



August 1, 2000

Ms. Pam Watson
City Secretary
City of Athens
Athens City Hall
508 East Tyler Street
Athens, Texas 75751

OR2000-2897

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 137620.

The City of Athens (the "city") received a request for information relating to an automobile accident and a related investigation of a complaint about a police officer. The city has submitted information that it deems to be responsive to the request and seeks to withhold that information from public disclosure. However, the city raises no specific exception to disclosure of the requested information. We have considered your arguments and have reviewed the information you submitted.

Initially we must address the city's failure to comply with section 552.301 of the Government Code in requesting this letter ruling. Section 552.301 prescribes the procedures that a governmental body must follow when it receives a written request for information and seeks to withhold all or part of that information from the public. Section 552.301 provides in relevant part:

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

...

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:

(1) submit to the attorney general:

...

(C) a signed statement as to date on which the written request for information was received by the governmental body or evidence sufficient to establish that date[.]

Gov't Code § 552.301(b), (e)(1)(C). Section 552.302 of the Government Code provides as follows:

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

Gov't Code § 552.302. In requesting this letter ruling, the city has failed timely to raise any exceptions to disclosure, as required by section 552.301(b), and also has failed to submit evidence of the date of its receipt of the written request for information, as required by section 552.301(e)(1)(C). The time intervals during which the city was required to comply with subsections (b) and (e) of section 552.301 have expired. Accordingly, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of that information from the public. *See* Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 380-81 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 at 3 (1994). A claim that the requested information is deemed confidential under section 552.101 of the Government Code in conjunction with some other source of law can furnish a compelling reason sufficient to overcome the operation of section 552.302. *See* Gov't Code § 552.101; Open Records Decision Nos. 630 at 3 (1994) (addressing compelling reasons sufficient to overcome non-compliance with section 552.301), 325 (1982) (citing statutory predecessor to section 552.101).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common law right of privacy. Gov't Code § 552.101; *see also Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) there is no legitimate public interest in its disclosure. *Industrial Found.*, 540 S.W.2d at 685. The matters considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimacy, psychiatric treatment, attempted suicide, and injuries to reproductive organs. *Id.* at 683; *see also* Open Records Decision No. 659 at 5 (1999). In this instance, responsive information relating to the requestor's client reveals matters that ordinarily would be excepted from public disclosure under section 552.101 in conjunction with common law privacy. However, as an attorney representing the individual to whom the

information in question pertains, the requestor has a special right of access, beyond that of the general public, to information that relates to the requestor's client and that is protected from public disclosure by laws intended to protect his client's privacy interests. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 5 (1987) (stating that where an individual asks a governmental body to release information concerning only that individual, no common law privacy interest arises, and the individual is entitled to that information if the governmental body can claim no other basis for denying access to it).¹

You object to the release of responsive information that concerns an internal investigation of a complaint about a police officer's professional conduct. You inform us that "[t]he officer in question was given a Garrity Warning stating that his statement could not be used against him in any subsequent proceeding other than disciplinary proceedings within the confines of the department." You believe that the requestor will use information relating to the investigation for litigation purposes.² The United States Supreme Court held in *Garrity v. New Jersey*, 385 U.S. 493 (1967), that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Garrity*, 385 U.S. at 500. Decisions following *Garrity* deal with the admissibility in criminal prosecutions of evidence derived under the threat of termination. *See also Spevak v. Klein*, 385 U.S. 511 (1967). The Supreme Court's decision in *Garrity* has no bearing on whether the information in question here is confidential under chapter 552 of the Government Code. *See* Open Records Decision No. 575 (1990). We also note that a government body's promise to keep information confidential is not a basis for excepting information from required disclosure unless the governmental body has express statutory authority to make such a promise. *See* Attorney General Opinion JM-672 at 2 (1987); Open Records Decision No. 514 at 1 (1988). Thus, where an individual provides information based on a promise of confidentiality that is made without statutory authority, the information provided is not confidential under the Public Information Act on the basis of such a promise. Furthermore, the public has a genuine interest in information concerning a law enforcement officer's employment qualifications and job performance. *See* Open Records Decision No. 444 at 3-7 (1986). We therefore conclude that information relating to the internal investigation of the officer's professional conduct is not excepted from disclosure under section 552.101.

¹We emphasize, however, that if the city receives another request for the information that relates to the requestor's client, and the person who requests that information does not have a special right of access to it under section 552.023 of the Government Code, the city should resubmit that information to this office and request another ruling.

²Section 552.006 of the Government Code provides that the Public Information Act "does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided by this chapter." Gov't Code § 552.006. Under the Public Information Act, the motives of the requestor are irrelevant to the question of whether the requested information must be released. *See* Gov't Code §§ 552.222, 552.223; Open Records Decision No. 508 at 2 (1988). We note that the city did not raise an exception to the disclosure of the information in question under section 552.103 of the Government Code, the "litigation exception," which protects requested information relating to pending or anticipated litigation to which the governmental body is or may become a party. *See* Gov't Code § 552.103. As section 552.103 is a discretionary exception to disclosure that protects the interests of the governmental body, the city waived section 552.103 by failing timely to raise it. *See* Open Records Decision No. 665 at 2 n.5 (2000).

