



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 9, 1989

Mr. Ron McLemore
Assistant City Attorney
Baytown Police Department
3200 N. Main Street
Baytown, Texas 77521

Dear Mr. McLemore:

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# 7395; this decision is OR89-325.

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 Baytown Police Department received an open records request for records relating to a U.S. Justice Department investigation of an alleged civil rights violation by one of the department's police officers. You contend that the department's file concerning this matter comes under the protection of sections 3(a)(1), 3(a)(2), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 5.08(b) of article 4495b, V.T.C.S., makes confidential "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." You must, therefore, withhold these types of records.

Section 3(a)(1) also protects 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). Texas courts recognize four categories of common law privacy: 1) appropriation, 2) intrusion, 3) public disclosure of private facts, and 4) false light in the public eye. Information must be withheld under the false light privacy doctrine, only if its release would be highly offensive to a reasonable person, the public interest in disclosure is minimal, and there exists serious doubt about the truth of the information. Open Records Decision No. 308 (1982).

In 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), the court of civil appeals held that information contained in criminal justice information systems, such as TCIC, should remain closed to the public, in part because the release of these records, which often contain inaccurate or misleading entries, could result in false conclusions as to the individual's criminal past, thus raising "false light" privacy interests protected by section 3(a)(1). Id. at 188; see also Open Records Decision No. 438 (1986) (general discussion of "false light" privacy). Consequently, you must withhold all criminal history information.

The requested records also contain information that reveals the identity of a juvenile suspected of delinquent conduct. Section 51.14(d) of the Family Code, dealing with juvenile records held by law enforcement agencies, lists the persons or entities who may gain access to these records; the subsection does not grant the law-enforcement officials controlling these documents discretion as to who else may see them. Detailed reports of alleged delinquent conduct must be withheld. See Open Records Decision No. 181 (1977). The reports at issue are so detailed that they reveal a juvenile's identity, even with the deletion of the juvenile's name; anyone with knowledge of the juvenile's involvement in the incident could gain access to the police records and thus discover other information about the juvenile's actions. See id. You must therefore delete from the reports all references to the juvenile involved in the incident.

Section 3(a)(2) protects information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The test for

section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1), i.e., to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). None of the requested information comes under the protection of section 3(a)(2).

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, but only if the release of these records would "unduly interfere" with law enforcement or prosecution. Open Records Decision No. 434 (1986). You have not demonstrated, and it is not clear to this office, how the release of the requested records would unduly interfere with law enforcement or prosecution. You may not, therefore, withhold any of the records pursuant to section 3(a)(8). Consequently, except for those records outlined above that come under the protection of section 3(a)(1), all of the requested documents must be released to the requestor.

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 OR89-325.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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Approved by David A. Newton
Assistant Attorney General

DAN/RWP/bc

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