



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2012

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2012-10702

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# 458794 (COSA File No. W006267).

The San Antonio Police Department (the "department") received a request for the personnel file of a specified individual and any internal affairs documents relating to that individual's suspension. 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 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 a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the request was received. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

Next, we must address the department'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. *See id.* § 552.301. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See id.*

§ 552.301(b). 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). You state the department received the request for information on March 8, 2012. Accordingly, you were required to raise the exceptions to disclosure that apply to the requested information by March 22, 2012, and you were required to provide the information required by section 552.301(e) by March 29, 2012. *See id.* §§ 552.301(b), (e). However, you did not request a ruling from this office or submit the information at issue until May 3, 2012. Accordingly, we conclude the department 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 of San Antonio 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. *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 the submitted information is contained in the department's personnel file for the named officer and is maintained under section 143.089(g). We note that the submitted information contains information which is subject to section 143.089(a), including commendations, evaluations, and information related to disciplinary action taken against the police officer. You state the request has been forwarded to the San Antonio Fire Fighter and Police Officers Civil Service Commission.¹ Upon review, we agree the submitted information is generally confidential under section 143.089(g) of the Local Government Code and must 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 department must generally withhold it under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

The requestor also indicates he has a right of access to the submitted information pursuant to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human

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.

Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a). However, it is beyond the scope of this office’s authority to render a decision under HIPAA. *See* Gov’t Code § 552.301(a) (open records division’s authority is limited to determining, upon a governmental body’s request, whether requested information falls within an exception to disclosure); Attorney General Opinion GA-0138 at 10 (2004). Accordingly, we do not address the applicability of HIPAA to the submitted information.

However, we note the submitted information contains the named officer’s medical records, fingerprints, polygraph information, and breath specimen test results, and as a representative of the officer at issue, the requestor may have a right of access to this information. Medical records are governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, fingerprints are governed by chapter 560 of the Government Code, polygraph information is governed by section 1703.306 of the Occupations Code, and breath specimen test results are governed by section 724.018 of the Transportation Code. In this instance, the department seeks to withhold the medical records, fingerprints, polygraph information, and breath specimen test results under section 143.089 of the Local Government Code.

However, the MPA, section 560.002 of the Government Code, section 1703.306 of the Occupations Code, and section 724.018 of the Transportation Code are more specific statutes than section 143.089 because the MPA applies specifically to medical records, chapter 560 of the Government Code applies specifically to biometric identifiers, section 1703.306 applies specifically to polygraph information, and section 724.018 applies specifically to breath specimen test results, while section 143.089 generally applies to all records in a personnel file. Where information falls within both a general and a specific statutory provision, the specific provision prevails over the general statute. *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 (1991), 583 (1990), 451 (1986). Therefore, the medical records, fingerprints, polygraph information, and breath specimen test results are subject to the MPA, section 560.003 of the Government Code, section 1703.306 of the Occupations Code, and section 724.018 of the Transportation Code, respectively, and may only be released in accordance with their release provisions. *See* ORD 598. Thus, we will address the applicability of the MPA, section 560.003 of the

Government Code, section 1703.306 of the Occupations Code, and section 724.018 of the Transportation Code to the submitted information that falls within the scope of these statutory provisions.

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). 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 id.* §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). As noted above, the requestor represents the individual whose medical records are at issue. Thus, the medical records we have marked may only be released in accordance with the MPA.

Section 560.001(1) 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 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, as the authorized representative of the individual whose fingerprints are contained in the submitted documents, the requestor has a right of access to his client's fingerprint information under section 560.002(1)(A) of the Government Code. Therefore, the department must release the requestor's client's fingerprints, which we have marked, pursuant to section 560.002 of the Government Code.

Section 1703.306 of the Occupations Code 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:

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

Occ. Code § 1703.306. In this instance, the requestor's client is the polygraph examinee. Thus, the department has the discretion to release the polygraph information of the requestor's client pursuant to section 1703.306(a)(1) of the Occupations Code. *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, the department must withhold the polygraph information, which we have marked, under section 552.101 in conjunction with section 1703.306(a) of the Occupations Code.

Section 724.018 of the Transportation Code provides that “[o]n the request of a person who has given a specimen at the request of a peace officer, full information concerning the analysis of the specimen shall be made available to the person or the person’s attorney.” Transp. Code § 724.018. In this instance, the requestor is the authorized representative of the person who gave the blood specimen at the request of a peace officer. Therefore, the department must release the submitted results of the analysis of the breath specimen at issue, which we have marked, to this requestor pursuant to section 724.018 of the Transportation Code.

In summary, the medical records we have marked may only be released in accordance with the MPA. The department must release the requestor's client's fingerprints pursuant to section 560.002 of the Government Code and the requestor's client's breath specimen test results pursuant to section 724.018 of the Transportation Code. The department 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 remaining information must be withheld 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,

A handwritten signature in black ink, appearing to read "Kathryn R. Mattingly". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 458794

Enc. Submitted documents

c: Requestor
(w/o enclosures)