



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 16, 1994

Mr. James L. Dougherty, Jr.  
Cole & Dougherty  
5300 Memorial Drive, Suite 1070  
Houston, Texas 77007

OR94-557

Dear Mr. Dougherty:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 27787.

The City of West University Place (the "city") has received three requests<sup>1</sup> for two videotapes and written materials relating to an arrest on July 13, 1994. The city originally stated that it did not have the videotapes in its possession, but subsequently informed us that the videotapes have been returned to the city. The city asserts that the requested information is excepted from required public disclosure under sections 552.101 and 552.108 of the act.

Section 552.108 provides that:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

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<sup>1</sup>In a letter to this office dated August 3, 1994, you state that the Houston Chronicle made and then withdrew a fourth request for the same information. Based on your assertion that the request has been withdrawn, we do not address the fourth request.

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983). Certain factual information generally found on the front page of police offense reports, however, is public even during an active investigation. *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); Open Records Decision No. 127 (1976) at 3-4 (listing factual information available to the public).

After a file has been closed, either by prosecution or by administrative decision, the application of section 552.108 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 552.108 is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open 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.

In this case, you inform us that the Harris County District Attorney has decided not to prosecute the case. Although you state that a separate license revocation proceeding may be ongoing, we note that such proceedings are civil rather than criminal in nature. See V.T.C.S. art. 6701i-5. Given that there is no ongoing criminal investigation or prosecution, the burden is on the city to explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Because the city has not done so, we conclude that it may not withhold the requested records under section 552.108.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual

assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have reviewed the information you submitted and have concluded that none of the it is intimate or embarrassing under the *Industrial Foundation* standard.

A number of the records you have submitted to this office are confidential by statute. For example, the information you have submitted contains criminal history information which is protected under section 552.101. Open Records Decision No. 565 (1990) at 10-12. Information received from the National Crime Information Center Interstate Identification Index ("NCIC III") may not be released by Texas agencies.<sup>2</sup> *Id.* Information obtained from the Texas Crime Information Center ("TCIC") may be released only to the subject of the criminal history search or his or her representative pursuant to a request in compliance with section of 552.023 the Government Code. *Id.* Since the requestors are not the subject of the criminal history search, you must withhold any TCIC information.

A social security number or "related record" is excepted from required public disclosure under section 552.101 of the act in conjunction with the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994) (copy enclosed); *see also* 42 U.S.C. § 405 (c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security number at issue is confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the city should ensure that the information is not confidential under federal law.

In addition, we note that section 552.119 of the Government Code prohibits the release of a photograph that depicts a peace officer as defined by article 2.12 of the Code of Criminal Procedure except in certain circumstances. The two videotapes depict peace officers. Before releasing the videotapes, the city should ensure that the peace officers are not recognizable, unless one of the exceptions set forth in section 552.119 applies or the officers consent to the release of the videotapes in unredacted form.

Finally, we note that the subject of the records has filed a petition for expunction which seeks a court order directing various law enforcement agencies, including the City of West University Place Police Department, to expunge all records and files containing

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<sup>2</sup>Criminal history information received from the NCIC III may be obtained from the Federal Bureau of Investigation in accordance with federal regulations.

information about the arrest. We understand that no such order has yet been entered. You ask that this office address the effect of such an expunction order. To our knowledge, this office has never addressed the effect of an expunction order on a governmental body's obligation to release records pursuant to requests for records made before the order was entered,<sup>3</sup> and we decline to do so now since the expunction petition is pending before the court. We advise the city to seek clarification from the court regarding the effect of the pending petition for expunction and any resulting order on the city's obligation to release information under the Open Records Act pursuant to these requests.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Open Government Section

MRC/MAR/rho

Ref.: ID# 27787

Enclosures: Open Records Decision No. 622  
Submitted documents

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<sup>3</sup>In Open Records Decision No. 457 (1987), this office addressed the effect of an expunction order that appears to have been entered prior to the time the request for records was made.

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