



CITY OF RAPID CITY

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MEMORANDUM

TO: Legal and Finance Committee Members

FROM: Jason E. Green, City Attorney

DATE: October 25, 2006

RE: Disclosure of Criminal Information on City Applications

Introduction and Recommendation in Brief

At the August 30, 2006, Legal and Finance Committee, a request was made of staff to draft changes to license applications and bring them back to a future Legal and Finance Committee meeting. While there was discussion about what those changes should be, there was no direction given as to the specifics. The discussion centered on the requirement to disclose arrests (including arrests not resulting in conviction) and also limiting the timeframe for consideration of arrests (10 and 20 years were mentioned in the discussion). I have reviewed all of the applications for City licenses and met with Chief Tieszen regarding the contents of these applications. In short, the recommendation from Chief Tieszen and me is to leave the applications as they currently exist, except for one minor change. That change is to copy the bold language contained at the end of the application to the very top of the first page of the application. In addition, if the Council is inclined to limit the information available to the Chief of Police and the Council in considering the character and fitness of an applicant, I advise that the ordinances requiring licensing for five businesses be repealed.

Analysis

I. Licenses and Application Under Consideration

To begin, the following applications for City licenses do not require the applicant to disclose any information regarding previous criminal history or arrests:

Central Station Service
Mechanical
Plumbing
Mobile Home Court or Trailer Park
Electrical
Gas Fitting
House Mover
Commercial Refuse Collector
Residential Contractor
Sewer and Water Trenching
Sign Contractor.

In addition, the application for alcohol beverage licenses is a form prescribed by the State Department of Revenue. Therefore, the City has no ability to alter that form. This memo does not address any of these license applications.

The following applications do request criminal history information: Adult Oriented Business License and Manager/Operator for Adult Oriented Business license. However, the information requested in these two applications mirrors the language of the ordinance directly and requires disclosure only of specific offenses pertaining to adult oriented businesses (prostitution, assault, etc.) Therefore, I am not addressing these licenses either.

That leaves the applications for Security Guards, Second Hand Shops, Pawn Shops, Metals and Gems Dealers, and Taxi Drivers (hereafter “the five licenses”). The application for each of the five licenses is exactly the same. For your reference, I have attached a copy of that application to this memo, as well as the instructions that are distributed to each applicant for security and taxi licenses. The second page of the application requests information about the applicant’s criminal history. Specifically, the application asks if the applicant has ever been arrested or convicted for any crime, excluding traffic citations. Traffic citations are to be noted on the application at a later point if the operation of a motor vehicle is an integral part of the position for which the license is sought (i.e., taxi drivers, mobile security). The application requires the applicant disclose if they have ever been on probation as an adult. In addition, the application contains a waiver to authorize a background investigation by the Rapid City Police Department. The waiver advises the applicant that the investigation includes former employment, together with any and all information concerning the abilities, personal character, credit history, arrest record, etc., of the applicant. The applicant also acknowledges that they understand they may be asked to submit to a polygraph examination in order to verify aspects of the background investigation. Finally, in bold letters at the bottom of the third page there is a notice that failure to disclose any criminal or traffic offenses may result in the denial of the license by the Rapid City Common Council.

II. Legal and Finance Discussion

At the Legal and Finance Committee meeting on August 30, 2006, there was discussion about several changes. There was a suggestion that the time period for reviewing information related to criminal activity be limited to 10 or 20 years. In addition there was a suggestion that the application request information pertaining to convictions only rather than arrests or convictions. It was also noted that the staff may identify certain more sensitive licenses that should have deeper inquiry.

At the Committee meeting, I advised against restricting the information required to be disclosed by the applicant for one of the five licenses. After discussions with Chief Tieszen and further consideration, I am even more convinced that limiting the information available for consideration by the Chief of Police, and the Council is unwise.

III. Licensure Philosophy

At the out set, I believe it is important to keep in mind the public policy rationale for licensing certain business when considering whether to change the five license applications (and thereby changing the policy as to who is ultimately licensed.) The City licenses occupations, including the five licenses at issue, for the protection of the public, not for the benefit of those who are employed in the occupations. In issuing a license to an individual, the City is essentially vouching for the fitness of the individual to hold a position of trust.

