Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 20, 1996

Mr. Terence S. Welch
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main Street, Suite 4400
Dallas, Texas 75201

OR96-1722

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# 100737.

The Town of Flower Mound (the "town"), which you represent, received two requests for the probable cause affidavit and arrest warrant for the arrest of Mary Elizabeth Womack. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The town 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 is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The town must meet both prongs of this test for information to be excepted under section 552.103(a).

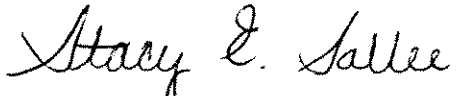
You assert that the requested information relates to pending litigation, *Teague v. City of Flower Mound*, Cause No. 396CV1068-P, in the United States District Court for the Northern District of Texas. We have reviewed the complaint in that case and agree that the requested information relates to the pending lawsuit. However, you state that the opposing parties have obtained copies of the requested documents. In situations in which the opposing parties in the litigation have seen or had access to requested information, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we

conclude that the town may not withhold the requested information based on section 552.103.[1]

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n 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." Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). These documents have been filed with the court in a civil lawsuit. Consequently, these documents have become part of the public record and may not be withheld under section 552.108. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 100737

Enclosures: Submitted documents

cc: Ms. Mary E. Estrello
(w/o enclosures)

Mr. Greg A. Jones
(w/o enclosures)

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[1] You inform us that you believe that the requested documents were improperly removed from the town's police department. Ordinarily, a governmental waives a discretionary exception to disclosure by releasing requested information. *See* Gov't Code § 552.007 (prohibiting selective disclosure of requested information). However, where, as here, a release was through no official action and against the governmental body's wishes and policy, we do not believe the Open Records Act precludes a governmental body from invoking an exception to disclosure. *See* Open Records Decision No. 387 (1983). Thus, we do not believe the town waived section 552.103, but under the facts presented to us the exception is not applicable.