THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

October 22, 1986

Honorable Stephen C. Howard
Orange County Attorney
Courthouse
Orange, Texas 77630

Open Records Decision No. 444

Re: Whether the Open Records Act, article 6252-17a, V.T.C.S., requires the sheriff of Orange County to release certain information

Dear Mr. Howard:

The Orange Leader has submitted to your office and to Orange County Sheriff James Wade several requests for information. This decision will discuss the extent to which the Open Records Act, article 6252-17a, V.T.C.S., entitles the Leader to this information. We note that there is in this instance some dispute as to whether some of the information requested by the Leader has been supplied to it. Because this office cannot resolve fact questions, we cannot determine the extent to which the Leader's requests have been granted; instead, we will address the Leader's requests in their entirety. Before doing so, however, we shall summarize the history of this controversy.

Of the requests submitted by the Leader in recent months, none were initially granted. Neither your office nor Sheriff Wade, moreover, asked this office to rule on the legality of any of these denials within the ten-day period established by section 7(a) of the Open Records Act. After failing to obtain the desired information, the Leader contacted this office for assistance. This precipitated a series of communications between this office and both you and Sheriff Wade, the purpose of which was to achieve an informal resolution of this dispute. Letters were sent informing both you and Sheriff Wade that most of the information sought by the Leader was public information, and representatives of this office have conferred with Sheriff Wade to reiterate that fact. At these meetings, assurances were given that most of the requested information would be furnished to the Leader. As of this date, however, the Leader and the sheriff continue to dispute the extent to which the Leader's requests for information have been granted. The Leader, moreover, claims that it is on some occasions allowed to inspect jail records that it has requested, but that it is at other times not allowed to see the same records.

In a letter dated June 13, 1986, the Leader informed this office that it has asked Sheriff Wade to release the following information:

> 1. the prisoner jail cards of the sheriff's department, whether or not the arrestee has been released on bond;
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> 2. the department's dispatch cards;
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> 3. the department's general offense reports, 'on which the Department has frequently removed the names of complainants and suspects, has deleted the description of the offense, or has withheld access altogether';
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> 4. information relating to disciplinary action that has been taken by the department against [four named individuals] (current and former employees of the department); including but not limited to the dates of such disciplinary action; the punishment assessed; all factual details giving rise to the disciplinary action; and any written findings regarding the reasons for the action taken;
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> 5. information relating to an internal department investigation into an April 12, 1986 shooting incident involving [a named individual];
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> 6. information relating to the reason that the department dismissed [a named individual] from the force;
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> 7. information relating to the reasons for the promotion or demotion of [two named individuals] by the department;
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> 8. information regarding the age, law enforcement background, previous experience, and employment record of [two named individuals] including information relating to the reasons why either individual resigned or was terminated from any of his previous jobs.

The names in question are referenced in the Leader's letter of June 13, a copy of which is hereby made a part of this opinion.

In a letter to this office, Sheriff Wade argued that the information in item eight could be withheld for these reasons:

> This information is part of the employees personnel files. While the employees have a right to view their own files the information is not subject to public disclosure.

These reasons also apply to some of the information in items numbered one through seven, and we shall therefore consider them first.

Section 3(a) of the Open Records Act provides that "[a]ll information collected . . . by governmental bodies . . . in connection with the transaction of official business is public information . . . with the following exceptions only. . . ." (Emphasis added). Information in a public employee's personnel file is within this definition and is therefore available to the public unless it is also within a section 3(a) exception. It is thus incorrect to state that employees' personnel files are never subject to public disclosure. Second, this office held in 1981 that employees have no special right of access entitling them to inspect their personnel files. Open Records Decision No. 288 (1981). On the contrary, their right to inspect their personnel files is coextensive with the right of the public to do so. Accordingly, employees have no unrestricted right to view their own files.

One section 3(a) exception that may apply to personnel file information is section 3(a)(2), which excepts that information from required public disclosure if its release would cause a "clearly unwarranted invasion of personal privacy." Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.), however, establishes that such an invasion occurs only if the release of personnel file information would cause an invasion of privacy tort under the standards of Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). Under Industrial Foundation, this tort occurs when information is publicly disseminated even though it is highly intimate or embarrassing such that a reasonable person would object to its release and the public has no legitimate interest in it. Id. at 685.

