



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2007

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2007-08058

Dear Ms. Sims:

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# 282988.

The City of Lubbock (the "city") received a request for the requestor's personnel and internal affairs files. You indicate that some of the requested information will be released. You claim that other responsive information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and have reviewed the information you submitted.

We first note that the submitted information includes the requestor's high school and college transcripts. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for

¹Although you also raise section 552.108 of the Government Code, you have submitted no arguments in support of the applicability of that exception. Accordingly, we do not address section 552.108. See Gov't Code §§ 552.301(e)(1)(A), .302.

the purpose of our review in the open records ruling process under the Act.² Consequently, education records that are responsive to a request for information under the Act should not be submitted to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”).

We note that the city is not an educational agency or institution for purposes of FERPA. In this instance, however, it appears that the city may have obtained the requestor’s transcripts from the educational institutions that created those documents. FERPA contains provisions that govern access to education records that were transferred by an educational agency or institution to a third party. To the extent that the transcripts were obtained from the educational institutions, so as to be governed by FERPA, we will not address the applicability of FERPA to the transcripts, because our office is prohibited from reviewing education records to determine whether appropriate redactions have been made under FERPA. Such determinations under FERPA must be made by the educational authorities from which education records were obtained. Thus, the city should contact any educational institutions from which the transcripts were obtained, as well as the DOE, regarding the applicability of FERPA to the transcripts. To the extent that the transcripts are not governed by FERPA, we will address your arguments against their disclosure.

We next note that the submitted information includes the requestor’s fingerprints, certain test results, and his medical records. The fingerprints, test results, and medical records are governed, respectively, by chapter 560 of the Government Code, section 81.103 of the Health and Safety Code, and the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. In this instance, the city seeks to withhold the fingerprints, test results, and medical records under section 143.089 of the Local Government Code. However, chapter 560 of the Government Code, section 81.103 of the Health and Safety Code, and the MPA are more specific statutes than section 143.089. 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, we will address the applicability of chapter 560, section 81.103, and the MPA to the submitted information that falls within the scope of those statutory provisions.

Section 560.001 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

²A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

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, the requestor has a right of access to his own fingerprints under section 560.002(1)(A). *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Therefore, the city must release the requestor’s fingerprints, which we have marked, pursuant to section 560.002 of the Government Code.

Section 81.103 of the Health and Safety Code provides that “[a] test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section.” Health & Safety Code § 81.103(a). Under section 81.101(5) of the Health and Safety Code, “test result” means

any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

Id. § 81.101(5). A test result may be released to the person tested or a person legally authorized to consent to the test on the person’s behalf. *See id.* § 81.103(b)(6). Moreover, a person tested or a person legally authorized to consent to the test on the person’s behalf may authorize the release or disclosure of the test result. *See id.* § 81.103(d). Such authorization must be in writing and signed by the person tested or the person legally authorized to consent to the test on the person’s behalf. *Id.* The authorization must state the person or class of persons to whom the test results may be released or disclosed. *Id.* We have marked test results that may only be released in accordance with section 81.103 of the Health and Safety Code.

The requestor’s medical records are confidential under the MPA, which 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.

(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). 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). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). 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* 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). Medical records may only be released in accordance with the MPA. *See* ORD 598. The city must withhold the medical records that we have marked under the MPA unless it receives consent for the release of those records that complies with sections 159.004 and 159.005 of the MPA.

You contend that the rest of the submitted information is confidential under section 143.089(g) of the Local Government Code.³ 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 that other statutes make confidential. Section 143.089 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 service file and another that 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 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-.055. In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, section 143.089(a)(2) requires the department 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

³We understand that the city is a civil service municipality under chapter 143 of the Local Government Code.

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). Information relating 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).

Subsection (g) of section 143.089 authorizes the police department to maintain, for its own use, a separate and independent internal personnel file relating to a police officer. Section 143.089(g) 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 that file. The records included in the departmental personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *See* 851 S.W.2d at 949 (concluding that legislature intended to deem confidential information maintained by police department for its own use under Local Gov't Code § 143.089(g)); *see also* *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, no pet.) (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 that the rest of the information submitted as Exhibit B is held in a file maintained by the Lubbock Police Department under section 143.089(g). You also state that the information submitted as Exhibit C consists of letters of reprimand that are not required to be included in a civil service file maintained under section 143.089(a). *See* Attorney General Opinion JC-0257 at 5 (written reprimand is not disciplinary action for purposes of Local Gov't Code chapter 143). Based on your representations and our review of the information in question, we conclude that the department must withhold the remaining information in

Exhibit B and all of the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

In summary: (1) to the extent that the requestor's educational transcripts were obtained from the educational institutions that created the transcripts, the city should contact any such educational institutions and the DOE regarding the applicability of FERPA to the transcripts; (2) the marked fingerprints must be released pursuant to section 560.002 of the Government Code; (3) the marked test results may only be released in accordance with section 81.103 of the Health and Safety Code; (4) the marked medical records must be withheld under the MPA unless the city receives consent for the release of those records that complies with sections 159.004 and 159.005 of the MPA; and (5) the city 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 records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal flourish extending to the right.

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

JWM/ma

Ref: ID# 282988

Enc: Submitted documents