



**THE ATTORNEY GENERAL  
OF TEXAS**

April 13, 1989

**JIM MATTOX  
ATTORNEY GENERAL**

Mr. Mark D. Dalpiaz  
Legal Counsel for the  
Bexar County Sheriff's Department  
200 N. Comal  
San Antonio, Texas 78207-3505

Dear Mr. Dalpiaz:

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# 5746; this decision is OR89-123.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Bexar County Sheriff's Department received an open records request from an employee for access to and copies of all documents currently contained in the employee's "confidential" personnel file. The requestor also asks for copies of "any future items placed in this file." The "confidential" file contains documents and reports gathered during the employee's pre-employment background check. You contend that subsections 3(a)(1), 3(a)(8), and 3(a)(11) protect the file from public disclosure.

As a preliminary matter, the Open Records Act pertains only to "information collected, assembled, or maintained by governmental bodies . . . ." V.T.C.S. art. 6252-17a, § 3(a). The act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. Open Records Decision No. 445 (1986). Similarly, the act does not require that a governmental body comply with a standing request for information to be collected or prepared in the

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future. See Attorney General Opinion JM-48 (1983). Consequently, the request for "any future items placed in this file" is not a "valid" request under the Open Records Act.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You state in your letter:

Although [the requestor's] confidential file really does not contain much or any confidential information concerning his pre-employment background, his file is the exception. In most cases, the confidential files contain detailed reports and statements concerning thorough background investigations. Much of such information is obtained from the source with the understanding that either the source will not be identified or that the information obtained will not be disclosed to the subject or attributed to the source.

This decision addresses only those issues relating to the information currently being requested. This informal open records ruling does not apply to other "confidential" personnel files not at issue here. The only question before us is whether the requestor's "confidential" file contains public information.

Many of the documents contained in the "confidential" file are made confidential by statute or federal regulation:

1) criminal history information obtained from the Federal Bureau of Investigation (28 C.F.R. §§ 20.30, 20.33);

2) criminal history information obtained from state and local criminal justice agencies (28 C.F.R. § 20.21);

3) records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician (V.T.C.S. article 4495b, § 5.08(b)); and

4) declarations by psychologists or psychiatrists of psychological and emotional health (Gov't Code § 415.057).

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These types of documents should be withheld from the general public. This open records ruling does not, however, address whether the requestor has a special right of access to these documents, a right granted by statutes other than the Open Records Act. See, e.g., Attorney General Opinion MW-95 (1979) (individual has right to review his own criminal history records); Open Records Decision No. 481 (1987) (cannot use section 3(a)(1) to prevent disclosure to person 3(a)(1) intended to protect).

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure 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 that are maintained for internal use in matters relating to law enforcement and prosecution. Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's executive deliberative process. Open Records Decision No. 464 (1987). After a careful review of the requestor's file, this office has determined that the file on its face contains no information protected by either section 3(a)(8) or (11). You do not show why these exceptions protect the information. Consequently, except for the documents protected by section 3(a)(1), the contents of the "confidential" file are public and must be released. Moreover, section 3(a)(1) does not authorize withholding information from the individual section 3(a)(1) was designed to protect.

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 OR89-123.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*

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JSR/RWP/bc

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