Even if information in the personnel file of an employee of the sheriff's department was found to be highly intimate or embarrassing, that information would very likely still be available to the public under Industrial Foundation. The public has an obvious interest in having access to information concerning the qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of a sheriff's department. Indeed, insuring that the public would have access to information that would enable it to keep track of its public servants was one of the dominant motives of the legislature which enacted the Open Records Act. This purpose is made clear by section 1 of the act, which states in part:

> [A]ll persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give

> their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

V.T.C.S. art. 6252-17a, §1.

In Open Records Decision Nos. 342, 329 (1982) and 298 (1981), this office held that certain information about public employees, including their licenses and certificates, professional awards and recognition, educational level, membership in professional organizations, and prior employment are open to the public. Open Records Decision Nos. 329 (1982) and 278, 269 (1981) held that in the usual instance, the circumstances of an employee's resignation are available to the public. Open Records Decision Nos. 350 (1982) and 208 (1978) held that the final determination of a complaint against a police officer and letters advising him of disciplinary action taken against him are open to the public.

These statutory provisions and decisions establish that information in a public employee's personnel file, including that which relates to his professional background and qualifications, to his resignation, or to the termination of his employment, is available to the public unless expressly excepted under section 3(a) of the act. In light of the Hubert v. Harte-Hanks case, this information can be withheld under section 3(a)(2) only if it is highly intimate or embarrassing and the public has no legitimate interest in it. Frequently, the public will have a legitimate interest in information relating to public employees; personnel file information, therefore, will generally be available to the public regardless of whether it is highly intimate or embarrassing.

Mr. Wade's letter also stated:

> As to your request for information on disciplinary action concerning [five named individuals]: [a named individual] has never been disciplined by this department. The investigations concerning [three named individuals] are part of this department's internal affairs and are not subject to public disclosure.

Investigative information may be withheld in certain instances, e.g., where its release would "unduly interfere" with law enforcement or prosecution within section 3(a)(8) of the Open Records Act, see, e.g., Open Records Decision No. 434 (1986), or where it relates to pending or contemplated litigation within section 3(a)(3) of the act, see, e.g., Open Records Decision No. 135 (1976). Open Records Decision Nos. 434 (1986) and 287 (1981), however, emphasize that where it is not readily apparent that the release of investigative

information would unduly interfere with law enforcement or prosecution, the governmental body must show how this would likely occur. Other decisions note that section 3(a)(3) is not a blanket exemption for investigative files. See, e.g., Open Records Decision No. 183 (1978). In this instance, neither you nor Sheriff Wade has argued that the release of the information in item number four would unduly interfere with law enforcement or prosecution or that this information relates to pending or anticipated litigation. No claim has been advanced, moreover, that any other section 3(a) exception applies to this information, and as we have often observed, we do not consider exceptions not claimed by governmental bodies seeking to withhold information. Open Records Decision Nos. 325, 321 (1982). Accordingly, unless, within five (5) days, you advance compelling reasons for withholding any of the information concerning the [three individuals] named in item number four, that information must be released. See Open Records Decision No. 319 (1982) (where ten-day requirement not met, governmental body may withhold information only if compelling reasons shown).

Mr. Wade next stated:

> As to your request for information concerning the April 12 shooting incident involving [the individual named in item number five]: This is a criminal case that is still pending and is not subject to public disclosure.

Neither your office nor Sheriff Wade, however, has informed us of the criminal case to which the requested information applies. Unless we receive that information within five (5) days, we will conclude that section 3(a)(3) does not apply.

Mr. Wade also stated:

> As to your request for reasons for Dismissal, Promotions or Demotions of Department Employees: These are inner Department Decisions that are not subject to public disclosure.

Open Records Decision Nos. 329 (1982) and 208 (1978) held that complaints against police officers and information concerning disciplinary actions taken with respect to them are available to the public. Open Records Decision Nos. 329 (1982) and 278 (1981) held that the circumstances of an employee's resignation are usually available to the public. These decisions recognized that the public has a legitimate interest in this kind of information concerning public employees. We believe it is equally obvious that the public has a legitimate interest in knowing the reasons for the dismissal, demotion, or promotion of a public employee. Section 3(a)(2), therefore, does not except the information from required disclosure.

