



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2012

Ms. Linda Pemberton
Paralegal
Office of the City Attorney
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2012-18274

Dear Ms. Pemberton:

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# 470877 (No. W008791).

The Killeen Police Department (the "department") received a request for personnel records maintained by the department and the City of Killeen (the "city") pertaining to the requestor.¹ We understand some of the requested information has been released. 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 information you submitted.

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 exception encompasses information made confidential by other statutes. You claim section 552.101 in conjunction with section 143.089 of the Local Government Code, which 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

¹You inform us the requestor clarified and narrowed his request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

service file and another the police department may maintain for its own internal use.² 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 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 *et seq.* In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against the officer, section 143.089(a)(2) requires the department to place all investigatory records related 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 must be forwarded 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). Information related to alleged misconduct or disciplinary action taken must be removed from the police officer's civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. See Local Gov't Code § 143.089(b)-(c).

Section 143.089(g) authorizes a police department to maintain a separate and independent internal personnel file related to a police officer for its own use and 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.

Id. § 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 the file. The records included in the departmental personnel file related to complaints against the police officer for which no

²You state the department is subject to chapter 143 of the Local Government Code.

disciplinary action was taken. The court determined section 143.089(g) made the records confidential. *See id.* at 949; *see also City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied) (restricting confidentiality under Local Gov't Code § 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 Local Gov't Code § 143.089(a) and (g) files).

You state the submitted information is contained in a personnel file regarding the named police officer the department maintains pursuant to section 143.089(g). We note the information at issue includes periodic evaluations of the officer by his supervisor, which we have marked. You state some of the evaluations contain references to instances in which the officer received reprimands or counseling. You ask that “those documents be reviewed to determine whether or not the information must be released.” Although a reprimand or counseling does not constitute disciplinary action for purposes of section 143.089(a)(2) of the Local Government Code, section 143.089(a)(3) specifically provides for the inclusion of evaluations of an officer by his supervisor in the officer’s civil service file. *See* Local Gov't Code § 143.089(a)(3). Thus, as you are responding to the present request for information on behalf of both the department and the city, you must include copies of the marked evaluations in the officer’s civil service file, and the city must release the evaluations unless it has already done so.³ *See* Local Gov't Code § 143.089(a)(3). Based on your representations and our review, we conclude the rest of the submitted information is generally confidential under section 143.089(g) of the Local Government Code.

We note, however, the requestor is the officer to whom the remaining information pertains, and the information includes the officer’s medical records; information acquired from a polygraph examination of the officer; and his fingerprints. Those types of information are subject to statutory confidentiality provisions other than section 143.089(g). The public availability of the officer’s medical records is governed by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA 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.

³We note section 143.089(g) requires the department to “refer to the [civil service] director or the director’s designee a person or agency that requests information that is maintained in [a] police officer’s personnel file.” Local Gov't Code § 143.089(g). You state the city’s director of civil service is also the director of human resources. You explain that “because all records are in the possession of the City of Killeen and the city attorney’s office would ultimately have to assist the civil service director in responding, the requestor has not been referred to the director of civil service so as to minimize delay.” Thus, we understand you are responding to the present request for information on behalf of both the department and the civil service director.

(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(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). 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) the 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). The medical records we have marked are confidential under section 159.002 of the MPA but must be released if the department receives the required written consent under section 159.004 and 159.005 of the MPA.

Section 1703.306 of the Occupations Code governs the public availability of polygraph information and provides in 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; *see* Open Records Decision No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Thus, the information we have marked that was acquired from a polygraph examination of the officer is generally confidential under section 1703.306 of the Occupations Code, but the department has discretion to release the information to the officer pursuant to section 1703.306(a).

The public availability of the officer's fingerprints is governed by chapter 560 of the Government Code. Section 560.003 states "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 provides, 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 officer has a right of access to his fingerprints pursuant to section 560.002. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

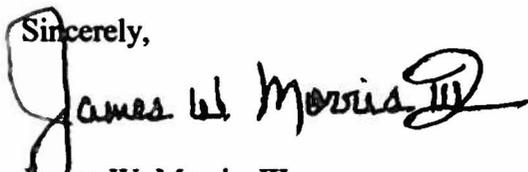
In this instance, the department seeks to withhold the officer’s medical records, the information acquired from his polygraph examination, and his fingerprints on the basis of section 143.089(g) of the Local Government Code. Thus, we must address the conflict between the officer’s rights of access under the MPA, 1703.306(a) of the Occupations Code, and section 560.002 of the Government Code and the confidentiality provided by section 143.089(g) of the Local Government Code. When information falls within both a general and a specific statutory provision, the specific provision prevails over the general provision, unless the general provision was enacted later and there is clear evidence the legislature intended for 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, section 1703.306 of the Occupations Code, and section 560.002 of the Government Code are more specific statutes than section 143.089(g) because the MPA applies specifically to medical records, section 1703.306 applies specifically to information obtained from a polygraph examination, and section 560.002 applies specifically to fingerprints, while section 143.089(g) of the Local Government Code is generally applicable to records in a personnel file. Thus, the officer’s medical records, the information acquired from his polygraph examination, and his fingerprints are governed by the MPA, section 1703.306(a) of the Occupations Code, and section 560.002 of the Government Code. Therefore, his medical records must be withheld or released in accordance with sections 159.002, 159.004, and 159.005 of the MPA, the information acquired from his polygraph examination must be withheld or released in accordance with section 1703.306(a), and his fingerprints must be released pursuant to section 560.002. The department must withhold the rest of the submitted information under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

In summary, (1) copies of the marked evaluations of the officer must be placed in his civil service file pursuant to section 143.089(a)(3) of the Local Government Code and released; (2) the officer’s medical records must be withheld or released in accordance with sections 159.002, 159.004, and 159.005 of the MPA; (3) the information acquired from the officer’s polygraph examination must be withheld or released in accordance with section 1703.306(a) of the Occupations Code; (4) the officer’s fingerprints must be released pursuant to section 560.002 of the Government Code; and (5) the department must withhold the rest of the submitted 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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 470877

Enc: Submitted documents

c: Requestor
(w/o enclosures)