



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

July 9, 2003

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

OR2003-4739

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# 183999.

The Town of Flower Mound (the "town"), which you represent, received one request for a variety of information pertaining to a specified complaint filed against the requestor. The town received another request from the same requestor for the requestor's personnel file. You state that you have provided the requestor with some responsive information. You also state that some responsive information does not exist.<sup>1</sup> You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Section 552.301(e) requires that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested, or representative samples of it if a voluminous amount was requested, labeled to indicate which exceptions to disclosure apply to which parts of the copy. *See* Gov't Code § 552.301(e). You acknowledge that a responsive audiotape of the requestor's conversations with a

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. -San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

Lieutenant Mitchell of the town's police department exists that was not submitted to us for our review. In addition, you acknowledge that a responsive videotape of the requestor's conversations with a Bill Parker of Parker-Jones, Inc. exists that was also not submitted to us for our review. Further, we note that, although you claim that the entirety of the remaining requested information is excepted from disclosure, you have not submitted to us for our review to date any documentation that exists concerning Mr. Parker's opinion about his interview with the requestor or any transcription that exists concerning the requestor's conversations with Mr. Parker. Therefore, we find that the town failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us with respect to all of this particular information.

Because the town failed to comply with the procedural requirements of section 552.301, the information at issue that has not been submitted to us for our review is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The town must demonstrate a compelling interest in order to overcome the presumption that this particular information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the town claims that the information that has not been submitted to us for our review is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this particular exception to disclosure is a discretionary exception to disclosure under the Public Information Act that does not constitute a compelling interest that is sufficient to overcome the presumption that this particular information is now public.<sup>2</sup> Further, we note that, although the town claims that this particular information is also excepted from disclosure pursuant to section 552.108 of the Government Code, the town in this instance has not demonstrated a compelling interest under this exception to disclosure that would allow any portion of this particular information to be withheld from disclosure. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108 in certain circumstances). Accordingly, we conclude that the town may not withhold any portion of this particular information under sections 552.103 or 552.108 of the Government Code. Consequently, the town must release to the requestor the information that has not been submitted to us for our review.

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

We now address your claims regarding the submitted information. 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.
- (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.
- (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. The town maintains the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the government body receives the request and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The town must meet both prongs of this test for information to be excepted under 552.103.

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.<sup>3</sup> *See* Open Records Decision No. 555 (1990); *see*

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<sup>3</sup>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

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).

You state that there are “serious questions and issues regarding whether [the requestor] gave inconsistent statements, some of which were ‘under the penalties of perjury,’ to fraud investigators for Chase and which may have clearly conflicted with her statements to departmental personnel. *If that is determined to be the case after additional investigation*, then it is clear that criminal prosecution may result.” (Emphasis added.) You also note that the internal affairs investigation into the requestor’s alleged conduct “is not complete and additional investigation may reveal new information.” After carefully reviewing the entirety of your arguments and the submitted information, we find that the town has failed to adequately establish that criminal litigation was realistically contemplated against the requestor on or before the date that the town received these requests for information. Accordingly, we conclude that the town may not withhold any portion of the submitted information under section 552.103 of the Government Code.

Section 552.108(a)(1) provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if release of the information would interfere with the detection, investigation, or prosecution of crime. *See* Gov’t Code § 552.108(a)(1). Section 552.108(b)(1) provides that 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 disclosure if release of the internal record or notation would interfere with law enforcement or prosecution. *See* Gov’t Code § 552.108(b)(1). Generally, a governmental body claiming subsections 552.108(a)(1) and (b)(1) as an exception to disclosure of requested information must demonstrate, 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 or prosecution. *See* Gov’t Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

Although you contend that the submitted information consists of law enforcement agency records the release of which would interfere with the detection, investigation, and/or prosecution of crime, we note that the information consists of records of an ongoing internal affairs investigation that is being conducted by the town’s police department. You do not argue, nor does it appear, that this investigation has resulted in any criminal investigation into the alleged conduct of requestor. Therefore, we have no basis for concluding that the submitted information is excepted from disclosure under subsections 552.108(a)(1) or (b)(1) of the Government Code. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); *see also* Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to Internal Affairs Division investigation file when no criminal charge against

officer results from investigation of complaint against police officer). Accordingly, we conclude that the town may not withhold any portion of the submitted information under section 552.108 of the Government Code.

We note, however, that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.<sup>4</sup> Section 1703.306 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:

- (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;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. We have marked the portions of the submitted information which constitute information acquired from polygraph examinations. It does not appear that any of the exceptions in section 1703.306 apply in this instance. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, we conclude that the town must withhold this marked information pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

In addition, we note that portions of the submitted information are excepted from disclosure pursuant to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer, or that reveals whether the peace officer has family members. *See* Gov't Code § 552.117(a)(2). Accordingly, we conclude that the town must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code.

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<sup>4</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

In summary, the town must release to the requestor the information that has not been submitted to us for our review. The town must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The town must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code. The town must release the remaining 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).

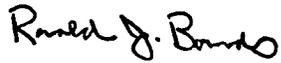
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 183999

Enc. Marked documents

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