



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

May 15, 1990

Mr. John C. West, Jr.
Chief, Legal Services
Department of Public Safety
Box 4087
Austin, Texas 78773-0001

OR90-189

Dear Mr. West:

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# 5627.

You have received a request for the personnel files of certain employees and for any affidavits executed by those persons regarding a particular matter. You assert that certain marked portions of the information requested are excepted from disclosure by sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8), 3(a)(11), and 3(a)(17). We will address each raised exception in turn.

Section 3(a)(1) of the act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 3(a)(1) applies to information made confidential by both common-law privacy and by constitutional privacy. Texas courts have recognized four categories of common-law privacy: (1) appropriation (commercial exploitation of the property value of one's name or likeness); (2) intrusion (invasion of one's physical solitude or seclusion); (3) public disclosure of private facts; and, (4) false light in the public eye (a theory analogous to defamation). It is with the third category that you are concerned.

The Texas Supreme Court in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977) [hereinafter Industrial Foundation] set forth the primary test for the "public disclosure of private facts" privacy protection applicable under section 3(a)(1). Information may be withheld under section 3(a)(1) only if the information

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. Id. at 683-85.

Section 3(a)(1) protects constitutional privacy, as well as common-law privacy. Id. The Texas Supreme Court concluded that constitutional privacy protects information falling within the "zones of privacy" described in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing.

We have considered the exception you claimed, specifically section 3(a)(1), and have reviewed the documents at issue. We have marked those portions that are excepted from required public disclosure; the remaining records must be released.

Section 3(a)(2) excepts from required public disclosure

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

This section protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act. See Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). We have examined the records that you have submitted to us and have marked any portions that may be excepted from disclosure; any remaining portions must be released.

Section 3(a)(3) of the act protects from required public disclosure

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to

which an officer or employee of the state or political subdivision, as a consequence of this office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Because you have not alleged the existence of any pending litigation or the likelihood of any anticipated litigation, we conclude that none of the information that you have submitted to us is excepted from required public disclosure under section 3(a)(3).

Section 3(a)(8) protects

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 which are maintained for internal use in matters relating to law enforcement and prosecution.

If a law enforcement agency's internal law enforcement and crime prevention techniques were readily available to the public, those techniques could be rendered ineffective. Release of certain law enforcement information would enable suspects and criminals to evade detection and capture more easily. See Open Records Decision Nos. 133, 127 (1976). However, section 3(a)(8) does not ordinarily protect general personnel information such as a law enforcement officer's age, law enforcement background, and previous employment. See Open Records Decision No. 216 (1978). On the other hand, section 3(a)(8) protects information that, if revealed, might endanger the life or physical safety of law enforcement personnel. Id. We have examined the material that you have submitted to us and have marked those portions that may be withheld from public disclosure; any remaining portions must be released.

Section 3(a)(11) of the act protects

inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

Section 3(a)(11) has been read to protect from public disclosure advice, opinion, and recommendation used in the

decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 470 (1987). We have examined the records that you have submitted to us and have marked those portions that may be withheld; the remaining portions must be released.

Section 3(a)(17) protects the home addresses and telephone numbers of "peace officers as defined by article 2.12, Code of Criminal Procedure . . . or by section 51.212, Texas Education Code." Unlike non-peace officer public employees, a peace officer need not affirmatively claim, under section 3A of the act, confidentiality for this information. Open Records Decision No. 488 (1988). Any information in the personnel file that reveals the home address and telephone number of the peace officer whose personnel file has been requested must be withheld from disclosure. We have examined the material that you have submitted to us and have marked those portions that may be withheld from public disclosure; any remaining portions 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 OR90-189.

Yours very truly,



Jim Moellinger
Assistant Attorney General
Opinion Committee

JM/le

Ref.: ID# 5627, 6171

Enclosure: Marked Documents

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