ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Ms. Debra A. Drayovitch
For City of Corinth
Drayovitch, P.C.
620 West Hickory Street
Denton, Texas 76201

OR2011-17453

Dear Ms. Drayovitch:

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# 437156.

The Corinth Police Department (the "department"), which you represent, received two requests for information related to internal affairs investigations 2010-003 and 2011-003.[1] You state the department will release some of the information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.119 of the Government Code.[2] You also state you have notified a third party who might have an interest in the submitted information.[3] *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue

[1]We note the department received clarification pertaining to the second request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

[2]We note the department has withdrawn its claim under section 552.107 of the Government Code.

[3]As of the date of this letter, we have not received comments from any interested third party.

should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note internal affairs investigation 2010-003 is a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a) provides:

> Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by 552.108[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary in nature and does not make information confidential under the Act. *Id.* §§ 3-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *see 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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold internal affairs investigation 2010-003 under section 552.103 of the Government Code. However, you also raise sections 552.101, 552.117, and 552.119 of the Government Code for this information. These sections make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 9 (to be codified as an amendment to Gov't Code § 552.117) (providing for "confidentiality" of information under section 552.117), 11 (to be codified as an amendment to Gov't Code § 552.119) (providing for "confidentiality" of information under section 552.119). Therefore, we will consider your arguments under sections 552.101, 552.117, and 552.119 of the Government Code for this information. We note this investigation also contains information subject to section 552.130 of the Government, which makes information confidential for purposes of section 552.022. *Id.* § 21 (to be codified as an amendment to Gov't Code § 552.130) (providing for "confidentiality" of information under section 552.130). Therefore, we will consider the applicability of section 552.130 to this information.[4] We also will consider section 552.103 for the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides:

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

> (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 to show 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 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). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, a governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You state the department anticipates litigation because the requestor's employment was terminated, he has hired an attorney, and the attorney has notified the department that the requestor intends to pursue an administrative appeal of his termination. However, we note the department received the requests for information on September 2, 2011, and September 7, 2011. The submitted information indicates the requestor was not terminated until September 15, 2011, and the department did not receive notice from the requestor's attorney until September 19, 2011. Accordingly, we find the department has not demonstrated it anticipated litigation on the date it received the requests. We further find the department has not demonstrated how the internal affairs investigation at issue pertains to the requestor's termination. Thus, we find the department may not withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection,

investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.— El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). Upon review, we find you have not demonstrated the applicability of section 552.108(a)(1) to the submitted information. Thus, the department may not withhold the information at issue under section 552.108(a)(1) of the Government Code.

You seek to withhold the entirety of the submitted video recordings under section 552.119 of the Government Code, which 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;
> >
> > (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. Under section 552.119, a governmental body must demonstrate, if the information does not demonstrate on its face, that release of the photograph would endanger the life or physical safety of a peace officer. Upon review, we find you have failed to demonstrate how the release of the videos at issue would endanger the lives or physical safety of the officers. Therefore, the department may not withhold this information under section 552.119 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." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication

of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, this office has also found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate concern to the public. The department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the public has a legitimate interest in the remaining information you have marked. Accordingly, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy

You also raise section 552.102 of the Government Code in conjunction with the common-law privacy test, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has disagreed with *Hubert*'s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at 5 (Tex. Dec. 3, 2010). Thus, we conclude the remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code.[5] Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). The department generally must withhold the personal information we have indicated under section 552.117(a)(2) of the Government Code. However, we note one of the individuals whose information is at issue is no longer employed by the department. If this person is no longer a peace officer, as that term is defined, then the department may not withhold the

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

information pertaining to him under section 552.117(a)(2) of the Government Code. Notwithstanding the applicability of section 552.117(a)(2), this individual's information is subject to section 552.117(a)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code §552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. You state the former employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code. Therefore, if this former employee is no longer a peace officer, then the department must withhold the information we have indicated that pertains to him under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country and information related to a motor vehicle title or registration issued by an agency of this state or another state or country. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Accordingly, the department must withhold the information we have marked under section 552.130 of the Government Code.[6]

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose personal information is at issue are currently licensed peace officers, the department must withhold the information we have indicated under section 552.117(a)(2) of the Government Code. However, if the former employee is no longer a peace officer, then the department must withhold the information pertaining to him under section 552.117(a)(1) of the Government Code. The department must withhold the

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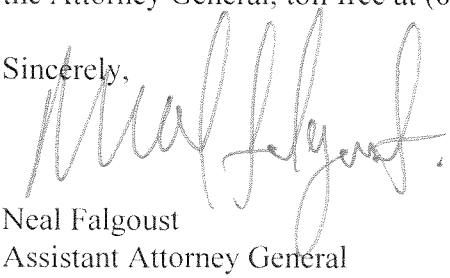
[6]We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas license plate numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

information we have marked under section 552.130 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 437156

Enc. Submitted documents

c: Requestor
(w/o enclosures)