



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 31, 1989

Mr. Robert E. Diaz
Assistant City Attorney
Police Legal Advisor
Box 231
Arlington, Texas 76004-0231

Dear Mr. Diaz:

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# 4648; this decision is OR89-355.

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. Attorney General Opinion H-436 (1974). The act does not require this office to raise and consider exceptions that you have not raised.

The Arlington Police Department received a request from the news media for prior employment information from the personnel files of four named police officers and all other police officers the department hired since September, 1987. This request grew out of two shooting incidents involving Officer Brian Farrell. The city received notice that the parents of one victim are planning to sue the City of Arlington. You previously asked for a ruling on this information, which resulted in informal decision OR88-284. In that ruling, you were asked to submit additional evidence and arguments to support your contention that section 3(a)(3) protects this information. You have submitted additional arguments and ask for a supplemental ruling on the applicability of section 3(a)(3).

Section 3(a)(3) excepts information from required public disclosure if the governmental entity can prove that litigation is pending or reasonably anticipated, and that

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the information relates to the litigation such that its release would adversely affect the governmental entity's interest. We agreed in the previous ruling that litigation concerning Officer Farrell is reasonably anticipated. We did not agree, however, that all of the information requested relates to the litigation sufficiently to trigger the section 3(a)(3) exception.

Portions of Officer Farrell's personnel records may be withheld under section 3(a)(3). Litigation is reasonably anticipated and the information requested "relates" to the litigation within the meaning of section 3(a)(3). See Open Records Decision No. 418 (1984) (personnel files of police officers directly implicated in suit withheld under section 3(a)(3)). This conclusion, however, does not govern whether the information is available through discovery. V.T.C.S. art. 6252-17a, § 14(f); Attorney General Opinion JM-1048 (1989). Once the information has been released in discovery, it must be released to the news media as well. The purpose for section 3(a)(3) would no longer apply. Moreover, certain basic information in the personnel files is public. See Open Records Decision No. 511 (1988).

You may not withhold the personnel files of the other officers under section 3(a)(3). The attorney general has ruled that prior employment information is not generally protected under section 3(a)(2) of the Open Records Act. Open Records Decision No. 329 (1982). You have provided no evidence to show that litigation is pending or reasonably anticipated involving these officers. You have also not shown that these files will be involved in the threatened litigation concerning Officer Farrell in a manner sufficient to pass the second part of the 3(a)(3) test. See Open Records Decision No. 418. Therefore, their files must be released.

You also claim that a clear reading of section 3(a)(3) suggests that the governmental entity's attorney has the right to determine if information should be withheld under this section, subject only to the attorney general's review for abuse of discretion. We disagree. Section 3(a)(3) requires only that the governmental entity's attorney must determine whether the section should be claimed. Review of the documents and decisions as to their release must be made by the attorney general. V.T.C.S. art. 6252-17a, § 7; Open Records Decision No. 511 (copy enclosed).

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

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published open records decision. If you have questions about this ruling, please refer to OR89-355.

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

JSR/le

Ref.: ID# 4648
ID# 4370
ID# 4468
OR88-284

Enclosure: ORD-511

cc: Mr. Eddie Vela
Dallas Morning News
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