



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

Mr. Mark G. Mann
Assistant City Attorney
City of Garland
P.O. Box 469002
Garland, Texas 75046-9002

OR2009-16225

Dear Mr. Mann:

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# 361368 (GCA 09-0659).

The City of Garland (the "city") received a request for the internal affairs file of the requestor's client. You claim the requested 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.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information another statute makes confidential. Section 143.089 of the Local Government Code provides for the existence of two different types of personnel files relating to a police officer: 1) one maintained as part of the officer's civil service file and 2) one the police department maintains for its own internal use. See Local Gov't Code § 143.089(a), (g). The city informs us it is a civil service city under chapter 143 of the Local Government Code.

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, 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, pet. denied). 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).

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.

Local Gov't Code § 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 those records confidential. *See City of San Antonio*, 851 S.W.2d at 949 (concluding "the legislature intended to deem confidential the information maintained by the . . . police department for its own use under subsection (g)"). The court stated the provisions of section 143.089 governing the content of the civil service file reflect "a legislative policy against disclosure of unsubstantiated claims of misconduct made against police officers and fire fighters, except with an individual's written consent." *Id.*; *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 section 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 section 143.089(a) and (g) files).

You explain the submitted information is from the police department's confidential internal files. You inform us the requestor's client is now appealing the disciplinary action related to him. Although you contend this information must be maintained in the police department's confidential internal file created under section 143.089(g) because of the pending appeal, we note an officer's civil service file must contain documents relating to any misconduct in those cases where the police department took disciplinary action against the officer. *See* Local Gov't Code § 143.089(a)(2); *see also id.* §§ 143.051-.055 (describing "disciplinary action" for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). Section 143.089(c) provides that information that must be placed in a civil service file under section 143.089(a)(2) must be removed if the civil service commission determines that (1) the disciplinary action was taken without just cause, or (2) the charge of misconduct was not supported by sufficient evidence. *See* Local Gov't Code § 143.089(c). Section 143.089(c) therefore signifies that complaint files resulting in disciplinary action must be placed in the civil service file during the pendency of the appeal. Because the submitted information relates to misconduct that resulted in disciplinary action against the requestor's client, this information must be maintained in the civil service file pursuant to section 143.089(a)(2), and it may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code.

Section 143.089(e) grants a right of access to a police officer for "any letter, memorandum, or document placed in the person's personnel file." *See id.* § 143.089(e). This office has interpreted this provision to grant a police officer an affirmative right of access to the information in his or her personnel file maintained under section 143.089(a). *See* Open Records Decision No. 650 at 2 n.2 (1996). In this instance, because the requestor is the attorney representing the officer, she generally has a statutory right of access to her client's section 143.089(a) file. Therefore, the city may not withhold the requestor's client's section 143.089(a) file under section 552.103 or section 552.108 of the Government Code. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

We note section 261.201 of the Family Code is applicable to a portion of the submitted information. Section 552.101 also encompasses section 261.201 of the Family Code, which provides as follows:

- (a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). A portion of the submitted information consists of files, reports, records, communications, or working papers used or developed in an investigation sexual assault of a child; therefore, this information is within the scope of section 261.201 of the Family Code. *See id.* § 261.001 (1), (4) (defining “abuse” and “neglect” for the purposes of chapter 261 of the Family Code). You do not indicate that the city’s police department has adopted a rule governing the release of this type of information; therefore, we assume that no such regulation exists. Given that assumption, we conclude that the information we have marked is confidential pursuant to section 261.201 of the Family Code.

We also note the requestor’s client’s section 143.089(a) file contains a mental health record. Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code, which provides in part:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
- (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a), (b); *see also id.* § 611.001 (defining “patient” and “professional”).¹ Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient’s behalf, or a person who has the written consent of the patient. Health & Safety Code §§ 611.004, .0045. The mental health record we have marked is confidential under section 611.002 of the Health and Safety Code and may only be released in accordance with sections 611.004 and 611.0045.

In this instance, because there is a conflict between the requestor’s right of access under section 143.089(e) of the Local Government Code and the confidentiality of the marked

¹This office has determined a “licensed professional counselor” is within the definition of professional as provided by section 611.001. *See* Attorney General Opinion JC-0538 (2002).

information under section 261.201 of the Family Code and section 611.002 of the Health and Safety Code, we must determine which statute governs access to these records. Where information falls within both a general and a specific statutory provision, the specific statutory provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is the general provision prevail. *See* Gov't Code § 311.026; *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). We find section 261.201 is a more specific statute than section 143.089 because section 261.201 of the Family Code applies specifically to child abuse or neglect reports or investigative information, while section 143.089 applies generally to all personnel records of a peace officer. Additionally, section 143.089 of the Local Government Code was enacted prior to section 261.201 of the Family Code.² We further note section 611.002 applies only to mental health records, whereas section 143.089 applies to all personnel records of a peace officer. While chapter 611 of the Health and Safety Code was enacted before section 143.089(e), it does not appear that it was the legislature's manifest intent that the more general provision prevail.³ Accordingly, we conclude that, notwithstanding the applicability of section 143.089(e), the city must withhold the information we have marked pursuant to section 261.201 of the Family Code in conjunction with section 552.101 of the Government Code and the mental health record we marked is subject to chapter 611 and may only be released in accordance sections 611.004 and 611.0045.

In summary, the city must withhold the information we have marked under section 261.201 of the Family Code in conjunction with section 552.101 of the Government Code. The city may only release the marked mental health record in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. The remaining information must be released to the requestor.⁴

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

²Act of May 31, 1989, 71st Leg., R.S., ch. 1248, § 84, 1989 Tex. Gen. Laws 4996, 5043 (Vernon) (codified as Local Gov't Code § 143.089); Act of April 10, 1995, 74th Leg., R.S., ch. 20, § 1 1995 Tex. Gen. Laws 113, 262 (Vernon) (codified as Fam. Code § 261.201).

³*See* Act of May 9, 1979, 66th Leg., R.S., ch. 239, 1979 Tex. Gen. Laws 512 (enacting statutory predecessor to Health & Safety Code ch. 611).

⁴We note that because the requestor has a special right of access to this information in this instance, the city must again seek a decision from this office if it receives another request for the same information from another requestor.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 361368

Enc. Submitted documents

cc: Requestor
(w/o enclosures)