



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 15, 1991

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

OR91-497

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# 13178.

You have received a request for information relating to a fair housing discrimination case. The manager of an apartment building attempted to evict a tenant, who then filed a complaint of housing discrimination. The requestor, who is a respondent in this case, seeks the entire case file which has been prepared in the course of the city's investigation of the complaint. You advise us that you do not object to release of some of the requested information, including information furnished by the respondents in the case; however, you claim that the remaining information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(8), and 3(a)(11) of the Open Records Act.

We have considered the exceptions you claim and have reviewed the materials submitted to us. Previous open records decisions issued by this office resolve your request. Section 3(a)(1) excepts from public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You assert that the identities of the witnesses involved in the housing discrimination investigation are protected by the informer's privilege as incorporated into the Open Records Act by virtue of section 3(a)(1). The interest protected by the informer's privilege is to encourage persons to report possible misconduct without their

identities being disclosed, and therefore, to prevent retaliation against them. Open Records Decision No. 470 (1987). Although it ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing civil laws. Attorney General Opinion MW-575 (1982). Once the identity of an informer is disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. It is not clear that you have claimed the informer's privilege for the complainant. In any case, information in the file shows that the respondent in the fair housing case knows the complainant's identity. Accordingly, the informer's privilege does not protect the complainant's identity or identifying information about him.

Less clear, however, is whether the identities of the witnesses are known to the respondent. The Texas Rules of Civil and Criminal Evidence indicate that the informer's privilege protects not only the identities of those who report violations of the law, but also the identities of those who merely cooperate in law enforcement investigations. See Open Records Decision No. 515 (1988). Information which would tend to identify such witnesses is also protected. *Id.* Provided that the identities of the witnesses are not known to the respondent, we therefore conclude that the identities and statements of the witnesses may be withheld from required public disclosure by section 3(a)(1).

You claim that some of the information contained in the investigation file is protected by the privacy aspect of section 3(a)(1). Generally, common-law privacy protects any information which contains highly embarrassing facts about a person, the disclosure of which would be highly objectionable to a person of ordinary sensibilities and which is of no legitimate concern to the public. Open Records Decision No. 579 (1990). Information relating to an individual's emotional or mental distress may be withheld under common-law privacy. Open Records Decision No. 343 (1982). "Highly intimate or embarrassing facts" may include facts about a person's subjective emotional state rather than about conduct or events. Disclosure of the kinds of prescription drugs a person is taking is also protected by common-law privacy. Open Records Decision No. 455 (1987) at 5. Much of the information included in the investigation file relates to an individual's state of mental illness and to the manifestations thereof. Such information is of a highly embarrassing and intimate nature and there is no legitimate public interest in its disclosure. Accordingly, information relating to a person's mental illness and to alleged incidents resulting from his mental illness must be withheld from required public disclosure.

You also claim that the requested information is excepted by section 3(a)(3), the litigation exception. Section 3(a)(3) excepts from 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 his 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.

Open Records Decision No. 555 (1990) held that section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to the pending litigation. Section 3(a)(3) applies only where the litigation involves or is expected to involve the governmental body which is claiming the exception. Open Records Decision No. 392 (1983). You advise us that the requested information is part of a case file prepared by the city's fair housing discrimination office in case styled *Matthews v. Rishon*, case number 91.010. Presently, the governmental body claiming the section 3(a)(3) exception is not a party to the litigation. Having examined the documents submitted to us, we conclude that you have not adequately demonstrated that the governmental body can reasonably anticipate litigation in this matter. Accordingly, you may not properly invoke section 3(a)(3).

Next, you claim that the investigation file is protected from disclosure by section 3(a)(8). Section 3(a)(8) excepts

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.

Section 3(a)(8) applies only to criminal prosecutions and not to the administrative enforcement of law. *See generally* Open Records Decision No. 493 (1988). However, where there is a reasonable probability of criminal prosecution, even a

non law enforcement agency may claim section 3(a)(8). Attorney General Opinion MW-446 (1982). The mere speculation of prosecution cannot form the basis for withholding information under section 3(a)(8). Open Records Decision No. 582 (1990). We conclude that the prospects of prosecution in this case are not sufficient to invoke section 3(a)(8).

Finally, you claim that the requested information is excepted 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." Section 3(a)(11) protects only advice, opinion, and recommendation and not severable factual information. Open Records Decision No. 574 (1990). Notwithstanding your failure to indicate which portions of the investigative file you believe consist of advice, opinion, or recommendation, we have examined the documents and conclude that no information contained therein may be excepted by section 3(a)(11).

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 OR91-497.

Yours very truly,



Susan Garrison  
Assistant Attorney General  
Opinion Committee

SG/GK/lcd

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