



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

November 28, 1989

Mr. Ron McLemore
Assistant City Attorney
City of Baytown
3200 N. Main
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# 7621; this decision is OR89-406.

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. Attorney General Opinion H-436 (1974). 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 two open records requests from a criminal defendant currently incarcerated with the Texas Department of Corrections. The requestor first sought certain police reports relating to the alleged criminal activities for which he is currently incarcerated. Although you claim only the protection of section 3(a)(1) with regard to this information, you contend in your letter to the requestor that some portions of the reports also come under the protection of section 3(a)(8).

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. Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law

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enforcement or prosecution. Open Records Decision No. 434 (1986). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision No. 133 (1976).

Portions of the police reports reveal the modus operandi of the crime; this and other related information in the report clearly come under the protection of section 3(a)(8). We have marked the information that you may withhold pursuant to section 3(a)(8). You may also withhold all information tending to identify witnesses who cooperated with the investigation, unless their identities have already been revealed to the defendant/requestor, e.g. through criminal discovery or during trial. In any instance, you must release the identity of the original complainant. 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).

The requestor also seeks other specific information, some of which is not contained in the public portions of the police reports and does not exist in tangible form. Although the Open Records Act does not require you to answer factual questions, see Open Records Decision No. 347 (1982), there is certainly nothing in the act to prevent you from doing so. Requestors of information should, however, be notified that the requested information does not exist. This office considers your proposed answers to the requestor's inquiries to be appropriate in this instance.

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 OR89-406.

Yours very truly,

*Open Government Section
of the Opinion Committee*
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of the Opinion Committee
Approved by David A. Newton
Assistant Attorney General

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Ref.: ID# 7621
ID# 7451
ID# 7406
ID# 7356

Enclosure: Marked Documents

cc: Mr. Rayford Leach
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