ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2004

Mr. Ross T. Foster, P.C.
Attorneys at Law
9001 Airport Freeway, Suite 675
Fort Worth, Texas 76180

OR2004-4740

Dear Mr. Foster:

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# 203183..

The City of Collyville (the "city"), which you represent, received a request for various information related to: training materials and sessions provided to the city's Planning and Zoning Commissioners; information related to the title, education and employment history of a named individual; information related to a specific complaint filed with the city's Ethics Commission; and information related to any ethics complaints filed against elected or appointed city officials. You have submitted information related to two specific meetings of the city's Ethics Commission that you claim is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We note that your request for this decision does not address the portions of the request for information relating to training materials and sessions provided to the city's Planning and Zoning Commissioners, information related to the title, education and employment history of the named individual, or information related to any ethics complaints other than the specific one identified in the request. We therefore assume that the city has released information that is responsive to these portions of the request. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000). We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You argue that the submitted information is confidential pursuant to judicial decision and cite *Texas State Board of Examiners in Optometry v. Carp*, 388 S.W.2d 409 (Texas 1965) and *City of Frisco v. Texas Water Rights Commission*, 579 S.W.2d 66 (Tex. Civ. App.–Austin 1979, writ refs'd n.r.e.)

to substantiate this claim. Neither of these decisions determined the confidentiality of any information. *See Carp*, 388 S.W.2d at 414-415 (court determined that, where administrative action is quasi-legislative, its review is limited to determination of questions of law); *City of Frisco*, 579 S.W.2d at 72 (court determined that what individual commissioner may have said or thought in process of arriving at a decision is immaterial to court's determination of whether agency's action is reasonably sustained based on record). Likewise, neither *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) nor *Florida Power and Light Co. v. Lorain*, 470 U.S. 729 (1985), both of which you also cite, determined the confidentiality of any information. Upon review, we determine that the cases you cite do not support your claim that the submitted information is confidential by law. Accordingly, the information cannot be withheld under section 552.101.

We will next address your arguments under section 552.103 for the submitted information. Section 552.103 of the Government Code, the "litigation exception," provides in relevant part:

> (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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> . . .
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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.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

You argue that hearings of the commission are "litigation" for purposes of section 552.103. You state that the city has adopted an Ethics Ordinance (the "ordinance") and appointed an Ethics Commission (the "commission"). You have provided a copy of the ordinance for our

review. You state that one of the duties of the commission is to review complaints, conduct evidentiary hearings and make decisions regarding whether individuals who are covered by the ordinance have violated its provisions. The commission has adopted Rules of Procedure (the "rules"), which you have also provided this office for review. You advise that, in response to the specific ethics complaint that is the subject of the instant request for information, the commission has convened on two occasions to hear evidence, and that the evidentiary proceedings have not concluded. Therefore, the commission has not yet rendered a decision regarding the alleged violations of the ordinance. The question is whether these proceedings amount to "litigation" for purposes of section 552.103.

This office has held that "litigation" within section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.,* Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, are "litigation" for purposes of section 552.103. *See, e.g.,* Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You argue that the submitted information relates to the decision making process of the commissioners and that, therefore, it is not subject to disclosure prior to the completion of the proceedings. The ordinance and rules reflect that evidence is heard, that the parties can be represented by counsel, and that the commission must state its findings in writing. However, the ordinance does not reflect and you do not advise that a record is made. Further, the rules contain no provisions for a discovery process. Section 552.103 enables a governmental entity to protect its position in litigation by requiring opposing parties to use the discovery process to obtain information relating to the litigation.[1] *See* Open Records Decision No. 588 (1991). When a contested case is heard in a quasi-judicial forum, discovery takes place and the evidence is presented at the administrative level. *Id.* See V.T.C.S. art. 6252-13a § 14a (discovery under Administrative Procedure and Texas Register Act is

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[1]It is not clear to this office that the city is a party to the proceedings conducted by the commission as contemplated by section 552.103(a). In Open Records Decision No. 301 (1982), which you cite, the Attorney General determined that, while the state of Texas was not actually a "party" to an ex parte request by a major telecommunications provider for a rate increase, the staff of the Public Utilities Commission did serve in an adversarial role during the hearing. Similarly, in Open Records Decision No. 368 (1983), which you also cite, this office determined that the state clearly is a party in a license revocation or cancellation hearing of an insurance agent's license. The commission's role, however, appears to be one of a neutral tribunal charged with deciding a controversy involving adverse parties other than the city.

"subject to limitations of the kind provided for discovery under the Rules of Civil Procedure"). The submitted rules, however, state that "[t]he Rules of Evidence shall not be strictly adhered to." When considered in totality, we find that the proceedings conducted by the commission are informal in nature and are not, therefore, conducted in a quasi-judicial forum for purposes of section 552.103. Accordingly, the city must release the submitted information to the requestor.

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).

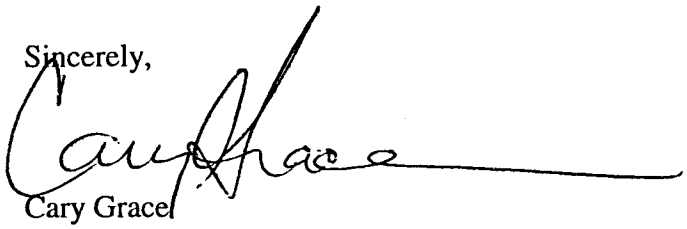
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/krl

Ref: ID# 203183

Enc. Submitted documents

c: Mr. Jody Boyd
c/o Ross T. Foster, P.C.
(w/o enclosures)