



CITY OF HOUSTON

Houston Police Department

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Bob Lanier, Mayor

CITY COUNCIL MEMBERS: Helen Huey, Michael Yarbrough, Martha J. Wong, Alfred J. Calloway, Joe Roach, Ray F. Driscoll, John Kelley, Felix Fraga, Ben T. Reyes, Gracie Guzman, Eleanor Tinsley, Lloyd Kelley, Sheila Jackson Lee, Judson W. Robinson III, CITY CONTROLLER: George Greanias

REC'D
APR 11 94

Opinion Committee

HF-GW
FILE # ~~92-05495-1~~

Sam Nuchia
Chief of Police



April 8, 1994

The Honorable Dan Morales
Attorney General of Texas
209 W. 14th Street, 7th Floor
Price Daniel, Sr. Building
Austin, Texas 78701

I.D.# ~~2688~~

File # RQ-00688-DM
ID# 26188

VIA FEDERAL EXPRESS

Re: Texas Open Records Act request of Jay D. Root, Houston Post

YOUR FILE: 25495

RQ-688

Dear General Morales:

In a letter dated March 28, 1991 the City of Houston, through Assistant City Attorney Tracy Briggs, requested an opinion as to whether or not certain materials related to the above Open Records request were excepted from public disclosure. A copy of that letter is attached as Exhibit 1. Ms. Briggs' letter referenced the fact that the material the City wished to be reviewed along with supporting documentation would be sent under separate cover. In compliance with that statement please find enclosed the material and supporting documents the City is requesting you review as outlined below.

Exhibit 2

Exhibit two (2) is a copy of the complete PIRG file # 92-0049. This file concerns the investigation of fire marshals allegedly giving disparate treatment in their performance of doing fire code inspections at night clubs. The file carries a disposition of "NOT-SUSTAINED." Fire Marshals are firefighters and are afforded the various protections found in Chapter 143 of the Local Government Code. More specifically, section 143.1214(b), which was just enacted in the last legislative session, protects firefighters from the release of files concerning investigations of charges of misconduct that the department did not sustain unless the file is being released to another police or fire department.

While 143.1214 addresses files created "by the department for department use", it seems clear that the legislative intent was to afford firefighters (and police officers), who are



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subject to multiple complaints from unhappy citizens, special protections from having unsustained complaints aired in public. This is consistent with the analogous protection afforded under section 143.089 that was recently upheld by the courts in The City of San Antonio v. Texas Attorney General, et al., 851 S.W.2d 946 (Tex. App. -- Austin 1993, writ denied).

The Houston Police Department believes that section 143.1214 should be read in the same spirit in which the court viewed section 143.089 in that. "All parts ... are quite obviously designed to work in harmony with each other and in harmony with the disclosure provisions of the Act under the general legislative policy that allegations of misconduct against a police officer shall not be subject to compelled disclosure under the Act unless they have been substantiated and resulted in disciplinary action." City of San Antonio at 949. Therefore, even though this case happens to deal with an investigation by a specialized investigative unit designed to specialize in internal investigations (i.e. the Public Integrity Review Group), rather than an investigation by fire department personnel, this is still the exact type of file the legislature has deemed protected as a matter of law.

EXHIBIT 3

Exhibit three (3) is a copy of the complete file of PIRG investigation #93-0065 which again involves the investigation of fire department personnel. This investigation was disposed of as "UNFOUNDED." The Houston Police Department (HPD) would argue that under the same reasoning set out above for Exhibit Two this entire file should be excepted from public release because it is confidential as a matter of law. Nonetheless, HPD freely admits that while three of the five persons investigated are firefighters entitled to the protections of Chapter 143 of the Local Government Code, the other two persons investigated were civilian employees of the fire department.

HPD takes the position that references to the work assignments and job descriptions are such that the involved firefighters would be easily identified and therefore a release of any part of the file would essentially circumvent the intent of section 143.1214 (and the spirit of 143.089). In the alternative, HPD would request an opinion as to whether or not at the very least the firefighters names and/or job assignments and/or job descriptions can be redacted prior to any release of the file.

EXHIBIT 4

Exhibit four (4) is a copy of a complete file of PIRG investigation # 93-0035. This investigation resulted in the filing of the criminal charge of Theft (Misdemeanor) by a public servant. This investigation was centered around Christopher Oborn and the criminal charge is being prosecuted under Cause No. 9401413, styled The State of Texas v. Christopher Oborn. I have attached a copy of the affidavit of the Division Chief of the Public Integrity Division of the Harris County District Attorney's Office, Mr. Chuck Noll, confirming the prosecution.

