



## The Attorney General of Texas

JIM MATTOX  
Attorney General

February 29, 1984

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Mr. Gregg Norris  
Assistant City Attorney  
1000 Throckmorton  
Fort Worth, Texas 76102

Open Records Decision No. 408

Re: Whether information in a  
criminal file is excepted from  
disclosure when the file is in  
"suspended" status

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

Dear Mr. Norris:

You have requested our decision under the Open Records Act,  
article 6252-17a, V.T.C.S. Your request letter states:

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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On December 21, 1982, an aggravated robbery occurred at People's Restaurant . . . . On February 10, 1983, a suspect . . . was arrested with a warrant by officers of the Fort Worth Police Department. The arrest was based upon, among other evidence, the identification of [suspect] in a "photo spread" by two eyewitnesses to the robbery . . . . After the arrest, [suspect] was placed in a police lineup, where the same two eyewitnesses made a positive identification of him as being the person who committed the aggravated robbery. [He] was indicted by the Tarrant County Grand Jury for aggravated robbery on March 3, 1983. On July 28, 1983, the Police Department received information that the eyewitnesses were now uncertain about their identification of [him]. After further investigation by the department and consultation with the district attorney's office, the indictment against [him] was dismissed on August 25, 1983, for insufficient evidence.

To this date, no other arrests have been made for the aggravated robbery. This case is not in a "suspended" status so far as the department's investigation is concerned. This means that the department's investigatory file is still "open," but the case is not being actively pursued on a day-to-day basis. If new evidence or information

regarding the perpetrator of the robbery were to come to the attention of police investigators, the robbery would again be actively investigated, and another arrest could be made.

A broad request for disclosure has been made of the city of Fort Worth for any and all records and information pertaining to the December 21, 1982 aggravated robbery, with the exception of juvenile information and the complainant's name and address. In addition to the name and address of any person arrested for this offense, the requestor has asked for the disclosure of the name of any attorney representing any person arrested. The only attorney mentioned in any of the department's records is the one who is listed as present at the police line-up. The city has no information or records to indicate who might have represented [suspect] in any other proceedings.

You have categorized the requested information as follows:

APPENDIX I

1. Name of [suspect]
2. Mugshot of [suspect]
3. Fingerprint Card
4. Booking Sheet No. (3 copies)  
(Note: This is not a copy of the "blotter" also known as the "arrest sheet" or "show-up" sheet. The Fort Worth Police Department has a separate record known as the "arrest sheet." The requestor did not ask for the disclosure of the "arrest sheet" for any particular period of time).
5. Wanted Person Data Input
6. Wanted Person Cancellation
7. Defendant Background Information
8. Investigative File Supplement, Dated 2/4/83
9. Arrest Warrant Affidavit and Warrant
10. Adult Warning
11. Offense/Incident Supplemental Report #4, Dated 2/10/83
12. Offense/Incident Supplemental Report #5, Dated 1/12/83
13. Name of attorney present at police line-up

APPENDIX II

1. Names and identification of witnesses
2. Offense/Incident Supplemental Report #1, Dated 12/23/82
3. Offense/Incident Supplemental Report #2, Dated 1/7/83
4. Offense/Incident Supplemental Report #3, Dated 2/3/83

5. Offense/Incident Supplemental Report #4, Dated 2/10/83
6. Offense/Incident Supplemental Report #5, Dated 2/12/83
7. Supplementary Report, Dated 2/4/83, composed of summary of case, summary of witness statements
8. Supplementary Report, Dated 7/28/83
9. Witness Line-up Identification Forms, including some of attorney present at line-up
10. Photographs used in the photo spread
11. Copy of sunglasses
12. Teletype information regarding License Number
13. Arrest Warrant Affidavit and Warrant
14. Adult Warning

APPENDIX III

1. Offense/Incident Supplemental Report, Dated 12/23/82
2. Supplementary Report, Dated 2/3/83
3. Supplementary Report, Dated 7/28/83

You contend that section 3(a)(1) of the Open Records Act excepts from required disclosure the information in Appendix I, that section 3(a)(8) excepts the information in Appendix II and Appendix I, and that section 3(a)(11) excepts the information in Appendix III. These sections except from required public disclosure:

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

. . . . .

