THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 22, 1990

Mr. Robert E. Talton
City Attorney
City of Pearland
308 South Shaver
Pasadena, Texas 77506

Open Records Decision No. 561

Re: Effect of federal law on release of law enforcement information, and related questions (RQ-1987)

Dear Mr. Talton:

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

The City of Pearland (hereinafter, the "city") received an open records request from a newspaper (hereinafter, the "requestor") for all information pertaining to investigations conducted by the Department of Justice of alleged criminal civil rights violations by certain city police officers. In the request, these investigations were identified only by United States Department of Justice case numbers.

The Civil Rights Division of the Department of Justice advises this office that the requestor requested access to the Civil Rights Division's closed[1] investigative files involving allegations of criminal violation of federal civil rights statutes within the State of Texas. The Civil Rights Division sent a partial response to this request providing Department of Justice case numbers, but denying the requestor access to the names of individuals, victims, complainants, and subjects of investigation contained in the requested files. The Civil Rights Division based the denial of the requested information on applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

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1. We are advised that these files are closed because, for a variety of reasons, the cases under investigation did not meet Department of Justice standards for prosecution.

The requestor then sought, and in many cases obtained, access to the names of individuals by directing its inquiries to local political subdivisions pursuant to the Texas Open Records Act. The city is the recipient of such a request.

The city was verbally advised by this office, based on a prior open records ruling, that it was required by the Open Records Act to discern the identity of the police officers who were investigated by contacting the Department of Justice (hereinafter, the "DOJ").[2] The city is able to gain access to information protected from public disclosure by the Privacy Act under DOJ policies that permit routine information sharing with local governments and police departments. See 28 U.S.C. § 534.

After determining the identities of the officers and complainants in question by contacting the DOJ, the city conducted a search for the requested records. You advise that the city is not in possession of any of the requested documents. Consequently, the city was unable to comply with the open records request. See Economic Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266, 268 (Tex. Civ. App. - San Antonio 1978, writ dism'd).

The city has received a subsequent request for the names of the police officers and of the complainants for whom it searched its files with respect to this matter. As noted, these names were obtained by the city from the DOJ pursuant to policies permitting the sharing of such information with local governments. You advise that the only place this information appears in city records is in a memorandum dated October 18, 1989, from the city attorney to the chief of police regarding the existence of records responsive to the original open records request. The request also asks for a copy of a letter to the city from Mr. James E. Farnan of the the Federal Bureau of Investigation.

The release of information by the DOJ is governed by the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Information excepted from public disclosure under FOIA includes

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2. Other, similarly situated, governmental bodies were also so advised by this office.

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement . . . investigations or prosecutions, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7). The Privacy Act provides, in part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be
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> . . . .
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> (2) required under section 552 of this title;
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> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;
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> . . . .
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> (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the

> particular portion desired and the law enforcement activity for which the record is sought.

5 U.S.C. § 552a(b).

Subsection (a)(7) of the Privacy Act defines "routine use" as a use "which is compatible with the purpose for which [the record] was collected." Subsection (e)(4)(E) of the Privacy Act provides that each agency that maintains a system of records must publish the policies and practices of the agency regarding "storage, retrievability, access controls, retention, and disposal of the records" in the Federal Register.

The DOJ maintains the information in question in a system of records designated "Central Civil Rights Division Index File and Associated Records [JUSTICE/CRT-001]." This information is disseminated by DOJ pursuant to policies most recently published in the March 31, 1989, Federal Register which state, in part:

> ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:
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> . . . .
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> B. A record maintained in this system of records may be disseminated as a routine use of such records as follows:
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> [1] A record relating to a possible or potential violation of law, whether civil, criminal, or regulatory in nature may be disseminated to the appropriate federal, state or local agency charged with the responsibility of enforcing or implementing such law; . . . .
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> Release of information to the news media: Information permitted to be released to the news media and the public pursuant to 28 CFR 50.2 may be made available from systems of records maintained by the Department of Justice unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

54 Fed. Reg. 13251-53 (1989).

Section 50.2 of title 28 of the Code of Federal Regulations provides guidelines for DOJ personnel with respect to the release of information regarding civil or criminal proceedings. These guidelines apply to the release of information regarding a criminal investigation "from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise." Id. § 50.2(b)(1).

