



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 6, 1989

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Dear Mr. Driscoll:

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# 7924; this decision is OR89-359.

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 Harris County Hospital District received a request for the dates of employment, titles, salaries, names, and home addresses¹ for numerous employees and administrators of the hospital. The hospital contends that section 3(a)(3) protects the requested information from required public disclosure.

1. Although you do not raise section 3(a)(17), public employees' home addresses should be withheld if, prior to receipt of the request at issue, the public employees requested, pursuant to section 3A, that their home addresses not be public information. Open Records Decision No. 530 (1989).

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Exception 3(a)(3) authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information relating to settlement negotiations involving such litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Attorney General Opinion H-483 (1974); Open Records Decision No. 331 (1982). To claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or reasonably anticipated; and 2) that the information in question "relates" to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). See Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976).

Section 3(a)(3) does not protect basic facts, the release of which would not impair the governmental body's legal strategy. Open Records Decision No. 395 (1983); see Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976); see also Open Records Decision Nos. 221 (1979) (section 3(a)(3) does not under any imaginable circumstances protect the minutes of a school board's public meeting); 208 (1978) (section 3(a)(3) does not protect certain fundamental factual information regarding a complaint against a police officer); 146 (1976); 43 (1974) (information expressly made public by statute cannot fall within section 3(a)(3)). The information at issue does not include witness statements, attorneys' work product, investigations, or evaluations. The requested information may not be withheld under section 3(a)(3).

Please note that the Open Records Act expressly makes public "the names, sex, ethnicity, salaries, title, and dates of employment of all employees and officers of governmental bodies." V.T.C.S. art. 6252-17a, § 6(2). The list of information expressly deemed public in section 6 does not override the act's exception to disclosure. Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 185 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W. 2d 559 (Tex. 1976); Open Records Decision Nos. 514 (1988); 280 (1981); 233 (1980). On the other hand, the legislature did not intend the section 6 enumeration to be totally meaningless. At the least, it heightens a governmental body's burden under the act of showing which exceptions apply and why. See id; see also Open Records Decision Nos. 395 (1983); 208 (1978).

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Moreover, the requestor here is the individual who filed suit against the district. His "request," which the district treated as an open records request, appears to be a request for production under the Texas Rules of Civil Procedure. The Open Records Act does not create privileges from civil discovery. V.T.C.S. art. 6252-17a, § 14(f); Attorney General Opinions JM-1048 (1989); H-231 (1974).

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 OR89-359.

Yours very truly,

Open Government Section
of the Opinion Committee

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Prepared by Jennifer S. Riggs
Chief, Open Government Section

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