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EXHIBIT 5

Exhibit five (5) is a copy of PIRG investigation # 93-0082. This investigation centered on the allegation that Raymundo Robles was selling various government documents while retaining the money for personal use. The investigation resulted in a grand jury returning a true bill and charges of Misdemeanor theft are pending under Cause No. 9400707, styled the State of Texas v. Raymundo Robles. Mr. Noll's affidavit referenced under Exhibit four (4) also confirms this prosecution.

EXHIBIT 6

Exhibit six (6) is a copy of the complete file of PIRG investigation #94-0013. This investigation centered around the erratic behavior of a City of Houston employee who is under medical care and takes medication to control his behavior. HPD requests your opinion as to what if anything may be released given this person's privacy rights. Since the entire investigation focused on the employees behavior, which appears to be related to his medical condition, it is difficult to redact out just certain passages and as such the Houston Police department takes the position the entire file should be excepted from public disclosure as a matter of privacy.

EXHIBIT 7

Exhibit seven (7) is a copy of the complete PIRG investigation file #94-0003. This investigation concerns the dumping of illegal material on City property. The nature of the complaint was such that it was passed on to the Texas Natural Resources Conservation Commission. Since the file contains the initial complaint the release of the information contained therein may allow persons to create alibis or collaborate with other persons to present a fictitious but consistent story. It may also result in attempts to intimidate the reporting party. Since this investigation could result in civil fines or criminal penalties, the Houston Police Department feels that this is essentially a law enforcement situation.

In view of the fact that a nonlaw enforcement agency may claim section 3(a)(8), now codified at Government Code, section 552.108, with regard to information in its custody that a law enforcement agency has determined would unduly interfere with law enforcement or prosecution (see Attorney General Opinion MW-575 (1982); ORD No. 493 (1988); ORD No. 272 (1981); ORD No. 183 (1978)), it stands to reason that files in the possession of the Houston Police Department that have either been incorporated into another agency's file or in the alternative would harm another agencies investigation, should likewise withstand the protection of section 552.108. This should hold true even if HPD is no longer actively in the investigation.

EXHIBIT 8

Exhibit eight (8) consists of five (5) pages from PIRG investigation file #93-0016. This

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investigation centered around an allegation of embezzlement of funds, but included in the file are reports concerning behavior of an employee that is totally unrelated to the investigation. I have highlighted a reference to the employee's psychologist which seems to document that the named employee may have an ongoing personality disorder. The Houston police department is concerned that this reaches the level of a protected privacy interest and is confidential as a matter of law. The other pages give a detailed account of some of the aberrant behavior the disclosure of which may be violative of this person's privacy if it is related to a medical condition.

EXHIBIT 9

Exhibit nine (9) is one page from PIRG investigation file #94-0009. While Ms. Briggs letter requested an opinion as to the confidentiality of the employee's home phone and address further investigation has shown that the employee has waived her privacy rights in this matter and therefore they will be released to the requestor. However, the Houston Police Department feels the listed Social Security Number is excepted as a matter of law as the person became a City of Houston employee after October 1, 1990. See ORD No. 622 (1994). Also included is a reference to the employee's social security number in a sworn affidavit. The rest of the information on these documents will be made available.

EXHIBITS 10, 11, 11(A) AND 12

These exhibits are criminal histories obtained via the NCIC/TCIC computer system. Such reports are excepted from disclosure as a matter of law. See ORD No. 565 (1990). Exhibit ten (10) is from PIRG file #92-0074. Exhibit eleven (11) is from PIRG file #92-0037. Eleven 11(A) is also from PIRG file #92-0037 and contains an officer's assignment sheet, home address and home phone number. These are excepted from public disclosure as per section 552.117 (1)(B) and as a matter of officer safety. Exhibit twelve (12) is from PIRG file #94-0005.

EXHIBIT 13

Exhibit thirteen (13) is from PIRG file # 93-0026. This exhibit is an offense report from an ongoing and active investigation. I have attached a memorandum from Captain S.J. Jones from the Houston Police Department Vice Division confirming this.

EXHIBIT 14

Exhibit four (4) is from PIRG file #93-0006. It consists of references to criminal histories obtained via NCIC/TCIC and the home phone and address of a City employee who wishes it to be kept private.

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EXHIBIT 15

Exhibit fifteen (15) is from PIRG file #94-0006. This investigation initially centered around possible workers comp fraud, but later expanded to include an investigation of unauthorized release of confidential law enforcement information. Exhibit 15 (A) is a statement made as part of an Internal Affairs Investigation that may result in criminal charges for the unauthorized running of criminal histories by the employee giving the statement. More specifically her affidavit contains the affiant's home address, home phone number and social security which should remain private.

Exhibit 15 (B) is information obtained via NCIC/TCIC and is confidential as a matter of law.

