



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 31, 1989

Mr. Steven G. Garcia
Assistant City Attorney
City of San Antonio
P. O. Box 9066
San Antonio, Texas 78285

Dear Mr. Garcia:

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# 5764; this decision is OR89-354.

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 San Antonio Police Department received three separate requests from a reporter for the San Antonio Light newspaper for copies of or access to complaints filed by citizens against San Antonio Police Department Officers Gary Simpkins and David Rodriguez. The first two requests concern complaints filed by two citizens, Mr. Anthony Carnevale and Ms. Lori Kyner, regarding two separate incidents. The third request concerns any and all complaints filed against the two officers. The requestor seeks access to or copies of the following: (1) the complaints filed against the two officers; (2) the officers' written responses to the complaints; (3) the police department's final disposition of the complaints; and (4) letters advising the complainants of any disciplinary action that may have been taken as a result of the complaints.

This office has previously held that certain information about complaints against law enforcement officers is available to the public, including the names of the officer and the complainant, the nature of the complaint, and the law enforcement agency's disposition of the complaint. Open Records Decision No. 484 (1987) (and decisions cited therein). This information generally is not protected by the right of constitutional or common-law privacy incorporated in section 3(a)(1) of the Open Records Act. Id. You do not, however, claim an exception to required public disclosure based on any right of privacy. Rather, you argue that disclosure of the requested information is excepted by sections 3(a)(3) and 3(a)(8) of the Open Records Act.

Section 3(a)(3), the litigation exception, excepts from required public disclosure

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party

This section permits a governmental body to withhold from disclosure information relating to pending or "reasonably anticipated" litigation involving the governmental body or its officers or employees. See 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 secure the protection of section 3(a)(3), the governmental body must show (1) that litigation is actually pending or reasonably anticipated, and (2) that the requested information relates to the litigation such that withholding the information is necessary to preserve the strategy or legal interests of the governmental body. See Open Records Decision Nos. 511 (1988); 416 (1984).

To establish that litigation is "pending" in a court case, a governmental body need only submit to this office a copy of the pleadings in the case. To demonstrate that litigation is "reasonably anticipated," however, the governmental body must supply concrete evidence that litigation involving a specific matter is realistically contemplated. A remote possibility of litigation will not suffice.

Your determination that litigation is reasonably anticipated is based on a letter from the attorney for Mr. Carnevale to the San Antonio city manager. A threat of a lawsuit communicated by an attorney representing an individual involved in a dispute with a governmental body may in some instances warrant the application of section 3(a)(3). See, e.g., Open Records Decision No. 452 (1986). The letter from Mr. Carnevale's attorney does not explicitly declare Mr. Carnevale's intention to sue the city. The tenor of the letter, however, clearly suggests that Mr. Carnevale is realistically contemplating that option. Furthermore, filing a notice with the city of a claim against it is a necessary prerequisite to filing a lawsuit for damages. Civ. Prac. & Rem. Code § 101.101. The letter from Mr. Carnevale's attorney alleges acts of negligence against the city, stipulates a minimum amount of damages suffered by Mr. Carnevale, and seeks redress from the city. We believe these features demonstrate that litigation may be reasonably anticipated.

There remains, however, the matter of the remainder of the Internal Affairs files on the two officers. You contend that information concerning past conduct should be withheld from disclosure because it would jeopardize the city's position in the lawsuit and impair its litigation interests. In addition to the requirement that litigation be pending or reasonably anticipated, section 3(a)(3) requires that the information a governmental body seeks to withhold from disclosure "relate" to issues that will arguably be raised in that litigation, at least until the lawsuit is filed and the scope and nature of the issues can be determined. See Open Records Decision No. 323 (1982). You do not explain how information about the officers' past conduct could impair the city's interests in any litigation that may be brought by Mr. Carnevale. Consequently, we conclude that the city may not withhold the remainder of the internal affairs files concerning the two officers.

You also claim that section 3(a)(8), the "law enforcement" exception, applies. This section protects information when its release would "unduly interfere" with law enforcement and crime prevention. See Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You do not show that the city is pursuing criminal charges against the officers at issue. Nor do you explain how release of the information to the public would unduly interfere with any federal investigation.

Finally, because this is an older open records request, please note that if this information has been released to a party in litigation pursuant to discovery, it must be

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released also to the public. Moreover, the exceptions to disclosure under the act do not create privileges from discovery. V.T.C.S. art. 6252-17a, § 14(f); Attorney General Opinion JM-1048 (1989).

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 OR89-354.

Yours very truly,

*Open Government Section
of the Opinion Committee*
Open Government Section
of the Opinion Committee
Prepared by Steve Aragon
Assistant Attorney General

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Ref.: ID# 5764

cc: Ms. Juli R. Branson
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