OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 5, 2003

Mr. Terrence S. Welch
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-5446

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185441.

The Town of Flower Mound (the "town"), which you represent, received a request for a specified internal affairs investigation conducted by the Flower Mound Police Department pertaining to a named officer, a copy of the officer's personnel file, and "any and all complaints ever filed within the last five years concerning [the named officer]." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.1175, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

We begin by noting that part of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

[1] We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The documents submitted as Exhibit 4 include a completed internal affairs investigation. As prescribed by section 552.022, the town must release the investigation unless it is excepted from disclosure under section 552.108 or confidential under other law. Although you raise section 552.103 of the Government Code with respect to the investigation, section 552.103 is a discretionary exception that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the town may not withhold any portion of the completed investigation at issue pursuant to section 552.103 of the Government Code. However, because section 552.022(a)(1) provides that a completed investigation may be withheld under section 552.108, we will address your claim under section 552.108 with respect to the investigation as well as the remaining documents not subject to section 552.022.

Section 552.108 provides in pertinent part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
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> > (1) release of the information would interfere with the detection, investigation or prosecution of crime;
> >
> > . . .
>
> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:
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> > (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

In general, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note, however, that section 552.108 generally does not apply to an internal administrative investigation involving law enforcement officers that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.–Austin 2002, no pet.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.–El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). In this case,

although you indicate that the investigation at issue may involve claims of fraud and perjury, you have not explained, nor do the documents reflect, how the submitted information relates to a criminal investigation. Rather, the documents reflect that the investigation at issue pertains to violations of the administrative regulations and general orders of the Town of Flower Mound Police Department by the named officer and another officer. We therefore determine that the town may not withhold any portion of the submitted information from disclosure pursuant to section 552.108 of the Government Code.

We next address your claim under section 552.103 of the Government Code with respect to the submitted information that is not subject to section 552.022. Section 552.103 provides:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

attorney for a potential opposing party.[2] *See* Open Records Decision No. 555 (1990); *see* also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

While you state that "there are serious questions and issues regarding whether [an officer involved in the investigation] gave inconsistent statements . . . some of which written statements were 'under the penalties of perjury,'" you have failed to establish that criminal litigation related to this investigation was realistically contemplated on or before the date that the town received the present request for information. Consequently, we determine that the town may not withhold any portion of the submitted information under section 552.103 of the Government Code.

We note, however, that the submitted documents contain information that is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. This section encompasses information that is protected from disclosure by other statutes. Section 1703.306 of the Occupations Code provides as follows:

> (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:
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> > (1) the examinee or any other person specifically designated in writing by the examinee;
> >
> > (2) the person that requested the examination;
> >
> > (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

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[2]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

The submitted documents include information acquired from polygraph examinations. None of the exceptions in section 1703.306 apply in this instance. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we have marked the portions of the information that the town must withhold pursuant to section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). This office has also ruled, however, that the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). We have marked personal financial information in the submitted documents that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

We also note that portions of the submitted information are excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We have marked the information that must be withheld under section 552.117(a)(2).[3]

Finally, section 552.130 of the Government Code provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:

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[3] Because we are able to make a determination under section 552.117, we do not reach your claim under section 552.1175 with respect to this information.

> (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
>
> (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked Texas driver's license information and vehicle registration information that must be withheld under section 552.130 of the Government Code.

In summary, the marked polygraph information must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The marked personal financial information must be withheld pursuant to section 552.101 in conjunction with the doctrine of common-law privacy. We have marked information that must be withheld under sections 552.117(a)(2) and 552.130 of the Government Code. The remainder of the submitted information must be released to the requestor.[4]

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

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[4]We note, however, that the submitted documents contain information that is confidential with respect to the general public. *See* Gov't Code § 552.023 (person's authorized representative has special right of access to information that is excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself). Thus, in the event the town receives another request for this information from someone other than this requestor or his client, the town must ask this office for a decision whether the information is subject to public disclosure.

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 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 185441

Enc: Submitted documents

c: Mr. Terry Hickey
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(w/o enclosures)