



Office of the Attorney General

State of Texas

August 24, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Thomas L. Allensworth
Senior Assistant City Attorney
City of Grand Prairie
P. O. Box 530011
Grand Prairie, Texas 75053-0011

OR93-539

Dear Mr. Allensworth:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. art. 6252-17a. Your request was assigned ID# 20904.

The City of Grand Prairie (the "city") received two open records requests for the "[p]ersonnel files, internal affairs records and all other materials in your possession regarding the employment of" a named police officer who has recently been indefinitely suspended from the city police department. You contend that portions of the requested records come under the protection of sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(17) of the Open Records Act.

Section 3(a)(17)(A) 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 confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). This office agrees that the city must withhold the information you have marked as coming under the protection of section 3(a)(17)(A).

To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). The purpose of section 3(a)(3) is to prevent parties in litigation from circumventing the discovery process and ensure the orderly release of documents to the opposing party. Open Records Decision No. 551 (1990).

In this instance, you initially demonstrated that the officer in question pursued an administrative appeal of her suspension before the Civil Service Commission (the "commission") pursuant to section 143.010 of the Local Government Code, which establishes a process for the appealing officer's discovery of pertinent documents. *See Loc.*

Gov. Code § 143.010(e). You later informed one of our staff members in a telephone conversation that the administrative hearing had concluded since the date of your request for an open records decision, but that the officer nevertheless had the option to pursue an appeal of the commission's decision within ten days after the commission's final decision. See Loc. Gov. Code § 143.015. In a more recent telephone conversation you have informed us that the officer chose not to appeal the commission's decision to uphold the her suspension. Accordingly, we conclude that litigation is not reasonably anticipated and that section 3(a)(3) is therefore inapplicable to any of the documents contained in the Section 2 of your submittal.

You have also informed this office that because the officer chose not to appeal her suspension the city has released to the requestor all of the records contained in Section 2 of your submittal except for certain medical records, *see infra.*, and a "confidential" memorandum from the city manager to the city council regarding the suspended officer.¹ Other than section 3(a)(3), you have raised no other exception regarding this memorandum. Information is not confidential under the Open Records Act merely because the party submitting the information anticipates or requests that the information be kept confidential. See *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Because you have raised no applicable exception to public disclosure with regard to this document, the city must release it.

Section 3(a)(1) of the Open Records Act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The Texas Medical Practice Act, article 4495b, V.T.C.S., provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). We agree that the city must withhold documents 1/6-10 and 2/13-17 as confidential medical records.

Section 3(a)(1) of the act also protects information protected by the common-law right of privacy. See *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 3(a)(2) protects, *inter alia*, "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Because the scope of section 3(a)(2) protection is the same as that of section 3(a)(1), see *Hubert v. Harte-Hanks Texas*

¹Interestingly, you informed this office in your initial correspondence that the city had previously released this document at the time it received the open records request.

Newspapers, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), we will consider the applicability of these two exceptions together.

Section 3(a)(2) is designed to protect public employees' personal privacy. The scope of section 3(a)(2) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). 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, supra*, at 550.

The public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees. Open Records Decision No. 444 (1986). Accordingly, the city may not withhold any of the information on privacy grounds. The city therefore must release the requested information, except as discussed above.

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 contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Government Section

WW/RWP/lmm

Ref.: ID# 20904

Enclosures: Marked documents

cc: Mr. Pete Slover
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(w/o enclosures)