ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2011

Ms. Caroline Kelley
City Attorney
City of Missouri City
1522 Texas Parkway
Missouri City, Texas 77489

OR2011-17267

Dear Ms. Kelley:

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# 436730.

The City of Missouri City (the "city") received a request for a copy of a named police officer's personnel file. You state the city has released some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.119, 552.122, and 552.137 of the Government Code. You also inform us release of some of the submitted information may implicate the proprietary interests of Creative Leadership Center ("Creative"). Accordingly, you notified Creative of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Creative has not submitted comments to this office explaining why any of the information submitted by the city should not be released. Therefore, we have no basis to conclude Creative has a protected proprietary

interest in this information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information based upon the proprietary interests of Creative.

Next, we address your claim under section 552.103 of the Government Code for the information in Exhibit B. Section 552.103 of the Government Code provides in part 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). The 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). The 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, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert Exhibit B is excepted from disclosure under section 552.103. You provide two letters the city received from an attorney who represents the named officer in connection with his termination from the city's police department (the "department"). One of these letters states that the facts concerning this officer's termination "will certainly give rise to contentious and expensive litigation" unless the city agrees to meet with the attorney and the officer to resolve the matter. In addition, the attorney requests in the second letter that the city and department take all steps necessary to ensure the preservation of evidence relevant to the officer's termination. Both of the letters were received by the city prior to the city's receipt of the instant request for information. Based on your representations and our review, we conclude the city has established that litigation was reasonably anticipated when the city received the request. Furthermore, we agree the information in Exhibit B is related to the anticipated litigation. Accordingly, we find the city may generally withhold Exhibit B under section 552.103.

However, the opposing party in the anticipated litigation may have seen or had access to some of the information in Exhibit B. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to may not be withheld under section 552.103. Therefore, to the extent the opposing party has seen or had access to any of the information in Exhibit B, the city must release it. If the opposing party has not seen or had access to this information, the city may withhold it under section 552.103. We note, however, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

You raise section 552.122(b) of the Government Code for the information in Exhibit D. Section 552.122 excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.*

at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). You state the sergeant candidate questionnaire and the assessment hiring report in Exhibit D are used to assess applicants of the department. You also state the department may use the same or similar questions to evaluate future applicants and release of this information may compromise the effectiveness of future examinations and assessments. Upon review, we agree the portions of the sergeant candidate questionnaire we have marked evaluate an individual's knowledge or ability in a particular area and, thus, qualify as test items under section 552.122(b). Therefore, the city may withhold this information in Exhibit D under section 552.122(b). However, we conclude the remaining information in Exhibit D only evaluates an applicant's overall suitability for employment and does not test the specific knowledge of an applicant in a particular area. Thus, none of the remaining information in Exhibit D may be withheld under section 552.122(b).

You assert the photographs in Exhibit F are excepted from disclosure under section 552.119 of the Government Code. Section 552.119 provides the following:

> (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
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> > (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 documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. You state there is a possibility that the peace officers whose images are portrayed in the group photographs at issue could perform undercover work. Thus, you claim release of these photographs could endanger such officers. Based on your representations and our review, we find you have not explained how release of the photographs at issue would endanger the officers' lives or physical safety at this time. Accordingly, we conclude the city has failed to demonstrate how the release of this

information would endanger the life or physical safety of the officers at issue. Therefore, the photographs in Exhibit F may not be withheld under section 552.119.

You raise section 552.137 of the Government Code for the e-mail addresses in Exhibit G. Section 552.137 states "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. You state the owners of the e-mail addresses you have marked have not affirmatively consented to the release of this information. Upon review, we agree that some of the e-mail addresses at issue, which we have marked, are confidential and must be withheld under section 552.137. However, the remaining e-mail addresses you marked are maintained by governmental entities for their officials or employees. Accordingly, none of these e-mail addresses may be withheld under section 552.137.

You assert the information in Exhibit H is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides, in pertinent part, the following:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
>
> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
> >
> > (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]
> >
> > . . .
>
> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:
>
> > (1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]
> >
> > (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Id. § 552.108(a)(1)-(2), (b)(1)-(2). Subsections 552.108(a)(1) and 552.108(b)(1) are mutually exclusive of subsections 552.108(a)(2) and 552.108(b)(2). Subsection 52.108(a)(1) protects information, the release of which would interfere with a particular pending criminal investigation or prosecution, while subsection 552.108(b)(1) encompasses internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. In contrast, subsections 552.108(a)(2) and 552.108(b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You generally assert that Exhibit H is subject to section 552.108 because this exhibit consists of information or internal records held by a law enforcement agency. However, you do not explain how release of any of this information would interfere with law enforcement or prosecution or how any of this information relates to an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply). Accordingly, we find the city has failed to demonstrate the applicability of section 552.108 to any of the information in Exhibit H. Thus, none of this information may be withheld under section 552.108.

You also raise section 552.101 of the Government Code in conjunction with common-law privacy for Exhibit H. Section 552.101 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. The type of information considered highly intimate or 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. This office has also determined common-law privacy protects the identifying information of juvenile offenders. *See* Open Records Decision No. 384 (1983); *cf.* Fam. Code § 58.007. Upon review, we have marked the information in Exhibit H we find is highly intimate and embarrassing and of no legitimate public interest. Accordingly, the city must withhold this information under section 552.101 in conjunction with common-law privacy. However, we conclude the remaining information in Exhibit H is not highly intimate and embarrassing and of no legitimate public interest. Therefore, the city may not

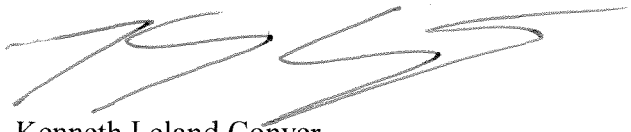
withhold any of the remaining information in Exhibit H under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the opposing party to the anticipated litigation has seen or had access to any of the information in Exhibit B, the city must release it. However, if the opposing party has not seen or had access to this information, the city may withhold it under section 552.103 of the Government Code. The city may withhold the information we marked in Exhibit D under section 552.122(b) of the Government Code. The city must withhold the e-mail addresses we marked in Exhibit F under section 552.137 of the Government Code. The city must withhold the information we marked in Exhibit H under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released to the requestor.[1]

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

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[1]We note the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); ORD 481at 4. If the city receives another request for this information from a different requestor, then the city should again seek a decision from this office. We also note the information being released includes social security numbers of individuals other than the requestor. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

Ref: ID# 436730

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Bill J. Singletary
President
Singletary Investments, Inc.
902 Green Belt Drive
Sugar Land, Texas 77498
(w/o enclosures)