



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2013

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

OR2013-08424

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# 488038 (W010171).

The Killeen Police Department (the "department") received a request for the requestor's personnel file including evaluations from the three years preceding the request. You inform us you have released some information to the requestor. 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.

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 inform us the department operates under the civil service law in 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). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). 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). 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. *Abbott*, 109 S.W.3d at 122. 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 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, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the submitted information is contained in the requestor's personnel file maintained by the department pursuant to section 143.089(g).¹ Based on your representations and our review, we conclude the submitted information is generally confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101 of the Government Code.²

¹Section 143.089(g) requires a police 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. Regardless of your statement that failure to do so was to minimize delay, the department must refer the requestor to the director of human resources, who you inform us is also the civil service director.

²We note that, although section 143.089(e) provides police officers a right of access to their own civil service file maintained under section 143.089(a), this office has determined that police officers do not generally have a right to their own internal files maintained by a police department pursuant to section 143.089(g). *See* Open Records Decision No. 650 at 3 (1996) (confidentiality provision of section 143.089(g) contains no exceptions).

We note, however, the requestor is the officer to whom the submitted information pertains, and the information includes information acquired from a polygraph examination of the requestor, his DD-214 forms, and his fingerprints. These types of information are subject to statutory confidentiality provisions other than section 143.089(g). 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(a)(1); *see also* 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 requestor is generally confidential under section 1703.306 of the Occupations Code, but the department has discretion to release the information to the requestor pursuant to section 1703.306(a).

The DD-214 forms are subject to section 552.140 of the Government Code. Section 552.140 of the Government Code provides in part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

(b) The record is confidential for the 75 years following the date it is recorded with or otherwise first comes into the possession of a governmental body. During that period the governmental body may permit inspection or copying of the record or disclose information contained in the record only in accordance with this section or in accordance with a court order.

(c) On request and the presentation of proper identification, the following persons may inspect the military discharge record or obtain from the governmental body free of charge a copy or certified copy of the record:

(1) the veteran who is the subject of the record[.]

Gov't Code § 552.140(a), (b), (c)(1). Section 552.140 provides a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with

section 552.140 or in accordance with a court order. *See id.* § 552.140(a)-(b). We note the submitted DD-214 forms came into the department's possession after September 1, 2003. Section 552.140(c)(1) provides a governmental body must release a discharge form to the veteran who is the subject of the record upon request and presentation of proper identification. *Id.* § 552.140(c)(1). Accordingly, we find the requestor has a right of access to his DD-214 forms under section 552.140(c)(1) of the Government Code.

The public availability of the requestor'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]." *Id.* § 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 requestor has a right of access to his fingerprints, which we have marked, pursuant to section 560.002. *See* ORD 481 at 4 (privacy theories not implicated when individual requests information concerning himself).

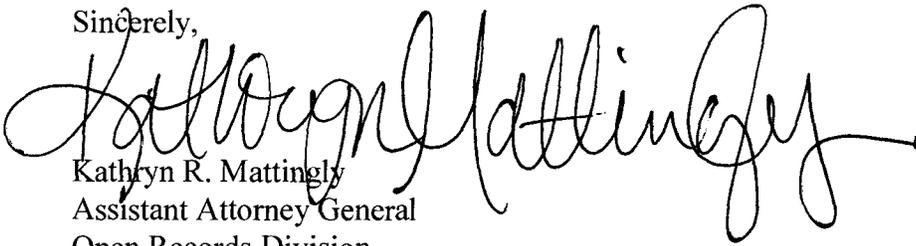
In this instance, the department seeks to withhold the information acquired from the requestor's polygraph examination, his DD-214 forms, and his fingerprints on the basis of section 143.089(g) of the Local Government Code. Thus, we must address the conflict between the requestor's rights of access under section 1703.306(a) of the Occupations Code, section 552.140(c)(1) of the Government 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. 583 (1990), 451 (1986). Although section 143.089(g) of the Local Government Code applies generally to all records in a personnel file, section 1703.306 applies specifically to information obtained from a polygraph examination, section 552.140 specifically applies to military discharge records, and chapter 560 of the Government Code applies specifically to biometric identifiers. Thus, we find section 1703.306 of the Occupations Code and sections 552.140 and 560.002 of the Government Code are more specific than the confidentiality provision of section 143.089(g). Therefore, notwithstanding section 143.089(g) of the Local Government Code, the information acquired from the requestor's polygraph examination must be withheld or released in accordance with section 1703.306(a), the requestor's DD-214 forms must be released in accordance with section 552.140(c), and the requestor's 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) the information acquired from the requestor's polygraph examination, which we have marked, must be withheld or released in accordance with section 1703.306(a) of the Occupations Code; (2) the requestor's DD-214 forms must be released pursuant to section 552.140(c)(1) of the Government Code, and (3) the requestor's fingerprints we have marked must be released pursuant to section 560.002 of the Government Code. The department 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.³

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/bhf

Ref: ID# 488038

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because the information being released in this instance is confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor, the city must again seek a ruling from this office.