



**THE ATTORNEY GENERAL  
OF TEXAS**

September 18, 1989

**JIM MATTOX  
ATTORNEY GENERAL**

Ms. Adrienne C. Leonard  
Hutchinson Boyle Brooks & Fisher, P.C.  
Attorney for the City of Grapevine  
3900 First City Center  
Dallas, Texas 75201-4622

Dear Ms. Leonard:

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# 6779; this decision is OR89-295.

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 City of Grapevine received an open records request for copies of "all records, files and information of any kind concerning the public service employment" of a Grapevine police officer. You advise that the city agreed to release much of the information in the officer's personnel file, information such as personnel status change reports, prior work history, medical history information prepared by the officer, employment reference information, school transcripts, professional awards and recognition, training and qualification certificates, attendance records, and the officer's oath of office. We assume this information has been released already; if not, it must be released immediately.

You argue, however, that the remainder of the information, such as the officer's marital and family history information, birth certificate, driver's license information, previous addresses, information regarding distinguishing marks and scars, various release forms, medical reports, and personal financial history information should be

Ms. Adrienne Leonard  
September 18, 1989  
Page 2

withheld. You raise sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8), 3(a)(15), and 3(a)(17) of the Open Records Act as exceptions to required public disclosure of this information.

Section 3(a)(1) of the act protects "information deemed confidential by law," including constitutional and common-law privacy. Section 3(a)(2) protects personnel file information only if its release would cause an unwarranted invasion of personal privacy under the test articulated for section 3(a)(1) of the act, which attempts to balance a person's right to privacy against the public's interest in disclosure. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

Information is protected by constitutional privacy if it falls within the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), and Paul v. Davis, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. This constitutional right to privacy consists of an individual's interest in avoiding disclosure of personal matters. You argue that the officer's marital and family history information, specifically the officer's marriage certificate, divorce decree and Judgement of Dissolution fall within the protected "zones" of privacy. You do not explain why this information is in the officer's personnel file. Although we agree that there may be no public interest in this information the divorce decree is already a matter of public record in the courts and the marriage certificate is a public record in the county clerk's office. On the other hand, the requestor sought information "concerning the public service employment of" a named officer; this does not include information about his marital history. You may therefore withhold it because it has not been requested.

Section 3(a)(1) also protects information protected by common-law privacy rights. Information is protected by common-law right of privacy if it contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). You claim that the officer's "Personal Inquiry Waiver Authority For Release of Information" and personal financial history are protected by

common-law privacy rights. Information is protected under the common-law right of privacy aspect of section 3(a)(1) only if it meets both requirements of the test articulated in the Industrial Foundation case. The waiver for release of information contains no intimate or embarrassing information about the officer in question. Absent special circumstances, no legal authority makes this document confidential; you must release it. Specific financial information about an individual, however, may be protected from disclosure by common-law rights of privacy. See generally Open Records Decision No. 373 (1983); but see Apodaca v. Montes, 606 S.W.2d 734 (Tex. Civ. App. - El Paso 1980, no writ) (financial statements of bail bond licensees are public). You may withhold information concerning the officer's personal financial history.

Section 3(a)(1) also protects information made confidential by statutory law. The language of the relevant confidentiality statute controls the scope of protection. You have provided for our review copies of the officer's criminal history and medical reports prepared by a physician. You contend that these reports are specifically protected by Title 28 of the Code of Federal Regulations, section 20.21 (b) and (c), and V.T.C.S. article 4495b, section 5.08.

Title 28 of the Code of Federal Regulations, section 20.21, governs the preparation and submission of computerized criminal history information generated by the Department of Justice. Subsections (b) and (c) limit the dissemination of criminal history information to authorized state and federal criminal justice agencies and individuals. The requestor does not qualify under this statute as a person entitled to the criminal history information at issue. Consequently, you may withhold this information. Similarly, V.T.C.S. article 4495b, the "Medical Practice Act," governs the dissemination of records generated by a physician related to medical services rendered to a patient. Section 5.08 provides several exceptions under which medical records generated by a physician may be disclosed. Again, the requestor is not qualified under section 5.08 to gain access to these records. You may withhold them.

Section 3(a)(8), known as the "law enforcement" exception, 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 that are maintained for internal use in matters relating to law enforcement and prosecution.

Ms. Adrienne Leonard  
September 18, 1989  
Page 4

Section 3(a)(8) also protects certain personal history and arrest-related information of persons who have been arrested. See Houston Chronicle Publishing Co. 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). Physical descriptions of arrestees, with emphasis on scars and tattoos, may be protected under section 3(a)(8). Id. see also Open Records Decision No. 127 (1976). For similar reasons, section 3(a)(8) protects such information concerning the officer at issue. You may withhold information indicating any scars, tattoos, or distinguishing marks the officer may have.

This decision does not address your claims regarding the applicability of section 3(a)(15) to the officer's birth certificate. The request at issue does not encompass this information. As a general rule, access to birth and death certificates is governed by article 4477, V.T.C.S.

The requestor has indicated that the city may withhold the home address and telephone number of the officer in question. You request that the city be permitted to withhold information indicating all of the officer's previous residences. Because the requestor has not requested this information you need not provide it. We note, however, that the purpose of section 3(a)(17) is to protect peace officers. Giving a requestor a previous address of a peace officer does not put the officer at risk.

You also raise section 3(a)(3) of the act. This section authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving governmental entities or their officers or employees. Open Records Decision No. 331 (1982). This section is not triggered merely by verbal threats of a law suit made by the person requesting the information at issue. Id.; see also Heard v. Houston Post, 684 S.W.2d 210, 212 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). A governmental body must show that litigation is actually pending or reasonably anticipated and that the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's legal interests in the litigation. See Open Records Decision No. 478 (1987). You have not satisfied the requirements of section 3(a)(3). You may not withhold any of the information sought under this section.

Under separate covers, you submit additional information from the officer's personnel file for review. This office did not receive a request for an attorney general's

opinion within the period specified by section 7(a) of the act. A governmental body must request an attorney general's decision within 10 days after receiving a written request for information. Section 7(a) provides: "If a decision is not so requested, the information shall be presumed to be public information." The governmental body must show a compelling reason to overcome this presumption. Open Records Decision No. 319 (1982). You explain that the additional information was located in a separate personnel file located in the City Personnel Department rather than in the City Police Department. You claim that the compelling reason for not submitting this additional personnel file information to this office within 10 days after receipt of Mr. Kelton's request was that delay in locating the additional files was "an honest and unintentional mistake." It is unnecessary to determine whether this constitutes a compelling reason to overcome the presumption created by section 7(a).

You must release the performance evaluation information submitted under separate cover because it is not protected under either section 3(a)(1) or section 3(a)(11). The public has a legitimate interest in the manner in which public employees perform their jobs; section 3(a)(1) therefore does not apply. Nor is the evaluation the kind of sensitive advice on policy matters protected under section 3(a)(11). See Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.).

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 OR89-295.

Yours very truly,

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

JSR/FAF/bc

Ref.: ID# 6779  
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Ms. Adrienne Leonard  
September 18, 1989  
Page 6

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