



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 5, 1989

Mr. Jesus Toscano, Jr.
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

Dear Mr. Toscano:

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# 6547; this decision is OR89-187.

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 Dallas Police Department received a request for information about the department's hiring policies regarding homosexuals. You submitted the documents, labeled Exhibits B-I, for review. Exhibit B is a memorandum from an assistant chief of police to the executive assistant chief of police expressing his opinion of the "Gay Awareness Lesson Plan." Exhibit C is a "Preliminary Interview Form," a form that must be completed by every individual seeking admission to the Dallas Police Academy. Exhibits D and E are part of the "Preemployment Polygraph Booklet," a booklet that all applicants must complete. Exhibit F is part of the Dallas Police Department's formal statement of policy regarding certain matters for which applicants can be disqualified. Exhibit G is a memorandum from a police captain to the chief of police describing the questions asked of applicants. Exhibit H is a letter from the chief of police to the city attorney seeking legal assistance. Exhibit I is

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a memorandum of advice from an assistant city attorney to the chief of police. Attached to Exhibit I is the first page of a memorandum opinion of the United States District Court for the Northern District of Texas in the case of Baker v. Wade. You claim that sections 3(a)(1), 3(a)(7), and 3(a)(11) of the Open Records Act protect some of the requested documents.

You claim that section 3(a)(1) protects the information used to evaluate the candidates because the information is the equivalent to "test questions." Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." This exception does not apply to the evaluative questions about applicants' lifestyles. No statute, constitutional provision, or judicial decision protects this information. In Open Records Decision No. 118 (1976), this office determined that the authority to conduct an examination necessarily includes the authority to withhold examination questions. Although the police department could clearly withhold, under Open Records Decision No. 118, questions used on a written or oral examination to test a student's knowledge about the law and/or specific procedures and polices, the decision does not extend to questions about lifestyle. The situation you present is not analogous to Open Records Decision No. 118. Exhibits C, D, E, and F may not be withheld under section 3(a)(1).

Section 3(a)(1), however, also protects information deemed confidential by "laws" such as privileges. This includes the attorney-client privilege. Open Records Decision No. 412 (1984). Exhibit H, a letter from the chief of police to the city attorney requesting certain legal action, falls within the attorney-client privilege as a client communication made for the purpose of obtaining legal advice or representation. Exhibit H may be withheld under section 3(a)(1). See also V.T.C.S. art. 6252-17a, §§ 3(a)(7), 6(12). Similarly, Exhibit I may be withheld as it is a communication regarding legal advice or opinion from a city attorney to a client agency. The attachment of the memorandum opinion from the United States District Court, however, is not excepted from disclosure because court opinions are public information.

You claim that section 3(a)(11) protects Exhibits B and G. Section 3(a)(11) protects advice, opinion, and recommendations in inter-agency or intra-agency memoranda if the advice plays a role in the agency's deliberative process. Open Records Decision No. 464 (1987); see Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San

Antonio 1982, writ ref'd n.r.e.). The purpose of the exception is to protect the "executive privilege," i.e. the decisionmaking process whereby those individuals responsible for determining governmental policy fix that policy. Once certain policies are adopted, however, they cannot be withheld under section 3(a)(11). See V.T.C.S. art. 6252-17a, § 6(10), (13), (14).

Exhibit B is a memorandum from an assistant chief of police to the executive assistant chief of police expressing his opinion on sensitive policy questions regarding statements in the Dallas Police Academy's "Gay Awareness Lesson Plan." This exhibit may be withheld under section 3(a)(11).

Exhibit G is a memorandum from a police captain to the chief of police describing the questions about sexual activity that are asked of each applicant. The questions listed in the memorandum are taken from a standardized personnel questionnaire. The memorandum states that the questions are based on a legal opinion of the United States District Court. The memorandum explains how the questions are asked and states that the purpose of the questions is to detect character disorders. Nowhere in the memorandum is there stated a recommended change in policy or an opinion about the effectiveness of existing policy. The memorandum simply explains existing procedure and policy. Exhibit G may not be withheld under 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 OR89-187.

Yours very truly,

Open Government Section
of the Opinion Committee

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Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/bc

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