(8) records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement;

. . . . .

(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 . . . . .

Appendix III is, we understand, part of Appendix II.

We first address your section 3(a)(8) argument. In Open Records Decision No. 127 (1976), this office held that under 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), the following information is and is not available to the public under section 3(a)(8):

I. INFORMATION AVAILABLE TO PUBLIC

A. Police Blotter

1. Arrestee's social security number, name, alias, race, sex, age, occupation, address, police department identification number, and physical condition
2. Name of arresting officer
3. Date and time of arrest
4. Booking information
5. Charge
6. Court in which charge is filed
7. Details of arrest
8. Notation of any release or transfer
9. Bonding information

B. Show-up Sheet (chronological listing of persons arrested during 24-hour period)

1. Arrestee's name, age, police department identification number
2. Place of arrest
3. Names of arresting officers
4. Numbers for statistical purposes relating to modus operandi of those apprehended

C. Arrest Sheet (similar chronological listing of arrests made during 24-hour period)

1. Arrestee's name, race, and age
2. Place of arrest
3. Names of arresting officers
4. Offense for which suspect arrested

D. Offense Report -- front page

1. Offense committed
2. Location of crime
3. Identification and description of complainant

4. Premises involved
5. Time of occurrence
6. Property involved
7. Vehicle involved
8. Description of weather
9. Detailed description of offense
10. Names of investigating officers

II. INFORMATION NOT AVAILABLE TO PUBLIC

A. Offense Report -- all except front page

1. Identification and description of witnesses
2. Synopsis of confession
3. Officer's speculation as to suspect's guilt
4. Officer's view of witness credibility
5. Statements by informants
6. Ballistics reports
7. Fingerprint comparisons
8. Blood and other lab tests
9. Results of polygraph test
10. Refusal to take polygraph test
11. Paraffin test results
12. Spectrographic or other investigator reports

B. Personal History and Arrest Record

1. Identifying numbers
2. Name, race, sex, aliases, place and date of birth and physical description with emphasis on scars and tattoos
3. Occupation, marital status, and relatives
4. Mugshots, palm prints, fingerprints, and signature
5. Chronological history of any arrests and disposition

Subsequent Open Records Decisions, however, somewhat modified the holding in Open Records Decision No. 127. See, e.g., Open Records Decision No. 339 (1982). In particular, in Open Records Decision No. 366 (1983), we stated:

We believe that the meaning of [recent] decisions is abundantly clear: information . . . ordinarily found on the first page of an offense report

is . . . not protected by . . . section 3(a)(8), except in circumstances where the release of particular information would unduly interfere with law enforcement or crime prevention, Ex parte Pruitt, 551 S.W.2d 706, 710 (Tex. 1977), or conflict with an individual's constitutional or common law right of privacy. (Emphasis added).

You have informed us that:

The city has already forwarded to the requestor a copy of Exhibit B, which is a copy of the original offense report, dated 12/22/82. The names and identification of witnesses, other than the complainant, have been 'blacked-out.' This exhibit constitutes the front page of the offense report which is generally regarded as public information [under Houston Chronicle and] Open Records Decision Nos. 366 (1983); 339 (1982); 127 (1976).

You assert, however, that the remainder of the information in Appendix II may be withheld, because:

In this case, the investigative file is still 'open' even though the case is not now being actively investigated on a day-to-day basis. If any further evidence or information were to come to the attention of the Police Department's robbery investigators, the case would again be actively investigated, and another suspect could be arrested. Therefore, the entire contents of the investigatory file (Appendix II) should not be disclosed . . . .

