



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-14332

Dear Ms. Evans:

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# 464380 (Houston GC No. 19795).

The Houston Police Department (the "department") received a request for a specified complete internal affairs investigation file, including all video recordings, recorded witness statements, and all investigative material.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless

¹You state the department sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). The submitted information consists of a completed internal affairs investigation that is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the submitted information under section 552.103. However, you also raise section 552.101 of the Government Code, which protects information made confidential under law. Additionally, as previously noted, information that is subject to section 552.022(a)(1) may be withheld under section 552.108. As such, we will consider your arguments under sections 552.101 and 552.108 for 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 information protected by other statutes. You state the City of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 of the Local Government Code provides in relevant part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department’s use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head’s designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director’s designee for inclusion in the fire fighter’s or police officer’s personnel file maintained under Sections 143.089(a)-(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state the submitted information consists of records of an internal investigation of alleged misconduct on the part of department police officers. You state the allegations were not sustained and no disciplinary action was taken. You state the information does not meet the requirements of section 143.1214(c) for inclusion in the police officers' civil service personnel files. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). You indicate the submitted information is maintained in the department's investigatory files. You state the requestor is not a representative of another law enforcement agency, a fire department, or the office of a district or United States attorney. *See id.* § 143.1214(b)(1)-(2). Based on your representations and our review, we agree the submitted information is generally confidential under section 143.1214 of the Local Government Code.²

We note, however, the submitted information includes medical records of the requestor's client. Section 552.101 of the Government Code also encompasses information made confidential by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See Occ. Code* §§ 151.001-168.202. Section 159.002 of the MPA provides, in relevant 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.

Id. § 159.002(b)-(c). 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). Information subject to the MPA includes both medical records and information obtained

²As our ruling is dispositive, we need not address your argument for the information you seek to withhold under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). Medical records must be released on receipt of signed, written consent, provided 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 governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). As noted above, the submitted information includes the requestor's client's medical records. Thus, if the department receives consent for release of the submitted medical records and information obtained from medical records that complies with sections 159.004 and 159.005 of the MPA, the information at issue, which we have marked, must be released.

We note the submitted information also includes emergency medical services ("EMS") records to which the requestor may have a right of access. Section 552.101 of the Government Code also encompasses information protected by section 773.091 of the Health and Safety Code, which provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by [EMS] personnel or by a physician providing medical supervision that are created by the [EMS] personnel or physician or maintained by an [EMS] provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), EMS records are deemed confidential and may be released only in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-.094. The submitted information contains records created by EMS personnel. Upon review, we find section 773.091 is applicable to the information we have marked. We note records that are confidential under section 773.091 may be disclosed to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information[.]" *Id.* §§ 773.092(e)(4), .093. Section 773.093 provides a consent for release of EMS records must be written and signed by the patient, authorized representative, or personal representative and must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. *Id.* § 773.093(a). Thus, if the department receives

proper consent, the marked EMS records must be released in their entirety in accordance with chapter 773 of the Health and Safety Code.

Although the marked medical records and EMS records are generally confidential under section 143.1214 of the Local Government Code, the MPA and section 773.092 of the Health and Safety Code may provide the requestor with a right of access to the records we have marked. Therefore, there is a conflict between the confidentiality provision of section 143.1214 of the Local Government Code and the release provisions of the MPA and section 773.092 of the Health and Safety Code. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence the legislature intended the general provision to prevail. *See Gov't Code § 311.026(b); 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); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). Although section 143.1214 of the Local Government Code generally makes confidential the entire investigatory file created and maintained by the department, the MPA specifically applies to medical records and information obtained from medical records, and section 773.092 of the Health and Safety Code specifically applies to the release of EMS records made by EMS personnel. Therefore, we find the MPA and section 773.092 of the Health and Safety Code are more specific than the confidentiality provision of section 143.1214 of the Local Government Code. Additionally, although you also claim this information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.108 of the Government Code, these specific right of access provisions prevail over a claim under common-law privacy and the Act's general exceptions to disclosure. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on a statutory right of access to information); 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act); *see also CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law).

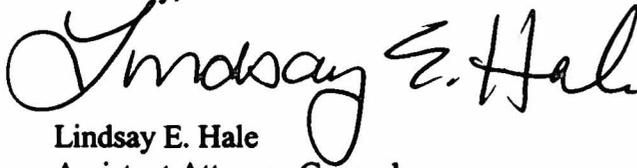
Therefore, notwithstanding the provisions of section 143.1214 of the Local Government Code, we conclude the submitted medical records we have marked must be released if the department receives consent for release of those records that complies with the MPA. Further, the EMS records we have marked must be released to the requestor pursuant to section 773.092(e) of the Health and Safety Code if the department receives the proper consent that complies with section 773.093(a). In that event, the department must withhold the remaining submitted information under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. If the department does not receive the proper consent for the medical records or EMS records, then the submitted

information must be withheld in its entirety under section 552.101 of the Government Code in conjunction with section 143.1214 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 that reads "Lindsay E. Hale". The signature is written in a cursive style with a large initial "L".

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 464380

Enc. Submitted documents

c: Requestor
(w/o enclosures)