



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

April 30, 1991

Mr. John F. Boyle, Jr.  
Hutchison Boyle Brooks & Fisher  
3900 First City Center  
Dallas, Texas 75201-4622

OR91-226

Dear Mr. Boyle:

On behalf of the city of Farmers Branch with whom you are employed as city attorney, 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# 11,249.

You have received from a resident of the town of Flower Mound a request for information, specifically the personnel file of Mr. Dennis Hazelwood, a former police officer for the city of Farmers Branch and the current chief of police for the town of Flower Mound. Subsequent to your receiving the open records request, you received a detailed letter and supporting documents from the city attorney of Flower Mound, claiming that the information requested should be withheld under section 3(a)(3) of the Open Records Act because the town of Flower Mound is involved in litigation. You agreed. In your letter to us, you assert that the information in your custody should be excepted from disclosure under section 3(a)(3):

Based on the information submitted by [the city attorney of Flower Mound], it would appear that the request to withhold the information is well founded in that a release of this information from former Officer Hazelwood's personnel file would be an attempt to circumvent the normal discovery process involved in the lawsuit. I therefore respectfully request an opinion from the

Attorney General stating that the material is not subject to the Open Records Act based on Section 3(a)(3) of the Open Records Act.<sup>1</sup>

Section 3(a)(3) of the Open Records Act excepts from required public disclosure:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision 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, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection. (Emphasis added.)

In Open Records Letter OR91-122, a letter addressed to you, we concluded that a custodian of public information could not invoke section 3(a)(3) in an instance in which neither that custodian nor an employee of that custodian was a party to the litigation:

A previous determination of this office, Open Records Decision No. 132 (1976), a copy of which is enclosed, resolves the question of the applicability of the section 3(a)(3) exception to disclosure of the requested information. Not being itself a party to the litigation to which the information in the requested personnel files may relate, the city of Farmers Branch may not raise section 3(a)(3) as an exception to required disclosure. Unless the personnel files must be withheld pursuant to other exceptions to disclosure in the Open Records Act, -- e.g., under laws which, in conjunction with section 3(a)(1), protect the privacy interests of the individual to whom the requested information relates -- you must release them. *See Industrial*

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<sup>1</sup>We understand you to assert, not that the information requested is not subject to the Open Records Act, but that it is excepted from disclosure under section 3(a)(3) of the act.

*Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (setting out privacy principles which, in conjunction with section 3(a)(1), require withholding of information under Open Records Act).

Accordingly, the information requested may not be withheld under section 3(a)(3) of the act.

When a governmental body requests an open records decision, it must state which exceptions apply to the information and the reasons why; if the governmental body fails to claim an exception, the exception is usually waived. Attorney General Opinion JM-672 (1987); Open Records Decision No. 252 (1980). However, because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor, this office will raise section 3(a)(1) on behalf of the governmental bodies. Open Records Decision No. 542 (1990).

In Open Records Letter OR91-122, the employees whose personnel files were requested were not police officers; in the instant request, the person whose personnel file has been requested was employed by the city of Farmers Branch as a police officer. We note that section 143.089 of the Government Code governs a police officer's personnel file in municipalities that have adopted the fire fighters' and police officers' civil service law pursuant to chapter 143 of the Local Government Code. In Open Records Decision No. 562 (1990), a copy of which is enclosed, this office discussed the scope and proper construction of section 143.089. You have not included a copy of the personnel file requested nor have you indicated whether the city of Farmers Branch has adopted the chapter 143 civil service law. Therefore we cannot determine whether the personnel file or any information contained therein is excepted from required public disclosure under section 3(a)(1) of the act.

We have considered the exception you claimed, specifically section 3(a)(3), and have reviewed the documents at issue. Previous determinations of this office, Open Records Decision No. 562 (1990) and Open Records Letter OR91-122, copies of which are enclosed, resolve your request. For this reason, you must release the requested information.

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 OR91-226.

Yours very truly,



Jim Moellinger  
Assistant Attorney General  
Opinion Committee

JM/mc

Ref.: ID# 11249

Enclosures: Open Records Decision No. 562 (1990), Open Records Letter OR91-122.

cc: Ms. Jill O. Zupancic  
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