



The Attorney General of Texas

JIM MATTOX
Attorney General

June 21, 1984

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1387
Telecopier 512/475-0268

Mr. F. J. Coleman, Jr.
City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251

Open Records Decision No. 418

Re: Whether records which are the subject of a subpoena are available under the Open Records Act

714 Jackson, Suite 700
Dallas, TX. 75202-4508
214/742-8944

Dear Mr. Coleman:

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

The defendant in an aggravated assault case which is now pending in the 208th Judicial District Court of Harris County, Texas, has asked you to release the personnel records of seven Houston police officers. You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to grant this request. You contend that the requested records are excepted from required disclosure under sections 3(a)(2) and 3(a)(3) of the act, which except:

1 Texas, Suite 700
Houston, TX. 77002-3111
713/223-5886

(2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

906 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

4309 N. Tenth, Suite B
McAllen, TX. 78501-1885
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

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The requestor has claimed that six of the seven police officers whose personnel records he has requested subjected him to police brutality and then concocted the aggravated assault charge to protect themselves. Some time ago, the defendant's attorney filed a motion for a subpoena duces tecum, pursuant to which you would have been obliged to produce "all records of complaints brought by any citizens against" the six police officers named therein, "together with the records of all action taken by the [Houston Police Department] as a consequence of said complaints filed." You have advised us that the court quashed this motion.

You claim that section 3(a)(3) is applicable in this instance because an adequate showing has been made that the requestor's attorney intends to file a civil action against the city because of the six officers' alleged misconduct. As noted, you also contend that the requested records are excepted under section 3(a)(2).

At the outset, we note that one of the seven officers whose records have been requested has, as far as we can tell, in no way been implicated in any of the proceedings which gave rise to the aggravated assault charge or may give rise to the civil action to which we referred. This officer's name was not mentioned in the subpoena duces tecum, nor can we find it in any of the materials that discuss the relevant facts in this case. Unless we are furnished with additional relevant information which causes us to conclude otherwise, therefore, we must conclude that this officer's personnel file must be treated differently from the files of the other six officers.

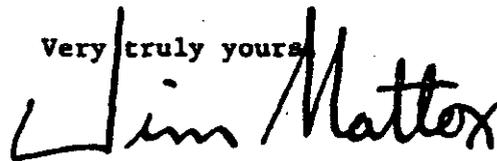
Section 3(a)(2) is, we conclude, not applicable in this instance. In Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 551 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court of appeals noted that claims arising under section 3(a)(2) should be resolved by applying the privacy test set forth in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). Under that test, information may not be withheld if it is of legitimate interest to the public, even if a person of ordinary sensibilities would object to its release on the grounds that it is highly intimate or embarrassing. Id. at 685. Here, even if we assume arguendo that information in any of the seven police officers' personnel files is highly intimate or embarrassing and that a person of ordinary sensibilities would object to its release, we cannot conclude, on the strength of the facts before us, that it is of no legitimate interest to the public. Information concerning complaints filed by citizens and their resolution by the police department is certainly of special interest to the public; you have not indicated, moreover, that there is anything else in these personnel records that needs protection. We therefore conclude that section 3(a)(2) does not authorize you to withhold information in any of the seven police officers' personnel files.

On the other hand, we conclude that section 3(a)(3) does authorize you to withhold the personnel files of the six officers who have thus far been implicated in these events. This section is applicable when litigation concerning a specific matter is either pending or reasonably anticipated. See, e.g., Open Records Decision No. 331 (1982). In this instance, the defendant has alleged that the six Houston police officers whose names he mentioned "fraudulently and maliciously filed [these] aggravated assault charges and a driving while intoxicated charge against" him in order to "protect themselves from their own wrongdoing." Given this allegation, we conclude that the personnel records of these six officers will be directly implicated in the pending aggravated assault case. Furthermore, the

defendant has alleged in documents presented to the court and to this office that he believes that he can seek redress in federal court for the alleged tortious conduct of the six police officers. His statements indicate, in our opinion, that there is in this instance a very real likelihood that civil actions will be initiated. If this occurs, the personnel records of the six police officers would of course be directly implicated in the proceedings.

We therefore conclude that the personnel records of six of the seven police officers whose records have been requested by the defendant under the Open Records Act may be withheld. These six officers are those who have thus far been accused of police misconduct in this case. On the other hand, nothing in the facts presently before us indicates that the other officer whose file has been requested is implicated in the pending action or will be implicated in the anticipated civil action. At this time, therefore, we must conclude that his file may not be withheld under section 3(a)(3). We have already noted that you have provided insufficient evidence to enable us to conclude that his file may be withheld under section 3(a)(2). If additional information comes to light which indicates that this officer may be implicated in litigation arising out of these facts, or that section 3(a)(2) is applicable, you may submit it to us for our consideration. Absent such information, however, you must release this officer's personnel file.

Very truly yours



JIM MATTOX
Attorney General of Texas

TOM GREEN
First Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant Attorney General

Prepared by Jon Bible
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Rick Gilpin, Chairman
Jon Bible
Colin Carl
Susan Garrison
Jim Moellinger
Nancy Sutton