



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 14, 1993

Mr. Mark S. Houser
City Attorney
City of Princeton
P.O. Box 844
McKinney, Texas 75069-0844

OR93-305

Dear Mr. Houser:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18870.

The City of Princeton (the "city") has received several requests for information concerning a former employee of the Princeton Housing Authority, specifically:

- 1) Two requests for information dated January 27, 1993¹ seeking:
 - a) All notes, memos, letters, and any other correspondence relating to discussions, meetings, telephone conversations, and other gatherings, between the following people, with particular attention to the listed dates:

.....

- b) The specific dates and events of those dates are as follows:

April 21, 1992 - Mark Houser and Paula Miller; (discussion of complaint)

April 22, 1992 - Mark Houser and Bobbie Hartwig; (initiation of complaint)

¹One of the request letters is a resubmission of an earlier request, addressed in Open Records Letter No. 422 (1992). At the time of the request, the information was part of an active investigation. Open Records Letter No. 422 concluded that the requested information could be withheld under section 3(a)(8) of the Open Records Act. The investigation has since been closed.

April 27, 1992 - Mark Houser, Bobbie Hartwig and Tom O'Connell; (discussion of complaint)

April 28, 1992 - Mark Houser and Lloyd Behm; (reluctance of DA to follow up on complaint)

April 28, 1992 - Mark Houser and Bobbie Hartwig; (discussion of complaint)

April 30, 1992 - Mark Houser and Tom O'Connell; (letter)

c) Any and all other correspondence between any of the above-mentioned individuals and any other agency regarding myself and my employment as Executive Director of the Housing Authority of the City of Princeton.

d) Any and all information regarding Complaint No. 92-108-0016, filed against [Glenna McLean] on April 17, 1992.

2) Requests for information dated February 8, and 11, 1993 seeking:

a) Itemized bill from the city attorney to the city for the month of April 1992 covering the following dates: April 21, 22, 27, 28, and 30.

b) Bill sheet for the months of April and May of 1992 showing the charges to the city for services of the city attorney for the dates listed above.

c) The February 3rd letter from the city attorney to the Office of the Attorney General requesting an open records ruling and setting out the city's arguments for withholding the requested information.

You state that much of the information has been released to the requestor. With respect to the information that has not been released, you state that the only information in existence that is responsive to item 1(a), (b), or (c) is the April 30, 1992 letter from the city attorney to the district attorney.² You also state that the information requested in

²You contend that the rest of the information requested in item 1(a), (b), and (c) is "telephone discussions or meetings wherein no notes or memoranda were made." The Open Records Act does not require a governmental body to make available information which does not exist. Open Records Decision No. 362 (1983).

item 2(a) and (b) has been released. Thus the only information at issue is the information requested in item 1(c), the April 30, 1992 letter from the city attorney to the district attorney; item 1(d), information regarding Complaint No. 92-108-0016; and item 2(c), the February 3, 1993 letter from the city attorney to this office. You contend that the April 30, 1992 letter from the city attorney to the district attorney, the information regarding Complaint No. 92-108-0016, and the February 3, 1993 letter from the city attorney to this office are excepted under section 3(a)(1) and section 3(a)(3). You also contend that information regarding Complaint No. 92-108-0016 is excepted from disclosure under section 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You contend that identifying information in Complaint No. 92-108-0016, the April 30, 1992 letter from the city attorney to the district attorney, and the February 3, 1993 letter from the city attorney to this office which identifies an "informer" is protected from disclosure by the informer's privilege as incorporated by section 3(a)(1).

The informer's privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege encourages citizens to report the commission of crimes to law enforcement officials by keeping their identity anonymous. *Roviaro v. United States*, 353 U.S. 53 (1957). The privilege is also a well established exception under the Open Records Act. Open Records Decision No. 549 (1990) at 4. The informer's privilege protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5. However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 (1978).

Here the requestor is the subject of the communications which you assert are protected under the informer's privilege. The original request letter, resubmitted January 27, 1993, seeks:

- 1) All notes, memos, letters, and any other correspondence relating to discussions, meetings, telephone conversations, and other gatherings, between the following people, with particular attention to the listed dates:

....

- 2) The specific dates *and events of those dates* are as follows:

.....
April 22, 1992 - Mark Houser and Bobbie Hartwig;
(*initiation of complaint*) [Emphasis added.]

It is obvious from this statement that the identity of the "informer" is known to the requestor. Therefore, neither the identity of the alleged "informer" nor any of the statements made by the alleged "informer" may be withheld under section 3(a)(1) of the Open Records Act. Accordingly, you may not withhold information contained in Complaint No. 92-108-0016, or the February 3, 1993 letter from the city attorney to this office under the informer's privilege as incorporated into section 3(a)(1). We note that the April 30, 1992 letter from the city attorney to the district attorney does not mention the alleged "informer." Therefore, there is no basis for claiming the informer's privilege for this document.