We note that the submitted records contain social security number information that may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if that information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number information contained in the submitted police report was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the information in question was obtained or is maintained pursuant to such a law and is therefore confidential under section 405(c)(2)(C)(viii)(I) of the federal law. We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. As noted in our previous discussion of section 552.101 and common law privacy, the requestor has a special right of access to his client's social security number under section 552.023(a). Prior to releasing any other social security number information, the city should ensure that the information was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

The submitted information also contains a medical record, the disclosure of which is governed by the Medical Practice Act (the "MPA"), as codified at subtitle B of title 3 of the Occupations Code. We have labeled the information that is governed by the MPA. Section 159.002 of the Occupations Code provides in relevant 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(b), (c). The MPA includes provisions that govern the disclosure of information that it encompasses. See Occ. Code §§ 159.003, 159.004, 159.005, 159.006. In construing the predecessor statute, this office held that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Public Information Act.³ Therefore, the medical record contained in the submitted information may be released

³See Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute article 495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. As the enacting legislation was a non-substantive codification, interpretations of the predecessor statute retain their relevance. See Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40.

only in accordance with the Medical Practice Act. In that regard, section 159.004 of the Occupations Code provides in relevant part:

An exception to the privilege of confidentiality in a situation other than a court or administrative proceeding, allowing disclosure of confidential information by a physician, exists only with respect to the following:

...

- (5) a person who has the written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Section 159.005[.]

Occ. Code § 159.004(5); *see also id.* §§ 159.005 (Consent for Release of Confidential Information), 159.006 (Information Furnished by Physician). In this instance, the requestor is an attorney representing the individual to whom the medical record in question pertains. If the city has been provided with that individual's written consent to the disclosure of his medical record to the requestor, in compliance with the Medical Practice Act, then the city must release the medical record in accordance with the client's consent and the MPA.

The submitted records also contain motor vehicle record information, the disclosure of which is governed by section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). The requestor also has a special right of access under section 552.023(a) to his client's driver's license information. Otherwise, the city must withhold motor vehicle record information in accordance with section 552.130.

Finally, we address the submitted peace officer's accident report, which appears to have been prepared pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Access to an accident report is governed by law outside the Public Information Act. The Seventy-fourth Legislature amended section 47 of article 6701d,

Vernon's Texas Civil Statutes, to provide for the release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident, (2) the name of any person involved in the accident, and (3) the specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414. In other legislation, the Seventy-fourth Legislature 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, 1870-71.⁴ In section 13 of Senate Bill No. 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. *See* 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). That same legislation also repealed section 47 of article 6701d, V.T.C.S. *See id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583. However, a Travis County district court has issued a permanent injunction precluding the enforcement of the amendment of section 550.065 of the Transportation Code that was enacted by section 13 of Senate Bill No. 1069. *See Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has determined that the law in effect prior to the passage of Senate Bill No. 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 No. 1069 was section 47 of article 6701d, V.T.C.S.⁵

Subsection (a) of section 47 provides that “[e]xcept as provided by Subsection (b) of this section, all accident reports . . . [are] privileged and for the confidential use of the Department [of Public Safety] and agencies . . . having use for the records for accident prevention purposes.” V.T.C.S. art. 6701d, § 47(a). Subsection (b) of section 47 provides in relevant part:

- (1) 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:

...

⁴Because the repeal of a statute by a code does not affect an amendment of that statute by the same legislature that 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).

⁵In 1997, the Seventy-fifth Legislature enacted Senate Bill No. 898, amending section 550.065 of the Transportation Code to conform to section 47 of article 6701d, as amended by the Seventy-fourth Legislature, and repealing article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49. Although the Seventy-fifth Legislature enacted Senate Bill No. 898 prior to the passage of Senate Bill No. 1069, Senate Bill No. 898 was not made effective until September 1, 1997. *See id.*, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill No. 1069 expressly provides that to the extent of any conflict, Senate Bill No. 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 by the same session of the same legislature, the latest in time prevails. *See* Gov't Code § 311.025(b). Thus, because Senate Bill No. 898 never became 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 No. 1069 regarding the availability of accident report information, rather than section 550.065 of the Transportation Code as amended by Senate Bill No. 898.

(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)(D); *see* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.⁶ Under section 47(b)(1)(D), a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report to a person who provides the law enforcement agency with at least two of the three specified items of information. In this instance, it appears that you have released a copy of the relevant accident report to the requestor's client. However, the requestor has provided the date of the accident and the identity of an individual who was involved in the accident. Therefore, the requestor is entitled to a copy of the accident report under section 47(b)(1)(D) of article on 6701d, Vernon's Texas Civil Statutes.

In summary, (1) the disclosure of the submitted medical record is governed by the Medical Practice Act, subtitle B of title 3 of the Occupations Code; (2) the requestor has the right to obtain a copy of the responsive peace officer's accident report under section 47(b)(1)(D) of article 6701d, Vernon's Texas Civil Statutes; and (3) otherwise, because of the city's failure to comply with section 552.301 of the Government Code in requesting this ruling, the requested information is subject to required public disclosure under section 552.302 and must be released unless there is a compelling reason to withhold any of that information from the public. Because of the requestor's special right of access to information relating to his client, information that otherwise would be confidential under section 552.101 in conjunction with common law privacy is not excepted from disclosure to the requestor. Social security number information relating to an individual other than the requestor's client may be confidential under section 552.101 in conjunction with federal law. Motor vehicle record information relating to an individual other than the requestor's client must be withheld in accordance with section 552.130. Except for any social security number or motor vehicle record information that must be withheld under sections 552.101 and 552.130, the requested information is not excepted from disclosure under the Public Information Act and 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.

⁶We note that the text of amended section 47 of article 6701d, V.T.C.S., is not found either in the Vernon's Revised Civil Statutes or in the Transportation Code. It is published, however, in the 1995 General and Special Laws of the Seventy-fourth Legislature at chapter 894, section 1.

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).

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,



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

JWM/ljp

Ref: ID# 137620

Encl. Submitted documents

cc: Mr. Christopher J. Smitherman
Attorney at Law
1716 Briarcrest Drive, Suite 500
Bryan, Texas 77802
(w/o enclosures)