



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2012

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2012-01356

Dear Mr. Weir:

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# 443802 (ORR W004296).

The City of San Antonio (the "city") received a request for information related to a specified police officer, including medical records, for the last two years. You state that you have released some information to the requestor. 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created prior to the last two years. 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 must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons

why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). The city received the request for information on November 9, 2011. We note November 11, 23, and 24 were holidays. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, you were required to provide the information required by section 552.301(e) by December 5, 2011. The envelope in which the city provided the information required by subsection 552.301(e) was postmarked December 7, 2011. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). Because section 552.101 can provide a compelling reason to withhold information, we will address the applicability of section 552.101 to the submitted information.

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 section 143.089 of the Local Government Code. 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 personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may maintain for its own internal use. *See* 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)-(2). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *Id.* §§ 143.051-.055; *see* Attorney General Opinion JC-0257 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143). 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, 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 police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file.¹ *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, information maintained in a police 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 requested information is held in files maintained by the city's police department under section 143.089(g). Upon review, we agree that the information maintained in the city's police department's internal files is confidential under section 143.089(g) of the Local Government Code and, therefore, the submitted responsive information must generally be withheld from disclosure under section 552.101 of the Government Code.

The requestor argues that he has a right of access to the submitted information under section 552.023 because he is the authorized representative of the person who is the subject of the information. Although section 552.023 of the Government Code grants a person a special right of access to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person's privacy interests, confidentiality under section 143.089(g) of the Local Government Code is not privacy based. *See* Gov't Code § 552.023(a). Therefore, because the submitted information is maintained pursuant to section 143.089(g), the right of access under section 552.023 does not apply to this information and the city must generally withhold it under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

However, we note the requested information includes medical records of the requestor's client, and the requestor is the authorized representative of his client. Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), subtitle B of

¹Section 143.089(g) requires a police or fire department that receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee. You state that the request has been forwarded to the San Antonio Fire Fighter and Police Officers' Civil Service Commission.

title 3 of the Occupations Code, which provides confidentiality for medical records. Section 159.002 of the MPA provides, in part:

(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.

Occ. Code § 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 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). 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. *Id.* §§ 159.004, .005. We have marked the portion of the information that constitutes medical records that may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

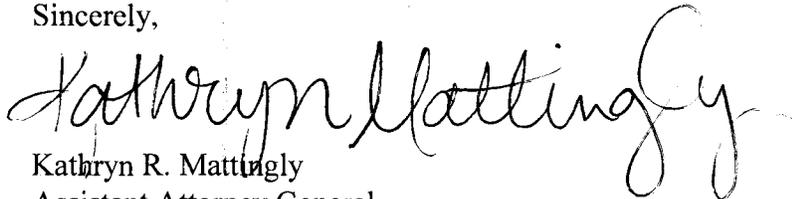
In this instance, however, the city seeks to withhold the medical records from the requestor under section 143.089 of the Local Government Code, while sections 159.004 and 159.005 of the MPA may provide the requestor with a right of access to this information. Thus, there is a conflict between section 143.089 of the Local Government Code and the applicable provisions of the MPA. 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 (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, 583 (1990), 451 (1986). The MPA is a more specific statute than section 143.089 because the MPA applies specifically to medical records, while

section 143.089 applies generally to all records in a personnel file. Additionally, section 143.089 of the Local Government Code was enacted prior to the MPA's release provision in section 159.005 of the Occupations Code. *See* Occ. Code § 159.005, *added by* Act of May 17, 1999, 76th Leg., ch. 388, § 1 (effective Sept. 1, 1999), *amended by* Act of May 25, 2001, 77th Leg., ch. 984, § 3 (effective June 15, 2001); Loc. 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). Therefore, the marked medical records are subject to the MPA and may only be released in accordance with its release provisions. *See* ORD 598. The city must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/som

Ref: ID# 443802

Enc. Submitted documents

c: Requestor
(w/o enclosures)