



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

August 26, 1991

Mr. Fred Toler
Executive Director
Texas Commission on Law Enforcement
Officer Standards and Education
1033 La Posada, Suite 240
Austin, Texas 78752

OR91-374

Dear Mr. Toler:

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# 12932.

The Texas Commission on Law Enforcement Officer Standards and Education (the commission) received an open records request for, *inter alia*, the following information:

The names of all peace officers who have been convicted of a felony but who were commissioned before a felony conviction was prohibited or otherwise "grand-fathered" in as peace officers, [and]

The names and number of all Texas peace officers for whom the Commission has no record that they were examined by a psychologist, or [have] taken a psychological test or had a criminal history check.

With regard to these two requests, you state that the commission does not currently possess lists of the requested information. It is well-established that the act does not require a governmental body to prepare new information in response to an open records request. Open Records Decision No. 342 (1982) at 3. Nor does the act require the preparation of information in the form requested by a member of the public. Open Records Decision No. 145 (1976). For example, in Open Records Decision No. 347 (1982), this office indicated that the act does not require a governmental body to answer factual questions; the act applies only to information

already transcribed into tangible form.

Although this office held in Open Records Decision No. 467 (1987) that a school district had the option of allowing a requestor of records to search through original documents rather than having district personnel conduct a massive search for the particular documents requested, such an option is not available here because confidential records, such as criminal history information and psychological declarations, would be compromised. See V.T.C.S. art. 6252-17a, § 10(a). Because the commission does not maintain the requested information, it need not comply with these two requests.

The commission also received a request for

[a] copy of the complaint filed by [a commission employee] with the state commission on Human Rights and any settlement agreement between [the employee] and the Commission on Law Enforcement.

You state that you have released to the requestor a copy of the requested complaint that was filed with the Texas Commission on Human Rights. You contend, however, that two settlement agreements executed by the commission and the employee in settlement of the discrimination charge is excepted from required public disclosure by sections 3(a)(1), 3(a)(2), and 3(a)(3) of the Open Records Act.

The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.--Austin, 1983, writ ref'd n.r.e.). The information at issue pertains solely to the commission's and employee's actions within the employment relationship and as such cannot be deemed to be outside the realm of public interest. Section 3(a)(2) was not intended to protect the type of information at issue here.

With regard to the settlement agreements, you inform us that

[t]he parties (excluding the Texas Human Rights Commission)

signing the Agreement included in the terms of the Agreement a confidentiality provision for a number of reasons [I]t was a management decision, that as a business necessity . . . that at all times the content of the negotiations be kept confidential in order to insure an honest and good faith exchange between the parties. . . . To hold that this Agreement is subject to disclosure is a violation under Vernon's Ann. Tex. Const. Article 1 §16, because based on the fact situation, it is clear that confidentiality was a critical condition of the negotiations which led to a settlement agreement in this matter.

Article I, section 16, of the Texas Constitution provides:

No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

The contract clause of the constitution forbids only laws that operate retroactively on contracts; consequently, any contracts with confidentiality provisions, such as those at issue here, that were executed after the enactment of the Open Records Act are without effect. *See, e.g.,* Open Records Decision No. 55A (1975). The settlement agreements are not made confidential by their own terms. *See also Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W. 2d 668, (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *but see* Open Records Decision No. 415 (1984) (settlement agreement made confidential by court order is excepted by section 3(a)(7)).

Finally, with regard to the applicability of section 3(a)(3), you assert that "[a]t this point, it is also unclear if the disclosure [of the agreements] will reopen the matter and thus lead to litigation." To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 331, 328 (1982). You have not shown that the requested material meets this initial test. We further note that section 3(a)(3) does not protect information that has previously been made available to all parties in the litigation. Open Records Decision Nos. 349, 320 (1982).

You have not demonstrated that the settlement agreement is excepted from required public disclosure; consequently the agreement must be released. Because

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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 OR91-374.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/RWP/lb

Ref.: ID# 12932
ID# 12993

Enclosures: Open Records Decision No. 55A

cc: Lorraine Adams &
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