



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

July 7, 1989

Mr. J. L. Phinney  
City Attorney  
City of Burleson  
141 West Renfro  
Burleson, Texas 76028

Dear Mr. Phinney:

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# 6783; this decision is OR89-193.

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 City of Burleson received an open records request for copies of all reports and correspondence pertaining to the application for and denial of a permit to operate a sexually oriented business. You state that the city has no objection to releasing this information, however, the city is concerned about violating constitutionally protected rights that the corporation or the applicant may have regarding this information.

It is unclear which constitutional rights concern you. No information in the requested documents comes within either the constitutional or common-law rights to privacy. You may, however, withhold information revealing an employee's prior arrest in 1973 pursuant to federal law. See, e.g., 28 C.F.R. § 20.21.

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You also ask whether this information may be withheld because future litigation may ensue if the denial of the permit, which the applicant is currently appealing with the city, is challenged in state or federal court. Although you cite none of the act's specific exceptions, we assume by your reference to "litigation" that you ask about section 3(a)(3) of the Open Records Act, 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 Nos. 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision No. 328 (1982). You have not shown that the requested material meets this initial test; consequently you may not withhold this information pursuant to section 3(a)(3). You therefore may withhold only the criminal history information contained in these documents; the remaining information must be released.

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 OR89-193.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*  
Open Government Section  
of the Opinion Committee  
Prepared by Jennifer S. Riggs  
Chief, Open Government Section

JSR/RWP/bc

cc: Sally M. Ellertson  
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Ref.: ID# 6783