ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2011

Mr. Jason D. King
Counsel to the City of Balch Springs
Aikers & Boulware-Wells
Building E, Suite 102
6618 Sitio Del Rio Boulevard
Austin, Texas 78730

OR2011-12269

Dear Mr. King:

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# 427837.

The City of Balch Springs (the "city"), which you represent, received a request for all employee files for a named individual. You claim 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. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not consist of information pertaining to the named officer. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

Next, we note, and you acknowledge, the city did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. *See* Gov't Code § 552.301(a)- (b). The city also failed to comply with its fifteen-business-day deadline under section 552.301(e). *See id.* § 552.301(e). The submitted information is therefore 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; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, orig. proceeding); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, orig. proceeding). This statutory presumption can generally be overcome when 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). Therefore, we will address your claim under section 552.101 of the Government Code, whose applicability can provide a compelling reason for non-disclosure.

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 of the Local Government Code. You state 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 relating to a police officer: a police officer's civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. 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 which the department took disciplinary action against the officer under chapter 143 of the Local Government Code. *Id.* § 143.089(a)(1)-(3).

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).[1] *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, orig. proceeding). 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 police department because of its investigation into a police officer's misconduct, and the police 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).

However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). In addition, a document relating to disciplinary action against a police officer that has been placed in the officer's personnel file

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[1]Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. Local Gov't Code §§ 143.051–.055; *see e.g.*, Attorney General Opinion JC-0257 (2000) (written reprimand is not disciplinary action for purposes of Local Government Code chapter 143).

as provided by section 143.089(a)(2) must be removed from the officer's file if the civil service commission finds the disciplinary action was taken without just cause or the charge of misconduct was not supported by sufficient evidence. *See id.* § 143.089(c). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *See City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, orig. proceeding); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, orig. proceeding).

You state the submitted information is maintained in the city police department's internal file pursuant to section 143.089(g) and is therefore confidential under section 552.101. We note that a portion of the submitted information pertains to alleged misconduct which does not appear to have resulted in disciplinary action. This information is confidential under section 143.089(g), and must generally be withheld under section 552.101 of the Government Code on that basis. However, the remaining submitted information pertains to an investigation which resulted in the officer at issue being suspended for thirty days without pay. As previously noted, 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* Local Gov't Code §§ 143.051-143.055 (suspension is "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). We find this portion of the submitted information resulted in disciplinary action against the named officer. In this instance, the request was received by the city, which has access to the files maintained under subsections 143.089(a) and 143.089(g); therefore, the request encompasses both of these files. Because this portion of the submitted information relates to misconduct that resulted in disciplinary action against the officer, this information must be maintained in the civil service file pursuant to section 143.089(a)(2), and thus it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

We note the information that belongs in the civil service file contains information subject to section 1703.306 of the Occupations Code and section 552.130 of the Government Code.[2] Section 552.101 also encompasses 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:

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

Occ. Code § 1703.306. The information we have marked consists of information acquired from polygraph examinations subject to section 1703.306. In this instance, the requestor represents the named officer, who is one of the polygraph examinees. Thus, the city has the discretion to release the polygraph information of the officer to the requestor 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). Otherwise, we conclude the marked polygraph information is generally confidential under section 552.101 in conjunction with section 1703.306(a) of the Occupations Code.

Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). The city must withhold the driver's license numbers we have marked under section 552.130 of the Government Code.[3]

The requestor has submitted comments asserting a right of access to the requested information under section 1701.451 of the Occupations Code. Section 1701.451 provides in part:

> (a) Before a law enforcement agency may hire a person licensed under this chapter, the agency head or the agency head's designee must:
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> > (1) make a request to the [Commission on Law Enforcement Officer Standards and Education (the "commission")] for any employment termination report regarding the person that is maintained by the commission under this subchapter; and
> >
> > (2) submit to the commission on the form prescribed by the commission confirmation that the agency:
> >
> > > (A) conducted in the manner prescribed by the commission a criminal background check regarding the person; [and]
> > >
> > > (B) obtained the person's written consent on a form prescribed by the commission for the agency to view the person's employment records[.]

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[3]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

. . .

> (a-1) A law enforcement agency that obtains a consent form described by Subsection (a)(2)(B) shall make the person's employment records available to a hiring law enforcement agency upon request.

Occ. Code § 1701.451. In this case, the requestor is a Lieutenant in the Mountain View College Police Department and states he seeks the requested information as part of an employment background investigation. Further, he provides a copy of the named officer's written consent to view his employment records. Thus, we find that pursuant to section 1701.451(a-1) of the Occupations Code, the requestor has a right of access to the records at issue. Therefore, we must harmonize the right of access provided by section 1701.451(a-1) of the Occupations Code with the confidentiality provided under section 143.089(g) of the Local Government Code. We are guided by the principle of statutory construction that, where possible, we are to construe statutes so as to harmonize them with other relevant laws, not to find conflict. *In re United Servs. Auto. Ass'n* 307 S.W.3d 299, 311 (Tex. 2010). Section 143.089(g) of the Local Government Code generally makes all records in an officer's departmental personnel file confidential. *See* Local Gov't Code § 143.089, *added by* Act of March 1, 1989, 71st Leg., ch. 1, § 25(c) (effective Aug. 28, 1989), *amended by* Act of May 29, 1989, 71st Leg., ch. 1248, § 84 (effective Sept. 1, 1989). However, we conclude that when the Legislature subsequently enacted section 1701.451, it intended to create an exception to the confidentiality of section 143.089(g) by providing a hiring law enforcement agency with a right of access to an officer's personnel file. Act of June 15, 2007, 80th Leg., ch.1068, §1 (effective Sept. 1, 2007); *see also* Occ. Code § 1701.003(a) (allowing an exception to chapter 143 of the Local Government Code where expressly provided in chapter 1701). Therefore, the city must release the information subject to section 143.089(g) to this requestor.

With respect to the information in the officer's civil service file, we find there is a conflict between the information that is made confidential by section 1703.306 of the Occupations Code and section 552.130 of the Government Code, and the right of access afforded to the requestor pursuant to section 1701.451(a-1) of the Occupations Code. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general statute unless the general provision was enacted later and there is clear evidence that the Legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b) (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). While section 1701.451 provides a right of access to a person's employment records to a hiring law enforcement agency upon receipt of proper written consent, section 1703.306 of the Occupations Code specifically protects polygraph examination results, and section 552.130 of the Government Code specifically protects driver's license information. These confidentiality provisions specifically permit release to certain parties in certain circumstances. We therefore conclude that, notwithstanding section 1701.451, the city has the discretion to release the polygraph information of the

named officer to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code, otherwise, the city must withhold the polygraph information under section 552.101 in conjunction with section 1703.306(a), and the driver's license information we have marked under section 552.130 of the Government Code. *See City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, orig. proceeding).

In summary, the city has the discretion to release the polygraph information of the named officer to the requestor pursuant to section 1703.306(a)(1) of the Occupations Code. Otherwise, the city must withhold the polygraph information under section 552.101 in conjunction with section 1703.306(a). The city must withhold the marked driver's license information under section 552.130 of the Government Code. The remaining information must be released to this requestor pursuant to section 1701.451 of the Occupations Code.[4]

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, toll free at (888) 672-6787.

Sincerely,

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/sdk

Ref: ID# 427837

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[4]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.