You also argue that the criminal history information is excepted from disclosure under federal law as discussed in Open Records Decision No. 565 (1990). Open Records Decision No. 565 ruled that information from the Texas Crime Information Center (TCIC) when requested by the subject of the information, as in this case, "must be released if a request in compliance with section 3B(b) is received."³ Open Records Decision No. 565 at 12. Accordingly, you may not withhold the criminal history information received from TCIC under section 3(a)(1).⁴

Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

After a file has been closed, either by prosecution or by administrative decision, the availability of section 3(a)(8) is greatly restricted. Open Records Decision No. 320 (1982). The test for determining whether information regarding closed investigations is excepted from public disclosure under section 3(a)(8) is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open

³Section 3B(b) provides that "[c]onsent for the release of information excepted from disclosure to the general public but available to a specific person under Subsection (a) of this section must be in writing and signed by the specific person or the person's authorized representative." The January 27, 1993 request for information regarding Complaint No. 92-108-0016, which contains the criminal history information, is made by the subject of the criminal history check pursuant to section 3B.

⁴Only information from the National Crime Information Center Interstate Identification Index (NCIC III) is confidential and may not be released by Texas agencies. Open Records Decision No. 565 at 12. NCIC III information may be requested from the F.B.I. in accordance with federal regulations.

Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3.

You state that although the criminal file is "technically inactive at this time," the file contains information that would reveal investigation techniques and identify informants. You also state that it is "unknown whether the federal authorities are still investigating the improprieties described in the special audit report and the HUD audit." We have reviewed the "OFFENSE/INCIDENT REPORT", the "SUPPLEMENTARY INVESTIGATION REPORTS," and the "VOLUNTARY STATEMENT." We find nothing in the file that details investigative techniques or mentions an informer other than the one already known to the subject of the report. See discussion of informer's privilege *supra*.

There is no indication in the file that the Fort Worth Office of the United States Department of Housing and Urban Development ("HUD") is continuing its investigation into this matter. The "Limited Management Review/Occupance Audit" report was completed by that office in April of 1992 and subsequently released to the requestor by your office. You have not made the requisite showing that release of information regarding Complaint No. 92-108-0016 would unduly interfere with the prevention of crime and the enforcement of the law. Accordingly, you may not withhold information regarding Complaint No. 92-108-0016 under section 3(a)(8) of the Open Records Act.

You have not submitted new arguments supporting your contention that the April 30, 1992 letter from the city attorney to the district attorney should be withheld from disclosure under section 3(a)(8). Your original argument, *see generally* Open Records Letter No. 422 (1992), that "the efforts on behalf of the City to involve other law enforcement agencies is protected since this investigation is yet completed" and that "release of this information could hinder the Princeton Police Department in the conduct of its investigation" no longer applies since the investigation is closed. Accordingly, you may not withhold the April 30, 1992 letter from the city attorney to the district attorney under section 3(a)(8).

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You make several arguments that section 3(a)(3) applies. First, you assert that "[w]hile the complaint has been 'no billed' by the Grand Jury . . . any information gleaned from HUD in its ongoing investigation may require the City to resubmit new evidence to the Grand Jury for further review." As we stated above, there is no indication in the file that HUD is continuing its investigation into this matter. The mere contemplation of future litigation by a governmental body is not sufficient to invoke section 3(a)(3). Open Records Decision No. 557 (1990).

You also list three instances that you claim indicate the requestor's intent to initiate litigation: 1) the requestor has "threatened a criminal complaint for official oppression aimed at [the city administrator and the city attorney]"; 2) the requestor has "filed a letter with the Mayor citing [the city administrator and the city attorney] for official misconduct"; and 3) the requestor has "submitted a draft petition for declaratory judgment concerning the employment contract of the City Administrator." Although "litigation" is not defined in the text of the Open Records Act, we have previously held that "litigation" encompasses judicial or quasi-judicial forums. Once it has been established that litigation in one of these forums exists or is reasonably anticipated, the information must then be shown to be directly related to the pending or anticipated "litigation." Open Records Decision Nos. 429 (1985) at 3; 301 (1982). A letter to the mayor complaining about the city administrator and the city attorney does not demonstrate that litigation in a judicial or quasi-judicial forum exists or is reasonably anticipated. The threatened criminal complaint and the draft petition requesting a declaratory judgment concerning the employment contract of the city administrator may demonstrate that litigation is reasonably anticipated. You have not demonstrated, however, that the requested information relates to any such litigation, and therefore, the information may not be protected under section 3(a)(3) on this basis.⁵

You also contend that release of "any informers or information relative to statements or investigatory material involved in this case may result in litigation." Section 3(a)(3) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). You have not made a showing beyond mere speculation that litigation is pending or anticipated and that the requested information relates to that litigation. Therefore, you may not withhold the information under section 3(a)(3) on this basis.

⁵We note that the requestor's letter to the city administrator of February 8, 1993, states that "a writ of mandamus may be sought" against the city if the information requested is not provided. Information is not excepted by section 3(a)(3) merely because section 8(a) of the Open Records Act provides that a requestor may seek a writ of mandamus to enforce the act. Open Records Decision No. 561 (1990)

Finally, you assert that section 3(e) provides that the city may be a party to litigation until the statute of limitations expires. We disagree. Unless a governmental body has met its burden of showing that litigation is pending or anticipated, section 3(e) is not applicable. Section 3(e) is not an exception to disclosure. It merely provides a time frame for information excepted under section 3(a)(3). Open Records Decision No. 518 (1989) at 5. As noted above, section 3(a)(3) is inapplicable. Because none of the exceptions you have raised applies to the requested information, you must release all of the information to the requestor.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/LBC/le

Ref: ID# 18770
ID# 19047

Enclosures: Marked documents

cc: Ms. Glenna McLean
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(w/o enclosures)