ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2005

Mr. Bryan P. Fowler
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OR2005-09681

Dear Mr. Fowler:

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# 234942.

The City of Montgomery (the "city"), which you represent, received a request for the personnel records of a particular police officer. You state that you will release some of the information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address the city's arguments regarding a complaint filed against the officer in question and the officer's disciplinary ledger. The city claims section 552.103 of the Government Code excepts the information. Section 552.103 provides as follows:

> (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.
>
> . . .

> (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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. 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 met in order for information to be excepted from disclosure under section 552.103. *Id.*

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.[1] Open Records Decision No. 555 (1990); *see* 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 a terminated police officer has hired an attorney who has threatened litigation as a result of the termination. Based on this representation, we conclude that litigation was anticipated at the time the city received the request for information. However, you have not explained how the complaint and disciplinary ledger at issue relate to the anticipated litigation. As such, you have not met your burden under section 552.103. Thus, the complaint and disciplinary ledger may not be withheld under this exception.

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[1]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).

The city also claims that section 552.108 of the Government Code excepts the complaint and disciplinary ledger. Section 552.108 provides, in part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

Gov't Code § 552.108(a)(1), (a)(2). The purpose of section 552.108 is to prevent certain law enforcement investigations and crime prevention techniques from being readily available to the public at large. It is not a catch-all provision that law enforcement agencies may use to protect certain personnel matters from disclosure. *See* Open Records Decision Nos. 133 (1976), 127 (1976); *see also 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). The complaint and disciplinary ledger concern administrative matters that only indirectly relate to law enforcement. Since the matter at issue did not result in a criminal investigation of the officer's conduct, we conclude that the city may not withhold the complaint and disciplinary ledger under section 552.108. *See* Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to internal affairs investigation of when no criminal charge against officer results from investigation of complaint against officer).

The city also claims section 552.102 for the complaint and disciplinary ledger, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Therefore, information must be withheld from the public 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. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The complaint and disciplinary ledger relate solely to the work behavior and job performance of a city employee, and, as such, cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not

generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Therefore, based on our review of the information, we conclude that the complaint and disciplinary ledger are not protected from disclosure under common law privacy, and the city may not withhold the complaint and disciplinary ledger on this basis.

We now address your remaining exceptions for the personnel file in its entirety, including the complaint and disciplinary ledger. Initially, you acknowledge that some of the submitted documents in Exhibit B are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. This section encompasses information protected by other statutes. Section 159.002 of the MPA provides:

> (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.
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> (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(a)-(c). Section 159.002(c) requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus the medical records in Exhibit B may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Exhibit B also contains fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information to the requestor. Therefore, the city must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

We note that Exhibit B also contains information that is excepted from disclosure pursuant to section 552.101 in conjunction with section 411.192 of the Government Code, which governs the release of all information maintained by DPS concerning the licensure of individuals to carry a concealed handgun. Section 411.192 provides:

> [DPS] shall disclose to a criminal justice agency information contained in its files and records regarding whether a named individual or any individual named in a specified list is licensed under this subchapter. [DPS] shall, on written request and payment of a reasonable fee to cover costs of copying, disclose to any other individual whether a named individual or any individual whose full name is listed on a specified written list is licensed under this subchapter. Information on an individual subject to disclosure under this section includes the individual's name, date of birth, gender, race, and zip code. Except as otherwise provided by this section and by Section 411.193, all other records maintained under this subchapter are confidential and are not subject to mandatory disclosure under the open records law, Chapter 552, Government Code, except that the applicant or license holder may be furnished a copy of disclosable records on request and the payment of a reasonable fee.

Gov't Code § 411.192. The submitted records contain information concerning an individual's concealed handgun license. Because section 411.192 makes this information confidential, we conclude that the city must withhold the information we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code.

Exhibit B also contains a Report of Separation of License Holder (F-5) which is made confidential by section 1701.454 of the Occupations Code. Section 1701.454 provides in relevant part:

> (a) A report or statement submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552 of the Government Code.

Occ. Code § 1701.454. The city must withhold the F-5 forms, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code.

We note that the submitted information contains medical and personal financial information. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs,

illnesses, operations, and physical handicaps). We have marked medical information that the city must withhold under section 552.101 in conjunction with common law privacy.

