Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 15, 1997

Mr. Herbert L. Prouty
City Attorney
Mr. Jerry E. Drake, Jr.
Assistant City Attorney
City of Denton
Municipal Building
Denton, Texas 76201

OR97-2049

Dear Messrs. Prouty and Drake:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108415.

The City of Denton (the "city") received a request for a variety of information pertaining to the requestor's client and the client's family, and information concerning a former Denton Police Department (the "department") officer. You state that some of the requested information has been released, however, you claim the remaining responsive records, submitted as Exhibits 11-15, are excepted from disclosure pursuant to sections 552.101, 552.102, 552.103, 552.108, 552.117, and 552.119 of the Government Code.[1] We have considered the exceptions and arguments you have raised and have reviewed the submitted information.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides:

> The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

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[1]We note that in your brief to our office, you only made references to sections 552.102, 552.117, and 552.119 in a footnote without further explanation. We have addressed these claimed exceptions to the extent they apply to the submitted information.

> (1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and
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> (2) except as otherwise provided in this section, *the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.* [Emphasis added.]

You have not informed this office of any rules the city has adopted that would permit access to the requested records. Because the information at issue pertains to an investigation of sexual assault of a child, this office concludes that the city must withhold such records, in their entirety pursuant to section 261.201 of the Family Code. *See* Gov't Code § 552.352 (section 552.352 imposes criminal penalties for release of confidential information). Therefore, to the extent the submitted records, Exhibits 11-14, relate to an investigation of sexual assault of a child, you must withhold those records in their entirety.[2] As for the remaining records, we will consider the other applicable exceptions.

As for Exhibit 15, relating to former officer Jimmy Brown, we note that Denton is a civil service city and its police department records are subject to the provisions of section 143.089 of the Local Government Code.[3] Section 143.089 works in conjunction with section 552.101 of the Government Code. Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g). Section 143.089(g) provides:

> A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

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[2]As we resolve this matter under section 261.201 of the Family Code, we need not specifically address your section 552.108 claim against disclosure for Exhibits 11-14.

[3]We note that in your brief to our office, you state that the documents in Exhibit 9 "have been blacked out to protect" confidential information. In reviewing your submissions, we did not find any responsive records labeled as Exhibit 9, however, Exhibit 15 did contain the records to which you appear to be referring in your letter to our office.

In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in an internal file maintained by the city police department for its own use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949. However, in cases in which a police department takes disciplinary action against a police officer, section 143.089(a)(2) mandates that documents relating to "any misconduct by the fire fighter or police officer" must be placed in a police officer's civil service file "if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter." Since you have asserted that only the information subject to § 143.089(a) has been submitted, we note that such records may not be withheld under section 552.101 of the Act; therefore, we will address your other arguments. Local Gov't Code § 143.089(f); Open Records Decision No. 562 (1990) at 6.

We next address whether any of the information in Exhibit 15, which is part of the section 143.089(a) file, must be withheld under sections 552.101 and 552.102 of the Government Code. Section 552.101 encompasses the common-law right to privacy. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 and section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

We note that there is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow). Thus to the extent the submitted information in Exhibit 15 relates to a public employee's job performance, we conclude that the public has a legitimate right to this information.

We note that section 552.117 applies to some of the submitted information. Section 552.117 of the Government Code excepts from disclosure:

> Information . . . that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:
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> (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024; or

> (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code.

In accordance with section 552.117(2), the city must withhold from disclosure peace officers' home addresses and telephone numbers, social security numbers, and any information that reveals whether the officer has family members. Pursuant to section 552.117(1), the city must also withhold this information for any current or former official or employee who, before the request for information was received, requested pursuant to section 552.024 of the Government Code that this information be kept confidential. *See* Open Records Decision No. 530 (1989) at 5 (whether particular piece of information is public must be determined at time request for it is made). Additionally, we note that social security numbers obtained or maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990 are confidential pursuant to the 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994).

You have also raised section 552.119 as an applicable exception, since the records may contain a copy of the former officer's photograph. Section 552.119(a) of the Government Code excepts from required public disclosure "a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure," with certain exceptions that do not appear relevant here. A photograph that depicts a peace officer may be released only if the peace officer gives written consent to the disclosure. Gov't Code § 552.119(b). Thus, unless the officer has give his written consent, you must withhold any photograph of the officer contained in the information. However, we note that in our review of the submitted records we did not find any information subject to section 552.119 of the Government Code.

We now address your claim pursuant section 552.103 of the Government Code. 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 city 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 city 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 (1986) at 4. 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.[4] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you state that litigation is reasonably anticipated, as a consequence of an investigation of an incident, which occurred on or about May 7, 1996. You have supplied to this office a claim letter, dated June 5, 1996, from an individual who is the parent of a party to the incident at issue. However, it does not appear at this time that an attorney has threatened the city with a lawsuit, nor have you provided any concrete evidence to support a claim that litigation is reasonably anticipated. *See* Open Records Decision Nos. 361 (1983), 346 (1982). We conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated. Therefore, you may not rely on section 552.103 to withhold any of the submitted information from the requestor.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Sam Haddad
Assistant Attorney General
Open Records Division

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Ref.: ID# 108415

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[4]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

Enclosures: Submitted documents

cc: Mr. Randall S. Boyd
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(w/o enclosures)