Furthermore, public disclosure of the criminal investigatory file would unduly interfere with law enforcement. The possibility of criminal charges being filed is still alive. The file should not be disclosed so that the Police Department might protect its 'valid interests such as maintaining as confidential the investigative techniques and procedures used in law enforcement and insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers,' Open Records Decision No. 216 (1978), which interests exist even though there is no prosecution pending in a particular case. Due to the particular circumstances of this case, the names of

witnesses, their statements, and their identification of [suspect] as the robber should not be disclosed because such disclosure might subject the witnesses to possible intimidation or harrassment. Open Records Decision No. 297 (1981). The release of the materials listed in Appendix II could hinder any future investigation of of this case by the department. The position of the state might be endangered in any future prosecution by the use of such materials to the disadvantage of the prosecution.

We conclude that any information in Appendix I, II and III that is within the "information not available to the public" category in Open Records Decision No. 127 may be withheld. The statute of limitations on this crime has not expired, article 12.01, Code of Criminal Procedure, and as you have indicated, the investigation will again be actively pursued if new information comes to light. To release this information would, in our view, clearly jeopardize the investigation if it is once again initiated, as it may well be. On the other hand, we are not at this time convinced that legitimate reasons exist for withholding any information in these appendices that is in the "information available to the public" category in Open Records Decision No. 127. This information does not "supply the explanation on its face, how and why release of it would unduly interfere with law enforcement," Open Records Decision No. 287 (1981), and you have not demonstrated that its release would likely have this effect. If you believe the release of this information would unduly interfere with law enforcement, you have 15 days from the date of the issuance of this decision to make the necessary showing to this office. Otherwise, the information must be released.

The same rationale applies to the officers' narrative summaries of the incident. Such summaries are not clearly within either the "available" or "unavailable" category in Open Records Decision No. 127. In Open Records Decision No. 354 (1982), however, this office held that such summaries "constitute public information." You must therefore release the narrative summaries in the investigative report, unless you demonstrate to us within 15 days of the issuance of this decision that their release would unduly interfere with law enforcement or crime prevention. Since you did not claim that section 3(a)(11) applies to these summaries, we do not address this issue.

We also conclude that the release of the information in Appendix II would not infringe impermissibly upon anyone's privacy interests. You take the contrary position:

Normally, the name of the person arrested for a particular offense and the circumstances

surrounding the arrest would be open to public disclosure. Houston Chronicle, supra; Open Records Decision No. 127 (1976). However, the criminal charge against [suspect] has not been dismissed and, as we have heretofore discussed, the disclosure of any such information would be an unwarranted invasion of personal privacy. Again, because of the particular facts of this case, the disclosure of the circumstances surrounding [his] arrest . . . and the subsequent dismissal of the criminal charge (the material listed in Appendix I) would unduly interfere with the Police Department's ability to investigate this case further and the State's ability to prosecute anyone in the future for the People's robbery.

You also advance a twofold argument concerning the information in Appendix I. First, you argue:

The disclosure of the records and information requested here will either directly or indirectly disclose criminal history record information and, specifically, nonconviction data. 28 C.F.R. Part 20 (1982) of the federal regulations prohibit the disclosure of criminal history record information, which is defined as:

information collected by criminal justice agencies on individual's consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. State and Federal Inspector General Offices are included. (Emphasis in original).

28 C.F.R. §20.3(b) (1982). Second, you contend that the release of this information would violate the common law privacy test articulated in Industrial Foundation of the South v. Industrial Accident Board, 540 S.W.2d 668, 685 (Tex. 1976), wherein the court held that information may be withheld from the public if it is highly intimate or embarrassing, if its release would be highly objectionable to a

reasonable person, and if it is not of legitimate concern to the public. In support of this contention, you argue:

That a person has been arrested for a felony offense is such a fact the public disclosure of which would cause embarrassment, shame, outrage and humiliation to the person arrested. In this particular case, the embarrassment, shame, and outrage is compounded by the fact that the criminal case was later dismissed before trial for insufficient evidence because of the lack of a positive identification of [suspect]. Also, the facts and information concerning the arrest of [him] are no longer a matter of legitimate concern to the public since the criminal charge against him has been dismissed. If the right of privacy means anything at all, it certainly means that [he] has the right to be left alone and the right not to have the facts of his arrest publicized to others. Public disclosure of the records and information in Appendix I would clearly be an unwarranted invasion of his privacy.