As can be seen from the foregoing recital, the dissemination of information by the DOJ regarding its investigations is governed by statutes, regulations, and policies designed to protect both law enforcement and privacy interests. These statutes, regulations, and policies expressly govern access to the information in question by the public (including the news media) and by local governmental agencies. As can also be seen, local governmental agencies may enjoy greater access to certain information than the news media.

You assert that the names of the officers and complainants are excepted under sections 3(a)(1) and 3(a)(2) of the Open Records Act as information the release of which would violate the common-law privacy rights of the individuals to whom the information pertains. To be excepted under common-law privacy in Texas, information must (1) contain highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) not be of legitimate concern to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977); Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). You have not explained, nor is it apparent, how the requested information meets these standards. We note, however, that it is difficult, if not impossible, for you to provide information explaining how this information meets the tests for common-law privacy found in Industrial Foundation, supra, as you have no information other than the names of the officers allegedly under investigation and the names of the alleged complainants.

However, section 3(a)(1) excepts from public disclosure "information deemed confidential by law." As the federal law governing dissemination of the information in question provides for access by the news media, we must conclude that when such access is denied the federal authority is acting

in compliance with the law to which it is subject in protecting a legitimate privacy or law enforcement interest.

This office has repeatedly held that the transfer of information between state agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976); H-836 (1974); Open Records Decision Nos. 272 (1981); 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. With respect to information to be transferred from a state agency to a federal agency this office has stated:

> While cooperation with federal agencies is desirable even where information is being requested that is not required to be supplied by the State of Texas under federal law, the policy supporting interchange of information among state agencies is absent when a federal agency requests information not required by law to be divulged to it. Especially where information, non-disclosable to the public, is involved, the state cannot effectively assure that federal agencies, which function under a different "Open Records Law", (see 5 U.S.C., Sec. 552) will maintain state records with the same eye towards confidentiality that state agencies would be bound to do under the laws of Texas. This lack of control by the state does not preclude the right of federal agencies to have access to public information of the State. It does preclude them from access to non-disclosable information, unless some other law requires its disclosure.

Attorney General Opinion H-242 (1974), at 4 (emphasis in original).

Attorney General Opinion H-242 expresses the concern (reiterated in Attorney General Opinion H-836) that in a transfer of information from a governmental body in Texas to a federal agency, confidentiality imparted to information under state law would not be respected by the federal agency under FOIA. We are of the opinion that in the reverse situation, i.e., a transfer of information from a federal agency to a governmental body in Texas, the comprehensive exception from public disclosure for "information deemed confidential by law" found in section

3(a)(1) of the Open Records Act will preserve the confidentiality of the information.

In the case at hand, a federal agency has shared information with a subdivision of the State of Texas. In such an instance, the public policy in favor of the exchange of information between governmental agencies is fully as strong as when the exchange is between state agencies. This policy strongly favors the continued availability of such information to local governments in Texas. The federal agency considers the information in question to be confidential as a matter of federal law. Under controlling federal law and agency policy, a local government may enjoy greater access to this information than the news media or the general public. We hold that when information in the possession of a federal agency is "deemed confidential" by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, section 3(a)(1) of the Open Records Act requires a local government to respect the confidentiality imposed on the information by federal law.[3] As we are advised by the DOJ that the requestor in this case has been denied the requested information by the DOJ, section 3(a)(1) of the Open Records Act requires that you recognize the confidentiality of the information under federal law and likewise withhold the requested information.

In Attorney General Opinion MW-95 (1979), this office considered a question regarding the access of an individual to his own criminal history record. In that opinion it was stated that because FOIA and the Privacy Act apply only to federal agencies, the provisions of these acts were not applicable to records held by an agency or political subdivision of the State of Texas. This statement is generally true, and we are not of the opinion that information in the possession of a governmental body in Texas is confidential or excepted from required public disclosure merely because the same information is or would be confidential in the hands of a federal agency. See Open

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3. We note that federal authorities may apply confidentiality principles found in FOIA differently from the way in which those principles are applied under the Open Records Act according to Texas precedent. See, e.g., Department of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468 (1989) for a discussion of the application of privacy interests recognized under FOIA.

