



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 5, 1989

Mr. Robert E. Diaz
Assistant City Attorney
P. O. Box 231
Arlington, Texas 76004-0231

Dear Mr. Diaz:

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# 5701; this decision is OR89-166.

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 Arlington Police Department received a request for the findings of an Internal Affairs Department report concerning shooting incidents involving police officer Brian Farrell. Under separate cover, you request our decision on the availability of an informal inquiry requested by the Arlington City Manager concerning the same subject. Since both requests concern the investigation of the conduct of Officer Farrell, we will discuss the availability of all the information in question in this ruling.

We first address the findings of the police Internal Affairs Department (I.A.D.) report. You inform us that the I.A.D. has concluded its investigation of the incidents, and has submitted its findings to the Chief of Police for further review and final disciplinary action. As of this writing, no final disciplinary action has been taken. You argue that sections 3(a)(3), 3(a)(7), and 3(a)(11) of the Open Records Act protects the investigation records from public disclosure.

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Section 3(a)(3) of the act authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees, as well as information relating to settlement negotiations involving such litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 331 (1982). To claim the section 3(a)(3) exception, a governmental body must show: 1) that litigation is actually pending or reasonably anticipated and 2) that the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). See also Open Records Decision Nos. 416 (1984); 180 (1977).

You have submitted for our review the I.A.D. report which includes, among other things, statements by police personnel familiar with the circumstances of the shootings, the results of a polygraph test, the I.A.D.'s analysis and conclusions concerning Officer Farrell's conduct, personal injury and damage claims against the City of Arlington filed by the survivors of the shooting victims, as well as newspaper accounts of survivor litigation plans. We believe the damage claims filed by the survivors is sufficient to demonstrate that litigation in this matter is reasonably anticipated. You have made the requisite showing to satisfy the requirements of section 3(a)(3). You may withhold the Internal Affairs report from the requestor.

We now address the information gathered in the city manager's inquiry into the duty assignment management of Officer Farrell. You advise that this information consists of "an internal auditor's handwritten interview notes to himself regarding an inquiry made at the direction of the City Manager and reported on verbally by [the auditor] to the City Manager." Your letter to us of February 21, 1989, implies that as personal notes of the auditor, these notes are not subject to the Open Records Act.

Section 3(a) of the Open Records Act makes "[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business" public information. The attorney general has previously determined that the act does not include the "personal notes of an individual employee in his sole possession and made solely for his

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own use." Open Records Decision No. 77 (1975) (emphasis added). This determination refers to personal notes made by a public employee for his own use as a memory aid, and which remain in the possession of the maker. See Open Records Decision 327 (1982).

However, the facts you have given indicate that the notes by the internal auditor were made in his capacity as an investigator at the direction of his supervisor. These notes were not in the "sole possession" of the auditor, but, in fact, are part of the city's investigation records. These investigation records are subject to the Open Records Act and may be withheld from the public only if a specific exception protects them from disclosure.

You argue that sections 3(a)(1), 3(a)(3), 3(a)(11), and 6(1) protect these notes from disclosure. The notes reflect questions and answers recorded by the auditor during a series of interviews with city and police personnel concerning the duty assignment of Officer Farrell.

You contend that that these notes contain issues of police duty assignment management involved in the claims filed by survivors against the City of Arlington. Your letter brief of April 6, 1989, indicates that the Arlington City Manager and the Chief of Police are likely defendants in the potential litigation between the victims' survivors and the city.

After careful review of the damage claim pleadings filed by the victims' survivors, and the content and substance of the auditor's notes, we believe your argument is reasonable. As we indicated above, you have met the requirements to withhold the police investigation records under section 3(a)(3). We believe that the interview notes made by the city's internal auditor sufficiently relate to the police investigation records as to reveal the City of Arlington's strategy or legal interests in the litigation if disclosed to the public. You therefore may withhold the interview notes from the requestor.

We have determined that section 3(a)(3) of the act protects the information at issue from disclosure; consequently, we do not address the applicability of the other exceptions to disclosure you have raised. Because case law

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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 OR89-166.

Yours very truly,

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of the Opinion Committee* *SA*

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