



Office of the Attorney General
State of Texas

October 21, 1992

DAN MORALES
ATTORNEY GENERAL

Ms. Mary Kay Fischer
Assistant City Attorney
City of Galveston
P. O. Box 779
Galveston, Texas 77553-0779

OR92-614

Dear Ms. Fischer:

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# 14340.

You have received a request for access to approximately 15 City of Galveston ("the city") personnel files as well as additional information about 11 city police officers. You seek to withhold portions of the requested information under various statutory exceptions to required public disclosure.¹

You claim that information relating to a certain internal affairs investigation is excepted from disclosure under section 3(a)(3) of the Open Records Act. Section 3(a)(3) excepts from disclosure information relating to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). Whether litigation may be reasonably anticipated is determined on a case-by-case basis. Open Records Decision No. 452 (1986). You advise us that the city anticipates litigation on the basis of a letter sent by an attorney on behalf of the police officer who was the subject of the internal affairs investigation. Having reviewed the information submitted to us for review, we conclude that litigation may not be reasonably anticipated. Accordingly, the requested information may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.

¹We assume the information at issue is taken from the civil service file of the officers. Information in a police officer's civil service file may be withheld from disclosure if it falls within an exception to disclosure under the Open Records Act. Open Records Decision No. 562 (1990).

You seek to withhold medical and psychological information relating to city applicants and employees. Section 5.08(b) of the Medical Practices Act, article 4495b, V.T.C.S., prohibits the release of "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician." Psychological and emotional health examination reports must be withheld under article 611.002 of the Health and Safety Code. *See also* Open Records Decision No. 455 (1987).

You also seek to withhold certain financial information relating to applicants and employees. Common-law privacy interests protect from disclosure information that reveals a financial decision on the part of the employee. Open Records Decision No. 545 (1990). Thus, you may withhold information relating to an employee's decision to participate in a deferred compensation program, assuming that participation in such programs is not mandatory. *See id.* Federal tax forms are made confidential by federal statute and therefore must not be disclosed to the public. 26 U.S.C. § 6103(a). The release of consumer credit reports is also governed by federal statute. 15 U.S.C. § 1681b; *see also* Open Records Decision No. 373 (1983).

Other information excepted from required public disclosure by statute includes N.C.I.C.I.I.I. printouts and polygraph examination results. N.C.I.C.I.I.I. printouts constitute criminal history information and are excepted by section 3(a)(1). 28 C.F.R. § 20.20(B); *see also 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). Section 19A(a) of article 4413(29cc), V.T.C.S., makes confidential "information acquired from a polygraph examination." We have marked the information which must be withheld from required public disclosure under the statutory exceptions as incorporated into the Open Records Act by section 3(a)(1).

You claim that information that details the types of firearms owned by a peace officer is excepted from public disclosure by section 3(a)(8). We have examined the list of firearms owned by the peace officer and conclude that its release might undermine a legitimate interest of law enforcement or crime prevention. *See* Open Records Decision No. 434 (1986) at 2. Accordingly, we conclude that it may be withheld from required public disclosure by section 3(a)(8).

You also claim that some of the requested information is excepted from required public disclosure by section 3(a)(11), which excepts memoranda and letters to the extent that they contain advice, opinion, or recommendation intended for use

in the entity's policy-making or deliberative process. Open Records Decision No. 464 (1987) at 2-3. We have marked the information that may be withheld under section 3(a)(11).

You claim that birth certificates maintained in peace officer personnel files are excepted from required public disclosure by section 3(a)(15). In Open Records Decision No. 338 (1982), however, this office held that section 3(a)(15) only excepts birth and death certificates maintained by the Bureau of Vital Statistics and that such certificates in the possession of a city health department are public. Accordingly, the birth certificates maintained in the personnel files must be released.

You claim that some of the requested information is excepted from disclosure by section 3(a)(17)A, which excepts "the home addresses or home telephone numbers of each official or employee or each former official or employee of a governmental body except as otherwise provided by Section 3A of this Act, or of peace officers as defined by Article 2.12, Code of Criminal Procedure, 1965, as amended, or by Section 51.212, Texas Education Code." Section 3A(a) provides that section 3(a)(17) is applicable only when an employee indicates in writing that he does not want his home address and telephone number disclosed. While peace officers need not affirmatively claim confidentiality for this information under section 3(a)(17), other officials or employees must have indicated in writing that they wish to have their addresses and telephone numbers withheld in order to come within section 3(a)(17). Thus, you must withhold the address and telephone numbers of peace officers, and you must withhold the address and telephone numbers of non-peace officers who have complied with provisions of Section 3A. *See also* Open Records Decision No. 530 (1989) (A governmental body may not solicit a response from its employees under section 3A(b) in response to a pending open records request.)

You claim that photographs of peace officers are excepted from disclosure by section 3(a)(19), which excepts:

photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer unless:

(A) the officer is under indictment or charged with an offense by information; or

(B) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(C) the photograph is introduced in a judicial proceeding.

In Open Records Decision No. 502 (1988) at 7, this office held that section 3(a)(19) "protects from required disclosure all photographs of peace officers unless the circumstances in subsections (A), (B), and/or (C) of section 3(a)(19) occur or the peace officer gives written consent to release as provided in section 3(c)." You inform us that a peace officer, whose personnel file is subject to this open records request, is presently a defendant in criminal litigation, and that another is a party to a civil service arbitration proceeding. Accordingly, their photographs may not be withheld from public disclosure pursuant to subsections (A) and (B) of section 3(a)(19). Otherwise, the photographs of peace officers may be withheld from public disclosure under section 3(a)(19).

Finally, you claim that Police Academy tests, quizzes, and answer sheets are excepted from disclosure by section 3(a)(22), which excepts, in part, "test items developed by licensing agencies or governmental bodies." See Open Records Decision No. 543 (1990). We have examined the documents that you claim are excepted by section 3(a)(22) and conclude that they may be withheld from required public disclosure.

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 OR92-614.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/GCK/lmm

Ref.: ID# 14340

ID# 14341

ID# 14648

ID# 14628

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