted this provision to grant a police officer an affirmative right of access to the information in his or her personnel file maintained under section 143.089(a). *See* Open Records Decision No. 650 at 2 n.2 (1996). In this instance, because the requestor is the attorney representing one of the officers, he has a statutory right of access to his client's section 143.089(a) file. Therefore, the city may not withhold the requestor's client's section 143.089(a) file under section 552.101 in conjunction with common-law privacy or sections 552.102, 552.103, 552.117, 552.1175, or 552.130 of the Government Code. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). We will, however, consider your arguments under these exceptions for the information contained within the other officers' section 143.089(a) files.

We next note the requestor's client's section 143.089(a) file contains polygraph information. Section 552.101 of the Government Code also encompasses section 1703.306 of the Occupations Code, which provides in relevant part the following:

(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[.]

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306(a)(1), (b). Section 1703.306(a) makes the information acquired from a polygraph examination in the submitted information confidential. However, we note that a portion of the information at issue consists of the polygraph examination information of the requestor's client. The city has the discretion to release the requestor's client's information 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). Thus, we are presented with a conflict between the requestor's right of access pursuant to section 143.089(e) of the Local Government Code and the confidentiality provision under section 1703.306 of the Occupations 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, 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." Gov't Code § 311.025(a). In applying the Code Construction Act, we note that section 1703.306 applies only to polygraph information, whereas section 143.089 applies to all personnel records of a peace officer. Furthermore, section 1703.306 was enacted after section 143.089(e) of the Local Government Code.³ Thus, we find that section 1703.306 of the Occupations Code prevails over section 143.089(e) of the Local Government Code in this matter. Accordingly, the marked polygraph information is confidential and must be withheld under section 1703.306(a). However, the city has the discretion to release the polygraph information of the requestor's client pursuant to section 1703.306(a)(1). The remaining information contained in the requestor's client's section 143.089(a) file must be released to the requestor pursuant to section 143.089(e) of the Local Government Code.

We next note the requestor's client's section 143.089(g) file contains the officer's fingerprints and medical records. Fingerprints are governed by chapter 560 of the Government Code. Section 560.001 of the Government Code provides that "[b]iometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry." Gov't Code § 560.001(1). Under section 560.003 of the Government Code, "[a] biometric identifier in the possession of a governmental body is exempt from disclosure

³Act of May 31, 1989, 71st 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 May 28, 1999, 76th Leg., R.S., ch. 388, § 1, 1999 Tex. Gen. Laws 2267, 2675 (Vernon) (codified as section 1703.306 of the Occupations Code).

under [the Act].” *Id.* § 560.003. Section 560.002 states, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Thus, the requestor has a right of access to his client’s fingerprints under section 560.002(1)(A). *See* ORD 481 at 4. Therefore, we are presented with a conflict between section 143.089(g) of the Local Government Code, which makes the police department’s internal file confidential, and the requestor’s right of access to his client’s fingerprints under section 560.002. As previously stated, 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. We note that section 560.002 applies only to fingerprint information, whereas section 143.089 applies to all personnel records of a peace officer. Furthermore, section 560.002 was enacted after section 143.089(g) of the Local Government Code.⁴ Thus, we find that section 560.002 of the Government Code prevails over section 143.089(g) of the Local Government Code in this matter. Therefore, the city must release the requestor’s client’s fingerprints, which we have marked, pursuant to section 560.002 of the Government Code.

The requestor’s client’s medical records, also contained in the section 143.089(g) file, are governed by the MPA, which provides in part:

(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.

Occ. Code § 159.002(a)-(c). This office has concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records must be released on the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the

⁴The statutory predecessor to chapter 560 of the Government Code was enacted in 2001. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 634, § 2, 2001 Tex. Gen. Laws 1195, 1196 (enacting Gov’t Code ch. 559).

governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Therefore, the medical records we have marked are subject to the MPA. *See* ORD 598. We are presented with a conflict between section 143.089(g) of the Local Government Code and the access provisions of the MPA. We note that the MPA applies only to medical records created or maintained by a physician, whereas section 143.089 applies to all personnel records of a peace officer. While the MPA was enacted before section 143.089(g) of the Local Government Code, it does not appear that it was the legislature's manifest intent that the more general provision prevail.⁵ Thus, we find the MPA prevails over section 143.089(g) of the Local Government Code in this instance, and the marked medical records may only be released in accordance with the MPA.

We next address your claims for the other officers' section 143.089(a) files. Section 552.101 also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the common-law privacy test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). You assert the remaining information is protected by common-law privacy. Upon

⁵*See* Act of August 5, 1981, 67th Leg., 1st C.S., ch. 1, § 1, 1981 Tex. Gen. Laws 1, 31 (enacting MPA).

review, however, we find none of the information at issue constitutes highly intimate or embarrassing information of no legitimate concern to the public. Therefore, the city may not withhold any of the information contained in the other officers' section 143.089(a) files under section 552.101 or section 552.102(a) in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.⁶ Thus, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

The other officers' section 143.089(a) files also contain information pertaining to a peace officer not employed by the city. Section 552.1175 of the Government Code provides in part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). If the individual in question is still a peace officer and elects to restrict access to his personal information in accordance with section 552.1175, then the city must withhold the information we have marked under section 552.1175. *See, e.g.*, Open Records Decision No. 678 (2003). Otherwise, this information must be released.

In summary, the city must release the marked fingerprints to the requestor pursuant to section 560.002 of the Government Code. The medical records we have marked may only be released in accordance with the MPA. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the polygraph examinations not pertaining to the requestor's client under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city has the discretion to release the polygraph information of the requestor's client pursuant to section 1703.306(a)(1) of the Occupations Code. The city must withhold the information we

⁶"Peace officer" is defined by article 2.12 of the Texas Code of Criminal Procedure.

have marked under section 552.117(a)(2) of the Government Code. The city must withhold the information we have marked under section 552.1175 of the Government Code if the individual in question is still a peace officer and elects to restrict access to his personal information in accordance with section 552.1175 of the Government Code. The remaining information must be released.⁷

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/eeg

Ref: ID# 351763

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁷Because such information may be confidential with respect to the general public, if the city receives another request for this information from an individual other than this requestor, the city should again seek our decision.