



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 5, 1989

Ms. Mary Ann Courter
Assistant City Attorney
City of Austin
P. O. Box 1088
Austin, Texas 78767-8828

Dear Ms. Courter:

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# 6032; this decision is OR89-168.

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 Internal Affairs Division of the Austin Police Department received an open records request from a citizen for "all information concerning the two investigations that were conducted due to two complaints that I made (IAD #87-196 and #89-010.)" You contend that subsections 3(a)(1), (3), (7), and (11) of the Open Records Act protect both internal investigation reports in their entirety.

Section 3(a)(3) of the act is known as the litigation exception. To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision No. 452 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision

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No. 328 (1982). You have submitted to this office a copy of a letter from the citizen's attorney who indicates that the citizen "is contemplating a personal injury action against the City of Austin, Officer Owens and Officer McDonnell." You have, therefore, met the first requirement for section 3(a)(3) protection.

The governmental body's attorney must also show that the requested material relates to the litigation, see Open Records Decision No. 323 (1982), such that disclosure of the materials would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988). Although file #89-010 clearly relates to the anticipated litigation, not all of its contents may be withheld pursuant to section 3(a)(3). The names of the complainant and police officers complained of, and the final disposition of the complaints, are public information. Open Records Decision No. 208 (1978). The incident report contained in this file is also public. Open Records Decision No. 127 (1976). Consequently, you must release these types of information.

Additionally, this office has held that no section 3(a)(3) interest exists with respect to information already obtained by all parties to the litigation. Open Records Decision No. 349 (1982). If the requestor has seen or heard any of the information in these records, there would, in our opinion, be no justification for now withholding that information from the requestor pursuant to section 3(a)(3), as the city would no longer have any litigation interests to protect with regard to that information. You should therefore release all statements made by the requestor to the internal affairs division during its investigation and any other documents the requestor has previously viewed. You may, however, withhold any remaining documents in file #89-010 pursuant to section 3(a)(3).

You have not, however, demonstrated that the contents of file #87-196, which concern an incident that occurred over a year ago, relate to the anticipated litigation. Unless you submit to this office, within ten days of receipt of this ruling, additional information showing that the release of this file would adversely affect the city's litigation strategy, you may not withhold this file pursuant to section 3(a)(3).

There is nothing in this file that comes under the protection of either subsections 3(a)(1) or (7). Absent additional section 3(a)(3) arguments, file #87-196 must be released in its entirety except for the portions that come within the protection of section 3(a)(11), which protects

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advice, opinion, and recommendation used in the division's decision-making process. Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.). We have marked those portions of file #87-196 that you may withhold pursuant to 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 OR89-168.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
Prepared by Steve Aragon
Assistant Attorney General

JSR/RWP/bc

Enclosures: Marked documents

Copies to: David Bryhan
6401 Kenilworth Drive
Austin, Texas 78723

Ref: ID# 6032