Additionally, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common law privacy. *See, e.g.,* Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common law privacy. *See* Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common law privacy). We cannot determine if some personal financial information involves the employee in a transaction with the governmental body. Thus to the extent that the financial transaction is funded in part by a governmental body, the information is not excepted under common law privacy. However, if the information is a personal investment decision that does not involve the employee in a transaction with the governmental body, the information is confidential pursuant to section 552.101 and common law privacy. We have marked the information accordingly.

The submitted records also contain information you claim is excepted from disclosure under section 552.117(a)(2). Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.[2] However, information regarding a former spouse generally does not reveal family member information. We have marked the information that must be withheld under section 552.117(a)(2).

We note that the personal references in the officer's application may be excepted under section 552.1175 of the Government Code, which provides, in relevant part:

> (b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:
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> (1) chooses to restrict public access to the information; and

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[2]"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

> (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(b). The personal references in the officer's application contain the home telephone numbers and home addresses of peace officers who do not work for the city. If these individuals are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b), the city must withhold the information we have marked under section 552.1175. If the city does not receive the appropriate elections, this information must be released.

Section 552.119 of the Government Code provides:

> (a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:
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> > (1) the officer is under indictment or charged with an offense by information;
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> > (2) the officer is a party in a civil service hearing or a case in arbitration; or
> >
> > (3) the photograph is introduced as evidence in a judicial proceeding.
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> (b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119.[3] In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photographs would endanger the life or physical safety of the officer depicted. We therefore determine that the city may not withhold the submitted photographs pursuant to section 552.119 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130 of the Government Code, the city must withhold the Texas motor vehicle record information we have marked.

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[3]As amended by Act of April 22, 2005, 79th Leg., R.S., S.B. 148, ch. 8, § 1, 2005 Tex. Sess. Law Serv. (Vernon).

The submitted information also contains insurance policy and bank account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The city must, therefore, withhold the insurance policy and bank account numbers we have marked under section 552.136.

We note that section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses we have marked do not appear to be of a type specifically excluded by section 552.137(c). In addition, you do not inform us that the city has received consent for the release of the e-mail addresses at issue. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

We note that Exhibit A contains military discharge information. Section 552.140 of the Government Code provides in relevant part:

> (a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See* Gov't Code § 552.140(a), (b). You do not indicate when the city first came into possession of the submitted DD-214 form. Therefore, if this form came into the city's possession on or after September 1, 2003, we conclude that the city must withhold this information under section 552.140. Otherwise, the form must be released, subject to the markings we have made under section 552.117(a)(2).

In summary: 1) the medical records in Exhibit B may be released only as provided under the MPA; 2) the city must withhold the fingerprint information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code; 3) the city must withhold the concealed handgun information we have marked pursuant to section 552.101 in conjunction with section 411.192 of the Government Code; 4) the city must withhold the F-5 forms, which we have marked pursuant to section 552.101 of the

Government Code in conjunction with section 1701.454 of the Occupations Code; 5) the city must withhold the medical information we have marked under section 552.101 on the basis of common law privacy; 6) to the extent that the financial information, which we have marked, is funded in part by a governmental body, the information is not excepted under common law privacy. However, if the information is a personal investment decision that does not involve the employee in a transaction with the governmental body, the information is confidential pursuant to section 552.101 and common law privacy; 7) we have marked the information that must be withheld under section 552.117(a)(2); 8) the home telephone numbers and home addresses for peace officers listed as personal references may be subject to section 552.1175; 9) the city must withhold the Texas motor vehicle record information we have marked; 10) the city must withhold the insurance policy and bank account numbers we have marked under section 552.136; 11) the city must withhold the e-mail addresses we have marked under section 552.137; 12) if the DD-214 form came into the city's possession on or after September 1, 2003, the city must withhold this information under section 552.140. Otherwise, the form must be released, subject to the markings we have made under section 552.117(a)(2). The remaining information must be released 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

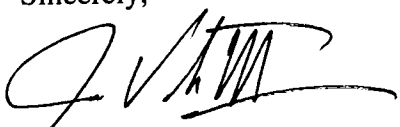
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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 Office of the Attorney General 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. 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,



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Enc. Submitted documents

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