



April 24, 2001

Mr. John M. Knight
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2001-1630

Dear Mr. Knight:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146338.

The City of Lubbock (the "city") received a written request for the civil service file of a named city police officer. You contend that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code and section 159.002 of the Occupations Code. You also contend that the records at issue are excepted from required public disclosure pursuant to sections 552.103, 552.115, 552.117, and 552.119 of the Government Code.¹

Because section 552.103 of the Government Code, the "litigation" exception, is the most inclusive exception you raise, we will address it first. Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

¹Although you also raise section 552.108 of the Government Code, you have not submitted comments as to why you believe this exception applies. *See* Gov't Code § 552.301(e)(1)(A). Consequently, we deem this exception as waived. *See* Gov't Code § 552.302.

In this instance, you have demonstrated that litigation involving the city was pending on the date the city received the records request. You inform us that the lawsuit

was filed in the Federal District Court for the Northern District of Texas. The case was subsequently heard, on appeal, by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied rehearing on January 9, 2001. . . . Pursuant to 28 U.S.C.A. 2101 (c), Plaintiffs – Appellants have 90 days in which to perfect an appeal [to] the Supreme Court of the United States. This time period expires on April 10, 2001. In the event that the time period expires without an appeal having been filed with the Supreme Court of the United States, City shall have no objection to releasing those portions of [the police officer's] civil service file not made confidential.

The time period for the appeal of this case has now passed. Because you have not informed this office of any change of circumstances surrounding the litigation, we conclude that you have not demonstrated that the litigation is still pending. See Open Records Decision No. 638 (1996). The applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Consequently, the city may not withhold any of the information at issue pursuant to section 552.103.

We will now address in turn the other exceptions you raised. Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) You contend that some of the information at issue must be withheld pursuant to section 143.089 of the Local Government Code because this provision “makes information about complaints against police officers confidential under section 552.101 if the department took no disciplinary action.”

Please note, however, that section 143.089(b) of the Local Government Code specifically prohibits information regarding alleged misconduct from being placed in the officer's civil service file “if the employing department determines that there is insufficient evidence to sustain the charge of misconduct.” The only information regarding misconduct that is to be placed in the civil service file is that which relates to “misconduct [that] resulted in disciplinary action by the employing department.” Loc. Gov't Code § 143.089(a)(2); see also Loc. Gov. Code §§ 143.089(b); 143.051-.055 (describing “disciplinary action” for purposes of section 143.089(a)(2)). Furthermore, after reviewing the information at issue, this office could not identify any information pertaining to alleged misconduct that did not result in disciplinary action. Accordingly, we conclude that none of the information at issue is made confidential under section 143.089.

The records at issue contain the officer's confidential medical records that may be released only in accordance with the Texas Medical Practice Act (the “MPA”), title 3, subtitle B of

the Occupations Code. *See* Open Records Decision No. 598 (1991). Section 159.002(b) of the MPA provides the following:

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.

The release of the "medical records" is governed by the MPA. Accordingly, the city is authorized to release those records only as specified in chapter 159 of the Occupations Code. We have marked the documents that the city must withhold pursuant to the MPA.

We also note that the civil service file contains a "Peace Officer Accident Report." The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.² In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.³

²Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

³ Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the

Section 47(b)(1) of article 6701d provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

....

- (D) a person who provides the Department or the law enforcement agency with two or more of the following:
 - (i) the date of the accident;
 - (ii) the name of any person involved in the accident; or
 - (iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.⁴ Under this provision, a law enforcement agency employing a peace officer who made an accident report “is required to release” a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* Article 6701d provides the sole means by which individuals may obtain accident reports. Because the requestor has not provided the city with the necessary information, the city is required to withhold the “Peace Officer Accident Report” pursuant to section 47 of article 6701d, V.T.C.S.

Section 552.101 of the Government Code also protects information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. Gov't Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

⁴We note that the text of amended section 47 of article 6701d is not found in Vernon's Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 1995 Legislature at chapter 894, section 1.

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that common law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982).

Upon review, we conclude that a small amount of the information you submitted to this office is highly intimate or embarrassing and of no legitimate public interest. The city must withhold the information we have marked pursuant to common law privacy.

You next contend that the police officer's birth certificate is excepted from public disclosure pursuant to section 552.115 of the Government Code. Birth or death records held by the bureau of vital statistics or local registration officials are excepted from required public disclosure under section 552.115 of the Government Code. However, because the birth certificate in this case is not held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. Accordingly, the city may not withhold the officer's birth certificate pursuant to section 552.115.

We note, however, that the birth certificate, as well as other documents, contain information that the city must withhold pursuant to section 552.117(2) of the Government Code. Section 552.117(2) of the Government Code requires the city to withhold the following categories of information pertaining to a peace officer, as defined by article 2.12, Code of Criminal Procedure: the officer's current and former home address, home telephone number, social security number, and information revealing whether the officer has family members. Open Records Decision No. 622 (1994). Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We agree that the city must withhold all section 552.117(2) information from the public.⁵

You also contend that the photograph of the police officer is excepted from public disclosure. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer which, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or

⁵We have marked the "family information" that the city must withhold pursuant to section 552.117(2).

police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. Section 552.119 also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). Because you state that none of the exceptions are applicable in this instance, we conclude that unless the officer consents to the release, the city must withhold the officer's photograph pursuant to section 552.119 of the Government Code.

Finally, we note that the records at issue contain information that must be withheld pursuant to section 552.130(a)(1) of the Government Code, which requires the city to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Also, section 552.130(a)(2) of the Government Code requires the withholding of information relating to "a motor vehicle title or registration issued by an agency of this state." Consequently, the city must withhold all Texas driver's license numbers and all Texas license plate numbers and registration information contained in the records at issue pursuant to section 552.130.

In summary, the city must withhold the following information from the officer's civil service file: all medical records, the "Peace Officer Accident Report," the officer's home address, home telephone number, social security number, and family information, including the family information contained in the officer's birth certificate, the officer's photograph, and all Texas driver's license numbers and vehicle registration information. The remaining information contained in the civil service file must be released.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/seg

Ref: ID# 146338

Encl. Submitted documents

cc: Mr. Charles Dunn
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P.O. Box 311
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(w/o enclosures)