As you have asserted no other basis for withholding this information, this portion of the request must be granted.

In defense of his claim that the requested information may be withheld, Sheriff Wade cited Open Records Decision No. 71 (1975). At issue there was information concerning a former employee's character, work methods, whether he had been suspected or convicted of drug-related offenses, and the conditions of the termination of his employment. The decision held that

> most of the information . . . is excepted from disclosure by section 3(a)(2) of the Act. Specifically, information concerning evaluation or investigation of the employee's qualifications and performance is not required to be disclosed. Nor do we think that information concerning the circumstances of termination of employment is required to be disclosed.

As our previous discussion shows, however, recent decisions have undermined this decision. See, e.g., Open Records Decision Nos. 342, 329 (1982) (information about qualifications of public employees available to public); 329 (1982); 278 (1981) (circumstances of employee's resignation open to public); 350 (1982); 208 (1978) (disciplinary action against public employee available to public). These decisions have pointed out that the test for applying section 3(a)(2) which was devised in Hubert v. Harte-Hanks Texas Newspapers, Inc., supra, does not permit information in an employee's personnel file to be withheld if the public has a legitimate interest in it. The public has a genuine interest in information concerning a law enforcement employee's qualifications and performance, and in the circumstances of his resignation or termination. As we have noted, ensuring that information of this nature would be available to the public was a principal reason underlying the enactment of the Open Records Act.

In light of recent decisions and the Harte-Hanks case, Open Records Decision No. 71 (1975) is no longer viable. To the extent that its conclusions conflict with those announced here, it is overruled.

Sheriff Wade also defended his policy of withholding much of this information by pointing out that Orange County Termination Notice forms contain a notation stating: "Personnel records are not opened to the general public. If employees wishes [sic] copy of this termination, please acknowledge receipt below. . . ." But it has long been settled that governmental bodies may not simply agree to keep information confidential. Industrial Foundation of the South v. Texas Industrial Accident Board, supra; Open Records Decision Nos. 293 (1981); 207 (1978); 133 (1975). This notation, therefore, has no effect on the availability of personnel file information. On the contrary, as we have observed, the right of anyone to obtain

information in a personnel file depends entirely on whether the governmental employer can show that a section 3(a) exception applies to that information. The notation in question cannot close up information which is not within a section 3(a) exception.

With respect to the jail cards, dispatch cards, and general offense reports of the sheriff's department, neither your office nor Sheriff Wade has advanced any argument for withholding this information. On the contrary, the attorney representing Sheriff Wade stated, in a letter to this office, that the jail and dispatch cards should be released. Much of the information in the department's offense reports is available to the public under Houston Chronicle Publishing Company 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), and Open Records Decision Nos. 408 (1984), 216 (1978), and 127 (1976). Other information in these cards and reports can be withheld only if, within five (5) days, relevant exceptions authorizing the withholding of this information are cited. After five days, we shall, if we receive no information, conclude that none of the information in these cards and reports may be withheld. This information, moreover, can now be withheld only if compelling reasons for doing so are advanced. See Open Records Decision No. 319 (1982).

Before leaving the subject of the offense reports, we note the Leader's claim that "the Department has frequently removed the names of complainants and suspects, has deleted the description of the offense, or has withheld access altogether." This office cannot resolve the factual issue of whether the alleged transgressions have occurred.

In summary, in the instances noted, either your office or Sheriff Wade has five (5) days within which to advance arguments for withholding the information requested by the Leader. After five days, we shall conclude that this information must be disclosed. The remainder of the information must be released immediately. In this context, we note that section 10 of the Open Records Act provides in relevant part:

> (b) A custodian of public records, or his agent, commits an offense if, with criminal negligence, he or his agent fails or refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act.
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> . . . .
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> (e) Any person who violates Section . . . 10(b) of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail not to exceed six

(6) months or fined in an amount not to exceed $1,000, or by both such fine and confinement. A violation under this section constitutes official misconduct.

Very truly yours,

Jim Mattox

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