



November 1, 1999

Mr. David M. Berman  
Nichols, Jackson, Dillard, Hager & Smith, LLP  
1800 Lincoln Plaza  
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Dallas, Texas 75201

OR99-3052

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129348.

The City of Melissa (the "city"), which you represent, received two requests, both for the personnel file regarding Paul Gaumond, a former city marshal, and for documents pertaining to a report generated by a consultant hired by the city to evaluate the city Marshal Department. You state that you have made the requested personnel file available to the requesters.<sup>1</sup> However, you claim that the requested consultant report and related documents are excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information in personnel files only if it meets the test articulated under section 552.101<sup>2</sup> for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

For information to be protected from public disclosure by the common-law right to privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) it is highly intimate or embarrassing such that its release would be highly

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<sup>1</sup>We assume that the documents you have made available to Mr. Hilburn of the "McKinney Courier-Gazette" include information responsive to his request for the list of state-approved classes that Mr. Gaumond attended during his employment with the city.

<sup>2</sup>Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *Id.* at 685. We have consistently held that the public has a legitimate interest in the job performance of public employees. *See* Open Records Decision Nos. 473 (1987), 470 (1987). Because the documents at issue concern the on-the-job conduct of a former city marshal, the public has a legitimate interest in these documents and they are not protected by the common-law right to privacy. Therefore, the city may not withhold these documents from disclosure under section 552.102 based on a right to privacy.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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). 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 with "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> 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). Nor does the mere fact that an individual hires an attorney and alleges damages establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You claim that litigation surrounding Mr. Gaumond's termination is reasonably anticipated due to the content of the request letter written by Mr. Gaumond's attorney. You argue that the letter "artfully omits" a specific threat of litigation, and that the letter itself serves to

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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 Records Decision No. 288 (1981).

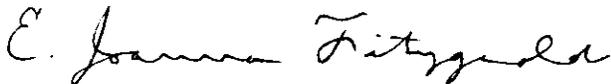
satisfy an administrative exhaustion requirement as a means of proceeding to litigation. However, we cannot overlook the fact that the letter contains no threat of litigation. *See* Open Records Decision No. 361 at 2 (1983). Therefore, we conclude that you have failed to meet the requisite showing that litigation is reasonably anticipated and accordingly, you must release the information at issue to the extent that the information is not confidential by law.

We note that one of the submitted documents contains a driver's license number. Section 552.130 excepts 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. Therefore, you must withhold the driver's license number. We have marked the document where the driver's license number appears.

Furthermore, the submitted documents contain social security numbers. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception applies to confidentiality provisions such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). This provision makes social security numbers confidential if they are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Therefore, if the social security number contained in the document meets the criteria of section 405(c)(2)(C)(viii)(I), it is confidential under this provision as encompassed by section 552.101. We have marked the documents that contain the social security numbers.

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.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF\ch

Ref: ID# 129348

Encl: Submitted documents

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