



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 2, 1993

Mr. Bill Turner
Brazos County District Attorney
300 East 26th Street, Suite 310
Bryan, Texas 77803

OR93-406

Dear Mr. Turner:

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# 20160.

The Brazos County District Attorney's Office (the "district attorney") has received a request for "a copy of the complete file regarding an incident that occurred on January 1, 1991," during which "Ahmad Hussein Aldirawi was arrested and charges of aggravated assault of a peace officer, resisting arrest and public intoxication were filed . . . [and] subsequently dismissed." You have submitted the requested information to us for review. You advise us that the motion/order of dismissal, petition for expunction, motion for continuance, application for subpoena, motion for discovery, indictment, and waiver of arraignment have been made available to the requestor. You seek to withhold, however, the following information from required public disclosure:

1. Criminal history of the defendant;
2. Memorandum from [the district attorney] and first assistant [district attorney] to the trial attorneys;
3. Notations by a trial attorney;
4. [College Station Police Department Policy] Manual;
5. Letter from Travis Bryan III;
6. Trial lawyers notes on the injured party's personnel file.

You claim that this information is excepted from required public disclosure by sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(8) of the Open Records Act. In addition, you claim that the entire file is excepted from required public disclosure by section 3(a)(3).

Section 3(a)(1) excepts from disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The information submitted to us for review appears to include criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC"). Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* We conclude, therefore, that if the CHRI data was generated by the federal government or another state, it may not be made available to the public by the district attorney. *Id.* CHRI information generated within the state of Texas and TCIC files must be withheld from required public disclosure under section 3(a)(1) in conjunction with the common law privacy doctrine. See Open Records Decision Nos. 565 (1990); 216 (1978); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).¹

You also claim that a trial lawyer's notes on the injured party's personnel file are excepted from required public disclosure by section 3(a)(2), which excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court in *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) found that section 3(a)(2) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act by the Texas Supreme Court in *Industrial Foundation*, 540 S.W. 2d 668. Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, a public employee's job performance does not constitute his private affairs. See Open Records Decision No. 470 (1987). For example, in Open Records Decision No. 484 (1987), this office held that the public interest in knowing how a police department has resolved complaints against a police officer ordinarily outweighs the officer's privacy interest, even if some complaints are found to be "unfounded" or "not sustained." The information for which you seek protection under section 3(a)(2) relates solely to the job performance of a police officer. Accordingly, we conclude that it may not be withheld from required public disclosure under section 3(a)(2) of the Open Records Act.

We next address your contention that the requested information is excepted from required public disclosure by section 3(a)(3), which excepts

¹We note, however, that the subject of CHRI generated within the State of Texas and TCIC files has a special right of access to such information pursuant to section 3B of the Open Records Act.

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.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). Section 3(e) provides that for purposes of section 3(a)(3), "the state . . . is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired." V.T.C.S. art. 6252-17a, § 3(e); *see also* Open Records Decision Nos. 469 (1987); 433 (1986). Section 3(e), however, does not relieve the governmental body from demonstrating the general applicability of section 3(a)(3). *See* Open Records Decision No. 518 (1989). In addition, section 3(a)(3) applies only to pending or reasonably anticipated litigation to which the governmental body claiming the exception is a party. *See* Open Records Decision No. 392 (1983).

We understand that the charges against Mr. Aldirawi have been dismissed. While you indicate that litigation in this matter is pending, you have provided us with no information demonstrating that you are party to the litigation, nor have you demonstrated that other litigation to which the requested information relates is pending or reasonably anticipated. We therefore have no basis on which to conclude that the requested information relates to pending or anticipated litigation. Accordingly, the requested information may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

Finally, you claim that some of the requested information may be withheld from required public disclosure under section 3(a)(8), which excepts

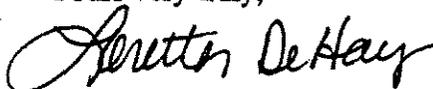
records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

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 release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)).

You claim that items 2, 3, 4, and 8, noted above, are excepted from required public disclosure by section 3(a)(8). You do not explain, however, how release of this information would unduly interfere with law enforcement, nor does the information provide an explanation on its face. We conclude, therefore, that this information may not be withheld from required public disclosure under section 3(a)(8) of the Open Records Act. Except as noted above, the requested information must be released in its entirety.

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,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/GCK/jmn

Ref: ID# 20160
ID# 20257

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