



Office of the Attorney General
State of Texas

May 11, 1992

DAN MORALES
ATTORNEY GENERAL

Ms. Elaine H. Piper
Assistant City Attorney
City of El Paso
2 Civic Plaza Center Plaza
El Paso, Texas 79999

OR92-194

Dear Ms. Piper :

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# 14352.

You have received a request for City of El Paso Police Department ("the department") documents regarding an internal affairs investigation into alleged leaks to the media by a certain police officer. You have submitted to us for review Exhibits A through D. Exhibit A includes documents portions of which have previously been publicly disclosed. Exhibit B includes a security survey and memoranda which relate to the security for the city impoundment lot. Exhibit C contains documents relating to the methods employed in the internal investigation, including an "IAD Investigation Checklist," a chronology of notes, a list of questions to be asked of witnesses, and a statement of charges. Exhibit D contains witness statements collected in connection with the internal affairs investigation. You claim the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(8), and 3(a)(11) of the Open Records Act.¹

You claim that Exhibits C and D are excepted from required public disclosure by section 3(a)(1). You assert that a body of case law on civil discovery makes information relating to internal affairs investigations confidential. We have

¹By a letter dated April 23, 1992, you have informed us that the police officer at issue has withdrawn his demand for arbitration. We understand that the department has therefore withdrawn its claim under section 3(a)(3), to the extent it was based on that arbitration demand.

reviewed the cases cited in your letter. First, we note that discovery privileges are not covered under section 3(a)(1) of the Open Records Act. Such information is "privileged" only to the extent that the court in a particular case deems it to be so. Open Records Decision No. 575 (1990). Furthermore, the cases cited in your letter do not establish that internal police investigative materials are absolutely confidential under law. These cases apply a balancing test which is inapplicable in the Open Records Act context. At most, these cases suggest that in some instances internal affairs materials will reveal information which implicates the privacy interests of individual police officers. Below, we consider whether any information in the requested materials implicates either common law or constitutional privacy interests of individual police officers.

In *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), the Texas Supreme Court ruled that the doctrine of common law privacy excepts only "information contain[ing] highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person," provided that "the information is not of legitimate concern to the public." Exhibits C and D include an investigation checklist, questions to be asked of witnesses, a statement of charges against a police officer, and witness statements relating to official police business. The information contained in Exhibits C and D relates to a police officer's job performance and to other police officers only in their capacity as public officials. Such information about public employees does not generally constitute their private affairs. Open Records Decision No. 470 (1987) at 4. You also assert that the witnesses were told that their statements would be kept confidential. Information is not confidential under the Open Records Act simply because the person submitting it anticipates that it will be kept confidential. Open Records Decision Nos. 479 (1987); 180 (1977); *see also* Open Records Decision No. 444 (1986) at 6 (governmental bodies may not withhold information simply because they agree to do so).

The test for constitutional privacy involves a balancing of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law, because the material must concern the most intimate aspects of human affairs. *See* Open Records Decision No. 455 (1987) at 5. The constitutional right of privacy protects information relating to marriage, procreation, contraception, family relationships, and child rearing and education. Open Records Decision No. 447 (1986) at 4. The

information in Exhibits C and D about individual police officers does not involve these most intimate aspects of human affairs. Accordingly, we conclude that this information may not be withheld from required public disclosure under the doctrines of common law or constitutional privacy.

You also claim that Exhibits B, C, and D are excepted from required public disclosure by section 3(a)(8). The section 3(a)(8) exception may be invoked only for records relating to a criminal investigation conducted by an agency authorized to enforce criminal laws. *See* Attorney General Opinion MW-575 (1982). Section 3(a)(8) excepts from required public disclosure

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.

This office has stated in previous open records decisions that the test for determining whether records are excepted from public disclosure under section 3(a)(8) is whether release of the records would unduly interfere with law enforcement and crime prevention. Open Records Decisions Nos. 553 (1990) at 4; 474 (1987) at 5; *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977) (citing *Houston Chronicle Publishing Co. 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)). When the "law enforcement" exception is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why its release would unduly interfere with law enforcement. Open Records Decision Nos. 434 (1986) at 2; 287 (1981). The names of witnesses, informants, and persons interviewed in the course of a police internal investigation may be withheld under section 3(a)(8) if the police department determines that disclosure might either subject these individuals to possible intimidation or harassment, or that it might harm the prospects of the individuals' future cooperation with law enforcement. Open Records Decision Nos. 329, 313 (1982); 297 (1981); 252 (1980) at 4. In determining whether information would unduly interfere with law enforcement, this office uses a case-by-case approach.

The documents in Exhibit B relate to the security of an area which, you assert, is often subject to burglary and vandalism. Exhibit B includes information which identifies the strengths and weaknesses of the security of a city facility. You assert that release of this information will unduly interfere with law enforcement and crime prevention. We agree. Accordingly, you may withhold Exhibit B from public disclosure under section 3(a)(8).² See Open Records Decision No. 413 (1984) (sketch showing security measures for execution excepted under section 3(a)(8)). The documents in Exhibit C relate to an internal administrative action, not to a criminal investigation. Exhibit C contains information which details the methods used in internal police investigations. You assert that release of the requested information would undermine the police department's ability to conduct future internal police investigations. However, you do not explain how the release of these documents would "unduly interfere" with law enforcement in this manner. As the documents do not on their face provide such an explanation, we conclude that Exhibit C may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act. Exhibit D contains witness statements collected in connection with the internal affairs investigation. You assert that these statements must be kept confidential to ensure thorough investigations and police discipline. You have not demonstrated, however, how release of this information would subject the witnesses to intimidation or harassment or harm the prospects of future cooperation, as is required to justify withholding such internal affairs information under section 3(a)(8). See Open Records Decision Nos. 329, 313 (1982); 297 (1981); 252 (1980). The documents do not supply such an explanation on their face. Accordingly, we conclude that these documents may not be withheld from required public disclosure under section 3(a)(8).

Finally, you assert that portions of Exhibit A not already released and Exhibits C and D are excepted from required public disclosure by section 3(a)(11).³ Section 3(a)(11) excepts:

²Because we hold Exhibit B to be confidential under section 3(a)(8), we need not address your claim that Exhibit B is excepted under section 3(a)(3) because the City of El Paso anticipates litigation with respect to these burglaries.

³We do not address your claim that Exhibit B is excepted under section 3(a)(11) because we have already concluded it is excepted under section 3(a)(8).

inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

Section 3(a)(11) excepts memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making or deliberative process. Open Records Decision No. 464 (1987) at 2-3. However, facts and written observations of fact that are severable from material excepted under section 3(a)(11) must be disclosed. Open Records Decision No. 582 (1990). While the documents you submitted to us contain advice, opinion, and recommendation, they also contain some factual information not ordinarily excepted from public disclosure under section 3(a)(11). For your convenience, we have marked the information that may be withheld under section 3(a)(11). The remainder, except as noted above, must be released.⁴

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 refer to OR92-194.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GK/lmm

Ref. ID Nos. 14352, 14537, 14769, 14968, 15784

⁴You claim that portions of Exhibit B are excepted from required public disclosure under section 3(a)(7). Because the availability of Exhibit B is resolved under section 3(a)(8), we need not address the applicability of section 3(a)(7) at this time.

cc: Mr. Raul Hernandez
Herald-Post Reporter
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El Paso, Texas 79999