EXHIBIT 16

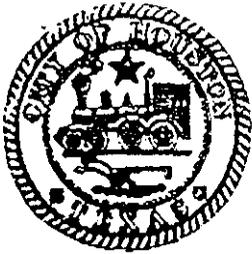
Exhibit 16 is a copy of PIRG file #93-0058. This investigation initially involved a complaint that city employees were passing forged checks. However, the investigation eventually revealed that the suspects were just persons presenting themselves as City of Houston employees. This investigation has led to a multi-agency investigation at the federal level and the U.S. Attorney handling the case has requested that all information related to this open and active investigation be excepted from public disclosure. I have attached correspondence from U.S. Attorney Andrew A. Bobb confirming this.

Thank you for your assistance in this matter. Should you have further questions about these exhibits or this request, please contact me at (713) 247-8367.

Sincerely,



Michael J. Harkins
Staff Attorney
Legal Services Unit
Houston Police Department



CITY OF HOUSTON

Legal Department

Post Office Box 1562 Houston, Texas 77251-1562 713/247-2000

Bob Lanier, Mayor

CITY COUNCIL MEMBERS: Helen Huey Michael J. Yarbrough Martha J. Wang Alfred J. Calloway Joe Roach Ray F. Driscoll John Keiley Felix Fraga
Ben T. Reyes Gracie Guzman Saenz Eleanor Tinsley Lloyd Keiley Sheila Jackson Lee Judson W. Robinson III CITY CONTROLLER George Greonlas

Benjamin L. Hall, III
City Attorney

March 28, 1994

BY FEDERAL EXPRESS

The Honorable Dan Morales
Attorney General of Texas
209 W. 14th St., 7th Floor
Price Daniel Sr. Building
Austin, Texas 78701

Re : Texas Open Records Request of Jay D. Root, Houston Post

Dear General Morales:

On March 17, 1994 the City of Houston Legal Department received a faxed Open Records Act Request for documents from the Houston Police Department's Public Integrity Review Group (hereinafter referred to as PIRG). See Exhibit 1. Specifically, that request seeks the following information:

1. Any completed PIRG investigations or documents relating to them.

On March 18, 1994 the City of Houston Legal Department received a second faxed Open Records Act Request that modified the first request in that it limited the request to a particular time frame. See Exhibit 2. It is the City's understanding that this particular request seeks investigative files closed since the first of the year.

In all, this Open Records request encompasses 33 investigative files. The City of Houston is releasing several of those files without exception. The City of Houston is of the opinion that all or part of the material contained in the remaining files is excepted from public disclosure under various sections of the Open Records Act as set out below.

The City of Houston is of the opinion that the documents contained in the PIRG investigations numbered 93-0035 and 93-0082 are excepted from disclosure pursuant to TEX. GOVT. CODE ANN. section 552.103 (Vernon 1994). Each of these investigations are the subject of pending prosecutions via the Harris County District Attorney's Office.



Section 552.103 excepts from disclosure information relating to litigation of a criminal nature and finds that a political subdivision is considered a party to litigation of a criminal nature until the applicable statute of limitations has expired. This has also been addressed in OR94-053 and OR94-040. Section 552.108 excepts from disclosure the records of a law enforcement agency that deal with the detection, investigation or prosecution of a crime.

The incident which is the subject of the investigation numbered 93-0035 involves allegations that a City of Houston animal control officer received cash from a citizen in exchange for not issuing citations and impounding the citizen's dogs. The charge of Theft (Misdemeanor) by a Public Servant is currently pending in Harris County Criminal Court at Law No. 4 under Cause No. 9401413.

The incident which is the subject of the investigation numbered 93-0082 involves allegations that a City of Houston employee was selling copies of various City of Houston documents and retaining the money for personal use. The grand jury returned a true bill and charges of Misdemeanor theft are pending in the 182nd State District Court of Harris County under Cause No. 9400708.

The City of Houston is of the opinion that certain information in the requested PIRG investigations is excepted from public disclosure as a matter of law as per TEX. GOV'T CODE ANN. section 552.101 (Vernon 1994). Whether the information is confidential by law, either constitutional, statutory, or by judicial decision is set out as follows.

In the PIRG investigation numbered 94-0013 there are references made to a particular individual's erratic behavior. The report contains information concerning that person's mental well-being and treatment associated with that condition. The release of that type of information could result in a violation of the common-law tort of invasion of privacy through the disclosure of private facts. The release of such information will meet the test set out in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Texas 1976), cert. denied, 430 U.S. 931 (1977). First, the information contains highly intimate and embarrassing facts the release of which would be highly objectionable to a reasonable person. Secondly, there is a question as to whether or not it is of legitimate concern to the public given that when the person takes his medicine as prescribed the person's behavior is rational and normal.

