THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 18, 1989

Mr. Robert L. McCallum
City Attorney
Town of Addison
4560 Belt Line Road, Suite 320
Dallas, Texas 75244

Dear Mr. McCallum:

On February 23, 1989, we combined your request of February 16, 1989, for an open records decision under article 6252-17a, V.T.C.S., in the Lochry matter with a pending file, RQ-1640. After completing our initial research on RQ-1640, we have determined that the issues you raise about the applicability of section 3(a)(3) of the Open Records Act to the Town of Addison's police manual differs from the issues raised in RQ-1640 about the applicability of section 3(a)(8) to the San Antonio Police Department's manual. For this reason, we have severed your request and resolve it by this informal ruling. Your request was initially assigned ID# 5669. This decision is OR89-218.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

You claim that section 3(a)(3), the litigation exception, protects the town's general police and fire policy and procedure manuals. To claim section 3(a)(3) the governmental body must show: that litigation is actually pending or reasonably anticipated, that the information in question relates to the litigation, and that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records

Decision No. 478 (1987). See Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976).

You have shown that litigation is pending, i.e. a federal lawsuit, challenging the actions of the town's police department with regard to the arrest and incarceration of Vernon Alex Drake, deceased. The pleadings in the lawsuit allege that the town's police officers "acted toward deceased under color of the statutes, ordinances, customs and usage of the State of Texas, Town of Addison, and the Addison Police Department." You state that the manner in which Addison employees handled the emergency is the crux of the lawsuit. We agree.

We do not agree, however, the the town's police and fire general policy and procedure manuals "relate" to the litigation within the meaning of section 3(a)(3). The act's exceptions are to be construed narrowly, in favor of disclosure. See V.T.C.S. art. 6252-17a, § 14(d). You have not shown how the town's police and fire policy and procedure manuals relate to this litigation. You do not indicate that they were created in response to this incident. Presumably, they existed long before this incident occurred. Nor have you shown how their release would impair the town's litigation interests in the lawsuit at issue.

Open Records Decision No. 416 (1984), which you cite as authority for withholding the manuals, is inapposite here. That decision addressed the public availability of fire department reports about an explosion and fire that were subject to litigation and noted that "the manner in which the city fire department handled the explosion and fire" might fall within section 3(a)(3). Open Records Decision No. 416 could be cited as authority under section 3(a)(3) to require the requestor to seek through discovery (rather than through the Open Records Act) the video tapes of the town's handling of this incident. The decision does not, however, warrant withholding general policies and procedures that do not specifically relate to the incident at issue.

Moreover, several provisions of the Open Records Act expressly designate policy and procedure manuals public:

> Sec. 6. Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:
>
> . . . .

> (8) statements of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (9) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (10) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;
>
> (11) each amendment, revisions, or repeal of 7, 8, 9 and 10 above;
>
> . . . .
>
> (13) statements of policy and interpretations which have been adopted by the agency;
>
> (14) administrative staff manuals and instructions to staff that affect a member of the public.

V.T.C.S. art. 6252-17a, § 6.

In Open Records Decision No. 514 (1988), this office stated:

> The list of information expressly deemed public in section 6 does not override the act's exceptions to disclosure. Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 185 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision Nos. 280 (1981); 233 (1980). On the other hand, the legislature did not intend the section 6 enumeration to be totally meaningless. . . . At the least, it heightens a governmental body's burden under the act of showing which exceptions apply and why. See id.; see also Open Records Decision Nos. 395 (1983); 208 (1978).

Because the Town of Addison has not shown how the manuals "relate" to the litigation at issue within the meaning of section 3(a)(3), it may not withhold its general police and fire policy manuals under section 3(a)(3). Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-218.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/bc

Ref.: ID# 5669

cc: Thomas J. Lochry
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