ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2007

Mr. David Weaver
General Counsel
Texas State Securities Board
P.O. Box 13167
Austin, Texas 78711-3167

OR2007-12899

Dear Mr. Weaver:

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# 290746.

The Texas State Securities Board (the "board") received a request for information pertaining to a specified former employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we note that the information in Tab B includes completed employee performance evaluations. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You claim that the information in Tab B is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a

[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.

discretionary exception under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Morning News*, 4 S.W.3d at 475-76 (section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, the board may not withhold the evaluations, which we have marked, under section 552.103.

We now turn to your argument under section 552.103 for the remaining information in Tab B, which is not subject to section 552.022. 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.
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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). 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. *Univ. of Tex. Law Sch. v. Tex. 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 section 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. 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. 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that the remaining information in Tab B relates to pending litigation involving the board. You do not indicate, however, that any such litigation was pending on the date the board received this request for information. Furthermore, we find you have not demonstrated that the board reasonably anticipated litigation on the date it received the request for information. Accordingly, the board may not withhold the remaining information in Tab B under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. Article 581-28 of the Texas Securities Act provides in relevant part:

> Art. 581-28. Investigations, Investigatory Materials, and Registration Related Materials
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> . . .
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> B. Confidentiality of Certain Registration-Related and Other Materials. To the extent not already provided for by this Act, any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations shall be treated as confidential by the Commissioner and shall not be disclosed to the public, except under order of court, for good cause shown. The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

V.T.C.S. art. 581-28 (B). You contend that the information in Tab C, which consists of a memorandum outlining the tasks the former employee was to complete at home, is confidential under article 581-28(B). However, article 581-28 is entitled "Investigations, Investigatory Materials, and Registration Related Materials." We further note that article 581-28(A) is entitled "Investigations by Commissioner," while article 581–28(B) is entitled "Confidentiality of Certain Registration-Related and Other Materials." In construing article 581-28(B), we must give effect to the legislature's intent. *See* Gov't

Code §§ 311.021, 311.023; *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To do so, we must construe it according to its plain language. *See In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985). But we must also consider it in the broader context of article 581-28 and the Texas Securities Act as a whole. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("We must always consider the statute as a whole rather than its isolated provisions . . . . We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."); *see also* Gov't Code § 311.011(a) (words and phrases to be read in context). In addition, we note that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Tex. Gov't Code Ann. § 311.011(b).

Upon review of the Texas Securities Act as a whole and the headings and purpose of article 581-28 in particular, we find that you have failed to demonstrate how the information in Tab C constitutes intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations for purposes of article 581–28(B). *See* House Committee on Pensions and Investment, Bill Analysis, H.B. 1295, 74th Leg. (1995) (amendments to section 28, Texas Securities Act, article 581-28, concern investigations, investigatory materials, and registration-related materials). Accordingly, none of the information in Tab C is confidential under article 581-28(B), and the board may not withhold any portion of it under section 552.101 of the Government Code on that ground.

Section 552.101 of the Government Code also encompasses the common-law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information that pertains to an employee's actions as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in

knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village, Texas,* 765 F.2d 490 (5th Cir. 1985).

You assert that release of the submitted information may implicate the privacy interests of the former employee. Upon review of your arguments and the information at issue, we conclude that none of the submitted information constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Furthermore, the board has failed to demonstrate how any of the submitted information falls within the "zones of privacy" or implicates the former employee's privacy interests for the purposes of constitutional privacy. Therefore, no portion of the submitted information may be withheld under section 552.101 in conjunction with either common-law or constitutional privacy.

We note that section 552.117 of the Government Code may be applicable to some of the submitted information.[2] Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the board may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. If the former employee at issue timely elected to keep her personal information confidential, the board must withhold the information we have marked in Tab B under section 552.117(a)(1). The board may not withhold this information under section 552.117 if this former employee did not make a timely election to keep the information confidential.

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.136 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(b). The board must withhold the account numbers we have marked in Tab D under section 552.136 of the Government Code.

In summary, the board must withhold the information that we have marked in Tab B under section 552.117(a)(1) of the Government Code, if the former employee at issue timely elected to keep her personal information confidential. The board must withhold the information we have marked in Tab D under section 552.136 of the Government Code. The remaining submitted 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).

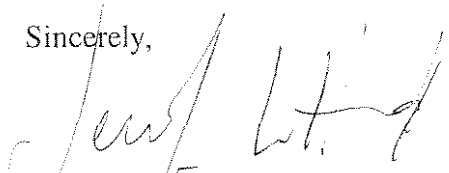
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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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