In the PIRG investigation numbered 93-0016, there are references to behavior for which the named employee sees a psychologist. The release of this type of information could result in a violation of the common law tort of privacy through the disclosure of private facts. The release of such information will be excepted from release to the public under the test set out in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W. 2d 668 (Tex. 1976), cert denied, 430 U.S. 931 (1977). The first prong of the test is met in that the material contains highly intimate and embarrassing facts the release of which would be highly objectionable to a reasonable person. The second prong leaves in question whether or not there is legitimate public concern given that the employee is under treatment and apparently can function with other employees making certain accommodations.

The PIRG investigation numbered 92-0074 contains criminal histories that were obtained via the TCIC/NCIC computer system. As a matter of law such information can only be released to other

law enforcement agencies. The rest of the file will be released at this time.

The PIRG investigation numbered 92-0037 contains criminal history information obtained via the TCIC/NCIC information network and can only be released to another law enforcement agency as a matter of law. This investigative file also contains the home phone number and the duty assignment of a Houston Police Officer. This information is believed to be excepted as per section 552.117 of the Open Records Act. The rest of the file will be released at this time.

The PIRG investigation file numbered 94-0009 contains the home address and phone number of a City employee. This is excepted from public disclosure under section 552.117(1)(a). The rest of the file will be released at this time.

The PIRG investigation numbered 94-005 contains criminal history information obtained via the TCIC/NCIC information system and such information can only be released to another law enforcement agency as a matter of law. The rest of the file will be released at this time.

The PIRG investigation numbered 94-0006 contains criminal history information obtained via the TCIC/NCIC information center and such information can only be released to another law enforcement agency. This investigation also contains references to an open Houston Police Department Internal Affairs investigation that may lead to the filing of criminal charges. These pages should be excepted from public disclosure as per section 552.108 of the Open Records Act. The release of this information at this time may aid in the tampering of evidence and the intimidation or collusion of witnesses. The rest of the file will be released at this time.

The PIRG investigation numbered 93-0065 contains allegations of theft by certain members of the Houston Fire Department, including members under the protection of Chapter 143 of the Local Government Code. The investigation revealed the complaint to be UNFOUNDED. As per section 143.1214 of the Local Government Code, the investigative files of a complaint related to a charge of misconduct that is not sustained may not be released to any agency or other person except another law enforcement agency or fire department. Therefore, this file is excepted from public release as a matter of law.

The PIRG investigation numbered 92-0049 contains allegations of suspicious activity by Fire Marshalls in approving permits for night clubs. The investigation revealed this complaint to be NOT-SUSTAINED. As per section 143.1214 of the Local Government Code the investigative files of a complaint relating to a charge of misconduct that is not sustained may not be released to any agency or other person except another law enforcement agency or fire department. Therefore, this file is excepted from public disclosure as a matter of law.

Section 552.108 excepts from disclosure the records of a law enforcement agency that deal with the detection, investigation or prosecution of a crime. The PIRG investigation file numbered 93-0026 contains an offense report related to Incident No. 029487393 W which is an open investigation out of which criminal charges have been filed. Not all suspects have been arrested in this case but they can be identified and will be prosecuted once they are taken into custody. The release of the offense report (other than the Public Information Sheet) at this time would hinder investigation in that it would potentially allow named suspects to avoid apprehension and it would allow for the tampering

of evidence, the intimidation of witnesses and collusion among witnesses. The rest of the file, other than the offense report, will be released at this time.

The PIRG investigation numbered 94-0003 contains allegations of the illegal dumping of contaminated material at a city water treatment plant. This case has been referred to the Texas Natural Resources Conservation Commission. This investigation was initiated by the Houston Police Department on January 12, 1994 and was referred to the Commission on February 2, 1994. A Mr. Ken Ausbie of the Commission has stated that the Commission considers this to be an open investigation with the potential for the assessment of civil and criminal penalties. However, further investigation must be completed before this decision can be made.

The PIRG investigation numbered 93-0058 contains allegations that city employees were attempting to pass forged checks while in City uniforms. This investigation was closed because it was revealed that no City employees were involved. However, there is now a criminal investigation that is intricately intertwined with the initial reports and this file has essentially become a criminal investigation file. Suspects have been identified and will be prosecuted when taken into custody. This file should be excepted from public disclosure under section 552.108 of the Open Records Act. The release of the investigative material at this time would impede further law enforcement efforts in that it may allow suspects to avoid apprehension, tamper with evidence, intimidate witnesses and/or enter into collusion as to their statements.

The documents containing the information which we believe to be excepted from disclosure as well as supporting documents will be sent under separate cover by Michael

Harkins of the Houston Police Department. Mr. Harkins may be reached at (713) 247-8367.

Very truly yours,

Tracy R. Briggs
Assistant City Attorney

TRB:ej

Enclosures

cc: Michael Harkins, HPD
Jay Root, Houston Post