In Open Records Decision No. 366 (1983), we dealt with an argument similar to your first argument concerning the effect of the federal regulations governing "criminal history record information." There, Mayor Whitmire asserted that the release of the requested materials would indirectly disclose such information. We responded:

The federal regulations, however, create an exception for the kind of information at issue here. 28 C.F.R. §20.20(b) (1982) provides:

The regulations in this subpart shall not apply to criminal history record information contained in . . . (2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required to be made public, if such records are organized on a chronological basis . . . .

It is precisely such chronological records of entry that have been repeatedly recognized by this office as disclosable, with certain exceptions previously discussed. Undoubtedly an enterprising individual with access to a computer could, with access to such information, compile a criminal history record for any person, at least as to his

arrests within a particular jurisdiction. Nevertheless, we must conclude that nothing in the federal regulations prohibits the disclosure of the records which are the subject of this request . . . .

It appears to us that much of the information in Appendix I and II that you assert is protected by federal regulations is within the above exception, if indeed it is even within the scope of the federal regulations. Based on Open Records Decision No. 366, therefore, we conclude that only that part of Appendices I and II that is specifically in the "criminal history record information" category is protected from disclosure. Information is not protected from disclosure simply because, if released, it might indirectly lead to the disclosure of such information.

We also reject your common law privacy argument. The fact that a person has been arrested for a felony offense is not a basis for withholding that person's name from the public, and we do not believe that any basis for withholding an arrestee's name exists when his indictment is later dismissed. By way of analogy, we note that we have held that allegations concerning a public employee's performance in her job could not be withheld on privacy grounds even though the allegations were later proved unfounded. Open Records Decision No. 400 (1983). In that decision, we noted that such disclosure would not create a "false light privacy" situation, see, e.g., Open Records Decision No. 397 (1983), because the fact that the allegations were found untrue could easily be released with the allegations themselves. We believe the same is true here. We believe there is a legitimate public interest in knowing the names of persons arrested and indicted for felony offenses, that common law privacy does not suddenly take hold when the indictment is later dismissed, and that any embarrassment or humiliation that might result from the release of the arrestee's name can easily be mitigated by also releasing the fact that the indictment was later dismissed for insufficient evidence.

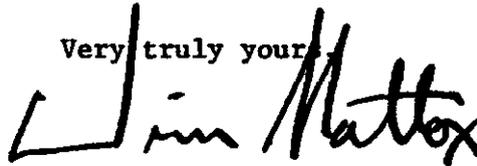
We therefore reject your arguments under section 3(a)(1), except to the extent that we conclude that information clearly and directly protected by the applicable federal regulations discussed above may be withheld.

We finally examine your section 3(a)(11) claim. Section 3(a)(11) excepts "advice, opinion and recommendation"; its purpose is to encourage open and frank discussion within an agency concerning policy matters. See, e.g., Open Records Decision No. 359 (1983). We have examined the three documents listed in Appendix III, which are the only documents that are, in your opinion, within the ambit of section 3(a)(11), and we fail to see how anything in these documents can be characterized as "advice, opinion and recommendation." In any event,

we believe that nothing in these documents that is not protected from disclosure by sections 3(a)(1) and 3(a)(8) is excepted by section 3(a)(11).

To summarize, information in Appendices, I, II, and III that is within the "information not available to the public" category in Open Record Decision No. 127 (1976) may be withheld under section 3(a)(8). Information in these appendices that is clearly within the federal regulations concerning "criminal history record information" may be withheld. Information in these appendices that may not be withheld for either of these reasons, including that which is in the "information available to the public" category in Open Records Decision No. 127, and the officers' narratives, must be released unless you can demonstrate to us that its release would "unduly interfere with law enforcement or crime prevention." If you intend to attempt to make such a demonstration to this office, you must do so within 15 days of the issuance of this decision.

Very truly yours,



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