The issuance of a security license in particular presents significant health, safety, and welfare considerations. Cloaking individuals with criminal histories with the authority of a security officer presents risks to the public and to the City. Likewise, second hand dealers, pawnbrokers, and metals and gems dealers all operate businesses that have been known to be used by criminals to facilitate the conversion of stolen goods into cash. Insuring that people in these businesses do not have criminal records serves not only the customers of the businesses, but also helps to protect the public from the crime of theft. If it is difficult to dispose of stolen property (such as by selling it to a second hand, pawn or metal and gem dealer), it is less likely that the crime will be committed in the first place. Ensuring that the people operating these types of businesses are of appropriate character and fitness to perform the functions authorized under the license furthers the public policy interest of protecting the health, safety, and welfare of the community.

IV. Specific Examples

To illustrate the perils of limiting the inquiry into the criminal history of applicants for the five licenses to arrests that result in convictions, please consider the following circumstances. Imagine the City receives an application from someone who had been arrested and charged with murder but found not guilty of the criminal charge despite overwhelming evidence of the person's guilt. Further, imagine that the applicant was subsequently found to be liable for wrongfully causing the death of another person in a civil lawsuit. Under the City's current application, that arrest for murder must be disclosed and is considered by the Police Chief and the Council in making a determination about the applicant's fitness to hold one of the five

licenses at issue. However, eliminating incidents of arrest that do not result in a conviction from the application will prevent these incidents and circumstances from being considered by the Police Chief and the Council. Imagine having to issue a security license to O. J. Simpson.

Next, consider the potential effect of a time limit for considering convictions. Imagine that an individual convicted of rape and murder is released from prison 40 years after the commission of the crimes. Under the current system, the arrest and convictions for rape and murder are required to be disclosed on the application. However, under a more time-limited review, even if the limit was 30 years, the City would not be able to require the applicant to disclose either the arrest or the convictions for rape and murder. I believe that this is a case where everyone would agree that looking back to the arrest and convictions is entirely appropriate and denial of a security license based on the convictions would be in the community's best interest.

I believe that these examples show the problems that may arise if either or both of the suggested changes are adopted. In addition, if either or both of the changes are adopted, it is my opinion that the City may be at risk of liability when someone is physically injured or the victim of a theft and the perpetrator holds one of the five licenses issued by the City.

Conclusion and Recommendations

While the current application for one of the five licenses casts a wide net and is likely to capture a number of applicants with relatively minor violations, it is imperative to ensure the Police Chief and ultimately, the Council, have all of the relevant information about an applicant before making a determination as to whether or not the applicant is a person fit to hold any of the five licenses. Merely having an arrest does not automatically disqualify an individual from consideration for one of the licenses. However, failing to disclose an arrest is a factor that goes directly to the credibility of the applicant. While it may be understandable that an applicant may forget an arrest for a minor infraction that occurred 20 years prior, it is not nearly as likely that someone has forgotten they were arrested and spent five years in prison. In any case, it is up to the Chief of Police to make a determination about the applicant's character and fitness in the first instance.

The City issues a number of licenses every year. Only a small percentage of applications are ever denied by the Chief of Police. In those instances, the applicant has the ability to ask the Council to overrule the Chief of Police. Sometimes the Council agrees with the Chief's decision, and sometimes it disagrees with the Chief's decision. In any case, it is the Council that has the final authority to make that decision. In my view, it is unwise for the Council to put blinders on the Chief of Police or on itself when making determinations about the character and fitness individuals to hold licenses issued for the benefit of the public.

For all of these reasons, I recommend the only change to the application for one of the five licenses be the addition at the top of the first page of the language currently located under the signature blocks. However, if the Council is inclined to restrict the information available to the Chief of Police and to itself regarding arrests from what is currently required by the

application for the five licenses, my advice is to repeal the ordinances that require the five licenses entirely. It is only a matter of time before someone will obtain one of the five licenses who would not have been issued the license if the City looked back into their past 1, 5, 10, or 20 years. It is also inevitable that at some point one of those individuals will commit a crime against a citizen of Rapid City and that citizen will look to the City for compensation. I do not believe a jury would have any difficulty finding that the City was liable for licensing someone with a history of violence or arrest when the City failed to discover criminal arrests or convictions because readily available information was disregarded. From my view, the decision makers should have access to all relevant information and weigh it accordingly in making a decision.

Please feel free to contact either me or Chief Tieszen if you have any questions about this memo.

JEG/map

cc: Public Works Committee
Mayor Shaw
Chief Tieszen
Jim Preston
Joel Landeen
Karie Price
Kevin Lewis