



The Attorney General of Texas

November 2, 1983

JIM MATTOX
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1367
Telecopier 512/475-0266

714 Jackson, Suite 700
Dallas, TX. 75202-4506
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

1001 Texas, Suite 700
Houston, TX. 77002-3111
713/223-5886

806 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1685
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

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Mr. Edward H. Perry
Assistant City Attorney
City Hall
Dallas, Texas 75201

Open Records Decision No. 400

Re: Whether investigative report prepared by the city of Dallas Department of Housing and Neighborhood Services is excepted from disclosure under the Open Records Act

Dear Mr. Perry:

Some time ago, a citizen alleged that a neighborhood services representative of the Department of Housing and Neighborhood Services of the city of Dallas had engaged in certain illegal or improper job-related activities. The department investigated these allegations and prepared a report. The citizen who made the allegations has requested a copy of this report, and you have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to release it. You claim that sections 3(a)(1), 3(a)(2), and 3(a)(11) of the act apply to all or part of the report. These sections except from required disclosure:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

(2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act;

.....

(11) inter-agency or intra-agency memorandums or letters which would not be available by law to

a party other than one in litigation with the agency.

We will first consider your section 3(a)(11) claim. In your request letter, you stated as follows:

A few months ago the requestor was allowed to review the report in question in order to ensure that a complete investigation was conducted and that all charges were answered in one way or another. The requestor was allowed to review the report based on the understanding that the requestor would not be given a copy of the final report. (Emphasis in original).

Correspondence to this office indicates that you have also made the material available to others. Section 14(a) of the Open Records Act provides:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person. (Emphasis added).

We conclude that when you permitted members of the public to examine this report, you waived any claim that you might have had under section 3(a)(11). The voluntary disclosure by a governmental body to a private citizen of information which could be withheld under section 3(a)(11) is not "prohibited by law" within the meaning of section 14(a). A governmental body is, therefore, free to effect such disclosure if it wishes to do so. However, under the express terms of section 14(a), once such voluntary disclosure has occurred, as it has in this instance, the information in question "shall then be available to any person." Accordingly, we reject your section 3(a)(11) claim.

At first glance, it might appear that when you voluntarily released this report to this citizen, you also waived any claim that you might have had under any other section 3(a) exception. Section 10(a) of the Open Records Act provides, however, that "information deemed confidential under the terms of this Act shall not be distributed." Information within section 3(a)(1) of the act is "confidential" within the meaning of section 10(a), and the release of such information is therefore prohibited both by that section and by section 14(a). We must, therefore, determine whether any information in the requested report is within the ambit of section 3(a)(1).

Your argument under section 3(a)(1) is that certain information in this report is protected from required disclosure under the "false light" privacy test articulated and discussed in Open Records Decision Nos. 372 (1982) and 308 (1982). In the latter decision, this office concluded that information may be withheld under this test where (1) it is communicated to a public body by an anonymous source; (2) the agency determines that it is not true; and (3) the public interest in disclosure is minimal. In the former decision, this office held that

a governmental body may withhold information on the basis of false light privacy, only if it finds, based upon the weight of evidence demonstrable to this office, that there is serious doubt about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal. (Emphasis added).

The former decision also highlighted the narrowness of the holding in the latter decision. It observed that in the latter decision, the false light privacy test was applied in a situation in which "scurrilous information about a particular individual that was put in [the] agency's file had been communicated to the public body by an anonymous source" (Emphasis added).

We conclude that the false light privacy test does not except from disclosure any information in this report. We reach this conclusion for the following reasons.

Virtually everything that you seek to withhold under this test is itself, or is directly related to, the allegations made by the complaining citizen concerning the manner in which the employee in question performed her job. The citizen alleged that the employee engaged in activities which could be characterized as either illegal or improper. As we read the report, none of the allegations concerned private activities of the employee, i.e., activities which did not relate to her job performance.

Both the courts and this office having frequently held that the name of a private citizen who is arrested and the reason(s) for the arrest are public information. See, e.g., Houston Chronicle Publishing Company v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). In our opinion, a city employee charged with engaging in illegal or improper activities during the course of her employment is not in a qualitatively different position under the Open Records Act from a citizen arrested and charged with a crime. Just as the arrestee's name and the reasons for the arrest may not be withheld from the public in the latter situation, we believe that the

employee's name and the offenses alleged may not be withheld in the former. In this context, we note that the reasons favoring public disclosure in the former situation are even more compelling, since that situation involves a public employee rather than a private citizen.

In Open Records Decision No. 372 (1983), this office held that, in order to be withheld under the false light privacy test, information must be highly offensive to a reasonable person and the public interest in its disclosure must be minimal. This is not a balancing test; information must satisfy both of these tests to be held nondisclosable. See Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ pending) (discussion of Industrial Foundation of the South v. Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976) [hereinafter IAB]). In the present instance, we conclude that -- even if the release of the requested information could be deemed to be "highly offensive to a reasonable person" (emphasis added) -- it cannot be said to be of minimal interest to the public. On the contrary, we believe that the general public has a compelling interest in knowing about allegations concerning the manner in which a Neighborhood Services Representative of the city of Dallas performs her job duties. It also has a compelling interest in learning the details of the investigation into those allegations and the conclusions reached during that investigation. If the allegations prove to be unfounded -- and you assert that this is the case in this instance -- that will be part of the public record which is released.

For all of these reasons, we conclude that the section 3(a)(1) false light privacy test does not apply in this instance.

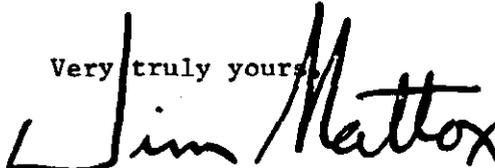
"False light" privacy is, of course, not the only basis for withholding information under section 3(a)(1). We are, however, aware of no statutory or constitutional provision which applies to this information. Nor do we believe that the information is excepted under the common law privacy test articulated in IAB, supra. That test is virtually identical to the portion of the false light privacy test discussed above. It asks whether the release of particular information would be highly offensive to a person of ordinary sensibilities and whether the public has any legitimate interest in obtaining that information. As we have already noted, even if we assume that the first part of this test is satisfied here, we believe the second part is clearly not satisfied.

We therefore conclude that the requested information is not protected from disclosure under section 3(a)(1). We next consider section 3(a)(2).

The scope of employee privacy under section 3(a)(2) is very narrow. See, e.g., Open Records Decision No. 336 (1982). As the court observed in Hubert v. Harte-Hanks Texas Newspapers, Inc., supra, at 551, information is protected from disclosure under this section only if its release would lead to a clearly unwarranted invasion of the employee's privacy. The same court also held that the test articulated in IAB, supra, at 550, should be applied to determine whether information may be withheld under section 3(a)(2). We believe that when one applies these tests, one can only conclude that none of the information in the requested report may be withheld under section 3(a)(2).

To summarize: none of the requested report may be withheld from disclosure under sections 3(a)(1), 3(a)(2), or 3(a)(11) under the facts of this case.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

TOM GREEN
First Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant Attorney General

Prepared by Jon Bible
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Rick Gilpin, Chairman
Jon Bible
Colin Carl
Susan Garrison
Jim Moellinger
Nancy Sutton
Bruce Youngblood