



**THE ATTORNEY GENERAL
OF TEXAS**

September 20, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Mark Dalpiaz
Staff Attorney
Bexar County Sheriff's Department
200 N. Comal
San Antonio, Texas 78207-3505

Dear Mr. Dalpiaz:

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# 6811; this decision is OR89-299.

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 Bexar County Sheriff's Department received a request for an Internal Affairs investigation file concerning alleged telephone harassment by a sheriff's department employee. The request was made by a representative of the employee under investigation. The investigation file includes a typed investigation report, written statements from witnesses and the accused employee, various releases, medical records, memoranda, and a report from Southwestern Bell Telephone. You claim sections 3(a)(1), 3(a)(2), 3(a)(8) and 3(a)(11) of the Open Records Act as exceptions to required public disclosure.

You contend that the witnesses' statements, the investigation report, the telephone logs by Southwestern Bell Telephone, and the medical records are protected by sections 3(a)(1) and 3(a)(2) of the act. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 3(a)(2) protects personnel file information only if its

Mr. Mark Dalpiaz
September 20, 1989
Page 2

release would cause an unwarranted invasion of privacy under the test articulated for section 3(a)(1) of the act. Because section 3(a)(2) does not except more information than that excepted under section 3(a)(1), the following discussion describes the type of information that may be protected under section 3(a)(2).

Section 3(a)(1) protects the "informer's privilege." Open Records Decision No. 515 (1988). In Roviaro v. United States, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Emphasis added.)

The "informer's privilege" aspect of section 3(a)(1) protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision No. 515 (1988). In a telephone conversation with this office, you explained that the persons who have submitted statements concerning the telephone harassment have not volunteered information under an agreement that their identities be withheld from the public; rather, these witnesses have made statements under a guarantee of protection against self-incrimination. See Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967). Further, you explained that the requestor may gain access to the names of the witnesses and the content of their statements if the matter proceeds to a civil hearing. The statements you have submitted are statements from persons who had personal knowledge of the harassment or are statements from persons acquainted with those suspected of harassment, i.e., witnesses. The statements are not those of "informants" as that term is defined by the

Supreme Court in Roviaro. Because part of the purpose of the privilege is to prevent retaliation against "informants," the privilege does not apply when the informant's (or in this case the witnesses') identity is known to the party complained of or can be easily obtained by that party. See Open Records Decision No. 208 (1978). You may not withhold the witnesses' statements under section 3(a)(1).

Section 3(a)(1) also protects information only 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, 687 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). The investigative report includes information about sexual conduct and marital infidelity and should be withheld from the general public. However, section 3(a)(1) cannot be used to withhold information from the individual section 3(a)(1) was designed to protect. V.T.C.S. art. 6252-17a, § 3B; Open Records Decision No. 481 (1987). You must release the investigation report to the requestor.

On the other hand, the telephone records at issue do not contain intimate facts about the employee's private affairs. Moreover, whether an officer of the sheriff's department is involved in activity such as telephone harassment is of legitimate public concern. You may not withhold the telephone records under section 3(a)(1).

The investigative file also includes the medical-psychological records of a minor not related to the requestor. As mentioned earlier in this ruling, section 3(a)(1) protects information made confidential by law, including statutory law. Article 4495b, V.T.C.S., the "Medical Practice Act," protects communications between a physician and patient relating to medical services rendered to that patient. Section 5.08(b) specifically makes confidential:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Section 5.08 provides eight exceptions under which medical records generated by a physician may be disclosed. The requestor is not qualified under section 5.08 of article

Mr. Mark Dalpiaz
September 20, 1989
Page 4

4495b to gain access the medical records at issue. In conjunction with section 3(a)(1) and section 5.08 of article 4495b, you may withhold this information from the requestor.

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. Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation on policy matters intended for use in the entity's executive deliberative process. Open Records Decision No. 464 (1987). After a careful review of the investigation file, this office has determined that the file, on its face, contains no information protected by either section 3(a)(8) or 3(a)(11). You do not show how these exceptions protect the information. Consequently, except as indicated, the investigation file is public and must be released.

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 OR89-299.

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# 6811

cc: Ms. Linda Chavez-Thompson
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