Records Decision Nos. 124 (1976); 59 (1974). However, we are of the opinion that to apply the Open Records Act to circumvent the application of federal law regarding the dissemination of information in the possession of a federal agency could restrict the flow of information to governmental bodies in Texas and violates basic notions of comity between state and federal authorities. Where a federal agency shares information with a governmental body in Texas pursuant to a policy affording the governmental body greater access to the information than that afforded to the general public, section 3(a)(1) of the Open Records Act will except such information from public disclosure if the information is confidential in the hands of the federal agency under federal law.

The Civil Rights Division of the DOJ advises this office as follows:

> Disclosure of information by local government entities in the State of Texas where these matters have been determined to lack prosecutive merit could foreseeably chill and impede the process by which private citizens seek to redress constitutional harms. Such disclosure by local government entities could, in turn, cause difficulties with the ongoing cooperative exchange of information by the Department of Justice with local law enforcement agencies where the federal government has strong interests in protecting the privacy of individuals and the confidentiality of witnesses, complainants and informants.

For the reasons elaborated above, we believe this office was in error in instructing the city to obtain information from the DOJ for the sole purpose of complying with an open records request. As noted above, the Open Records Act does not require a governmental body to provide information not in its possession. As information linking the DOJ case numbers to the names of the investigated officers or the complainants was not in your possession, the matter should have stopped there.

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where

governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974). In this case, it was impossible to identify the requested records without acquiring new information from a source extrinsic to the city's records. We are of the opinion that the Open Records Act does not require a governmental body to obtain new information in order to comply with a request. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 452 (1986); 342 (1982). Open Records Letter Rulings OR89-385, OR89-386, and OR89-387 are overruled.

We now turn to the request for a copy of the letter to the city from Mr. James E. Farnan of the FBI. You assert that Mr. Farnan's letter is excepted from public disclosure by sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(11) of the Open Records Act.

You characterize Mr. Farnan's letter to the city as the work product of the city attorney, bringing it under the protection of section 3(a)(1) as information "deemed confidential by law." Unsolicited correspondence from an individual outside of city government is not the city attorney's work product. This exception is inapplicable.

You assert that Mr. Farnan's letter is excepted under section 3(a)(11). Section 3(a)(11) is intended to protect from public disclosure advice and opinions on policy matters and to encourage frank discussion within an agency, or between agencies, in connection with the decision making process. Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.). Mr. Farnan's letter states the FBI's position with respect to the dissemination of certain information. Mr. Farnan's letter reveals no privity of interest or common deliberative process between his agency and the city. It is, therefore, not the type of information section 3(a)(11) was intended to protect.

Finally, you contend that Mr. Farnan's letter may be withheld pursuant to section 3(a)(3), the litigation exception, because the newspaper "is contemplating filing a writ of mandamus on the City for this information." Section 8(a) of the Open Records Act provides:

> If a governmental body refuses to request an attorney general's decision as provided in this Act, or to supply public information or

> information which the attorney general has determined to be a public record, the person requesting the information or the attorney general may seek a writ of mandamus compelling the governmental body to make the information available for public inspection. (Emphasis added.)

You may not withhold requested information pursuant to section 3(a)(3) merely because a legal remedy exists for a governmental body's non-compliance with the act. The fact that the requestor may seek a writ of mandamus to enforce the provisions of the Open Records Act will not justify withholding information from public disclosure under section 3(a)(3). To apply the litigation exception in such a manner is illogical, circular, and produces an absurd result. Mr. Farnan's letter must be released.

S U M M A R Y

Where a federal agency shares information with a governmental body in Texas pursuant to a policy affording the governmental body greater access to the information than that afforded to the general public, section 3(a)(1) of the Open Records Act will except such information from public disclosure if the information is confidential in the hands of the federal agency under federal law.

The fact that the requestor may seek a writ of mandamus to enforce the provisions of the Open Records Act will not justify withholding information from public disclosure under section 3(a)(3) of the act. Open Records Letter Rulings OR89-385, OR89-386, and OR89-387 are overruled.

Very truly yours,

Jim Mattox

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