THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

August 3, 1989

Mr. James Showen
Assistant City Attorney
Legal Department
P. O. Box 2039
Tyler, Texas 75710

Dear Mr. Showen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6318; this decision is OR89-229.

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.

The Tyler Police Department received an open records request for the statement of a certain rape victim that was given to the Tyler Police. The requestor is the individual who was arrested and convicted of the rape. You contend that sections 3(a)(1) and 3(a)(8) of the Open Records Act except the requested information from required public disclosure.

Section 3(a)(1) of the Open Records Act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. Id. at 683-85. Those portions of the rape victim's statement that contain details of the rape itself

clearly fall within the scope of common-law privacy, as does any information tending to identify the victim, see Open Records Decision No. 339 (1982), if the victim has not been identified already. You must, therefore, delete the victim's name and the marked information. The remaining portions of the statement, however, do not come within the protection of common-law privacy.

You also contend that section 3(a)(8) of the act excepts the victim's statement. Section 3(a)(8) excepts from required public disclosure:

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision No. 434 (1986). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision No. 133 (1976). Whether disclosure of particular records will unduly interfere with crime prevention must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981).

You contend that section 3(a)(8) protects the victim's statement because:

> The record is one showing the mode of operations of a criminal . . . . The details of the commission of his crimes may be the only hope of connecting him with the next crime he commits when he is released from prison.

After a careful examination of the victim's statement, this office determined that only a very small portion of the statement contains information that if revealed might interfere with future criminal investigations. We have marked one portion of the statement that we believe comes under the protection of section 3(a)(8). Unless you provide this office, within 5 days of your receipt of this letter ruling, a more detailed explanation as to how the release of the remaining information comes under the protection of section 3(a)(8), you must release all of the unmarked portions of the statement.

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 OR89-229.

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/RWP/bc

Enclosures: Marked documents

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Ref: ID# 6318
ID# 6709