



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

April 29, 1991

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR91-222

Dear Mr. Perry:

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# 10179.

You indicate that a requestor seeks certain letters of reprimand and efficiency evaluations of personnel of the Dallas Fire Department. You have submitted representative samples of the documents in question.

As to the letters of reprimand, you contend that they are excepted from disclosure by sections 3(a)(1) and 3(a)(2) of the Open Records Act, in that they contain "highly intimate or embarrassing information." Both common law privacy under section 3(a)(1) and employee privacy under section 3(a)(2) may be properly invoked to withhold information only if the material in question contains highly intimate and embarrassing facts about a person, such that disclosure would be highly objectionable to a person of ordinary sensibilities. In addition, the information must be of no legitimate concern to the public. *See* Open Records Decision Nos. 579 (1990); 470 (1987); 423 (1984).

In Open Records Decision No. 484 (1987), this office said that there is a legitimate public interest in knowing that a police officer was charged with misconduct while off-duty. In Open Records Decision No. 444 (1986), this office declared that even if information in a public employee's personnel file is highly intimate or embarrassing, it ordinarily would be of such legitimate concern to the public as to be disclosable. In Open Records Decision No. 418 (1984), this office held that information regarding complaints about police officers filed by citizens,

and their resolution by the police department, was of sufficient public concern to overcome the expectation of privacy guaranteed by section 3(a)(2).

One of the sample documents you submit is a letter of reprimand to an employee of the fire department who was arrested and charged with assaulting his wife. Another is a "letter of counseling" to a fire department employee for an unspecified offense. A third is a letter of reprimand to an employee for receiving more than three moving traffic violations within a 24-month period. A fourth is a letter of reprimand to an employee who "broke a rule requiring proper receipt of alarms and messages." The last is a letter of counseling which alleges that a fire department employee was "rude and uncooperative" to a newspaper reporter.

The samples you have submitted fail to achieve the standard of "highly intimate or embarrassing," even without considering the "legitimate concern" portion of the privacy test. If there are other examples in the personnel files of the fire department which are substantially more "highly intimate and embarrassing" than those you have submitted, you should submit them for our inspection. Otherwise, on the basis of the samples you have provided, we must conclude that the letters of reprimand and letters of counseling at issue are not excepted from disclosure by either sections 3(a)(1) or 3(a)(2) of the Open Records Act.

The second request is for performance evaluations of fire department employees. You contend that these documents are excepted from disclosure by sections 3(a)(1) and 3(a)(2), specifically the common law right of privacy, and also by section 3(a)(11), which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." This office has long construed this exception as one designed to protect advice and opinion on policy matters, and to encourage open and frank discussion regarding administrative action. *See, e.g.,* Open Records Decision Nos. 582, 563, 538 (1990). The standard for section 3(a)(11) has long been whether the particular advice or evaluative material plays a role in the decisional process. *See, e.g.,* Open Records Decision Nos. 559 (1990); 470 (1987). The exception extends to the information itself, regardless of whether the author is identifiable. Open Records Decision No. 538 (1990). In the samples you submit, the information clearly constitutes evaluations which are excepted by section 3(a)(11). Thus, you may withhold from disclosure all of the material in "Exhibit D."

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 OR91-222.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/lcd

Ref.: ID# 10179

Enclosure: Open Records Decision Nos. 582, 579, 563, 559, 538 (1990); 484, 470 (1987); 444 (1986); 423, 418 (1984).

cc: Mr. Troy L. Armstrong
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