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LOCAL GOVERNMENT LAW

by

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I. ACCESS TO GOVERNMENT INFORMATION

A. Open Records Act

RECORDS relating to football recruiting continued to be a prime battleground under the Open Records Act during the last Survey period.[1] The Fifth Circuit, in *Kneeland v. National Collegiate Athletic Association*,[2] reversed the district court's ruling,[3] which held that the Texas Open Records Act applied to the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). The district court held that the records maintained by these agencies should, in large part, be released to three news organizations.[4] These three organizations included WFAA-TV, Channel 8 in Dallas, the *Dallas Times Herald*, and the *Dallas Morning News*. The NCAA and SWC both contended that they did not receive public funds from the State of Texas and, therefore, were not governmental bodies under the Open Records Act.[5] The Fifth Circuit reversed the decision, but affirmed the district court's finding that both the NCAA and SWC received public funds from the State of Texas.[6] The appellate court, however, disagreed with the district judge's finding that these public funds paid to the NCAA and SWC were used for their general support.[7] The Fifth Circuit reversed this fact finding and found that the public funds were attributable to a specific payment for specific measurable services.[8] Relying on two opinions of the Texas attorney general,[9] the Fifth Circuit ruled that the

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1. *See* Babcock & Collins, Local Government Law, *Annual Survey of Texas Law* 42 SW. L.J. 661 (1988).
2. 850 F.2d 224 (5th Cir. 1988).
3. *Id.* at 231.
4. 650 F. Supp. 1076, 1090 (W.D. Tex. 1986).
5. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1)(F) (Vernon Supp. 1989) defines "Governmental body" as "the part, section, or portion of every organization, corporation, commission, committee, institution or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof . . . ."
6. 850 F.2d at 228.
7. *Id.*
8. *Id.* at 230.
9. TEX. ATT'Y GEN. ORD 228 (1979) and TEX. ATT'Y GEN. ORD-343 (1982).

athletic organizations were not subject to the Act and reversed the district court.[10] Despite the fact that the Texas attorney general filed an amicus curiae brief that quarrelled with the Fifth Circuit's analysis, the court denied a motion for rehearing.[11] The United States Supreme Court denied an application for writ of certiorari.[12]

Football recruiting records were also before the court in *Vandiver v. Star-Telegram, Inc.*[13] In that case the *Fort Worth Star-Telegram* filed an application for writ of mandamus in the district court seeking to require the president of Texas A & M University to furnish records concerning the recruitment of high school athlete Kevin Murray. The district court granted the newspaper's motion for summary judgment and issued the writ of mandamus. The Austin Court of Appeals affirmed.[14] The appellate court based its decision on the presumption found in section 7(a) of the Open Records Act that requires a governmental body wishing to withhold information pursuant to the Act to seek an opinion from the Texas attorney general.[15] Texas A & M, the governmental body in this case, did not request an attorney general ruling, but merely informed the newspaper that the information was not public. The Austin Court of Appeals held that under those circumstances the information sought was presumed public.[16] Furthermore, the court held that all fact findings would be construed against the governmental body at summary judgment unless the governmental body produced some summary judgment proof that would bring the information within one of the exceptions of the Act.[17]

Similarly, in *Creel v. Sheriff of Medina County*[18] the court considered the section 7(a) presumption that the information was public. In that case, Creel, an inmate in the Texas Department of Corrections, requested information pursuant to section 4 of the Open Records Act.[19] The sheriff and

10. 850 F.2d at 231.
11. 856 F.2d 191 (5th Cir. 1988).
12. 109 S. Ct. 868 (1989).
13. 756 S.W.2d 103 (Tex. App.—Austin 1988, no writ).
14. *Id.* at 107.
15. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7(a) (Vernon Supp. 1989) states:
If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.
16. 756 S.W.2d at 106.
17. *Id.* at 106-07.
18. 751 S.W.2d 645 (Tex. App.—San Antonio 1988, no writ).
19. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 4 (Vernon Supp. 1989) states:
On application for public information to the custodian of information in a governmental body by any person, the custodian shall promptly produce such information for inspection or duplication, or both, in the offices of the governmental body. If the information is in active use or in storage and, therefore, not available at the time a person asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within a reasonable time when the record will be available for the exercise of the right given by this Act. Nothing in this Act shall authorize any person to remove original copies of pub-

district attorney of Medina County denied the request, relying on sections 3(a)(1), 3(a)(3) and 3(a)(8) of the Act.[20] In denying the request, however, the governmental bodies did not seek an opinion from the attorney general. Absent a request, the San Antonio Court of Appeals held that the information could be presumed to be public.[21] The governmental bodies argued that since Creel had already seen the records, a writ of mandamus was unnecessary. The court of appeals, however, held that this fact did not overcome the section 7(a) presumption.[22]

The United States Court of Appeals for the Fifth Circuit in *Klein Independent School District v. Mattox*[23] decided an important case under the Texas Open Records Act and under the Federal Family Educational Rights and Privacy Act.[24] In that case a teacher in the Klein Independent School District filed a declaratory judgment action in federal court that sought a ruling that disclosure of the teacher's college transcript would violate her right to privacy under the Federal Family Educational Rights and Privacy Act and the first amendment. Since she was not a student, the district court dismissed the case on the grounds that her college transcript was not an educational record that would have been protected from disclosure under the Federal Family Educational Rights and Privacy Act. The court of appeals agreed with the lower court's holding that even if a privacy interest existed in the college transcript, the interest of the public to inquire into a teacher's credentials outweighed the teacher's individual privacy interests.[25] Based on this balancing test, the Fifth Circuit held that this information could be released under the Open Records Act.[26] The court of appeals did recognize, however, that the Act does make provisions for safeguarding the privacy of an individual.[27] In this case, however, these safeguards were not applicable because of the competing public interest. The court reasoned that the public disclosure of a teacher's academic record did not create an unwarranted infringement upon that teacher's privacy and that a teacher's right to

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lic records from the offices of any governmental body without the written permission of the custodian of the records.

20. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(1), (3), (8) (Vernon Supp. 1989). Section 3(a)(1) exempts information from disclosure that is deemed confidential by constitutional or statutory law, or by judicial decision. Section 3(a)(3) exempts:

> 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 . . . .

Section 3(a)(8) permits an agency to decline to disclose "records of law enforcement agencies and prosecutors that deal wit the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution . . . ."

21. 751 S.W.2d at 647.

22. *Id.*

23. 830 F.2d 576 (5th Cir. 1987).

24. 20 U.S.C. § 1232g (1982).

25. 830 F.2d at 578.

26. *Id.* at 581.

27. *Id.*

privacy was outweighed by the public's right to know.[28]

B. Open Meetings Act

In addition to the cases decided under the Open Records Act, there was also substantial litigation concerning the Open Meetings Act.[29] In *Sierra Club v. Austin Transportation Study Policy Advisory Committee*[30] the court decided whether the Austin Transportation Study Policy Advisory Committee (ATSPAC) was subject to the Open Meetings Act. The ATSPAC was a committee made up of government officials responsible for drafting certain transportation planning documents for submission to the federal government. The trial court ruled that ATSPAC was not required to comply with the Act, but this decision was reversed by the Austin court of appeals.[31] The appellate court noted that the language of the Open Meetings Act reveals the legislative intent to give it broad coverage and that ATSPAC was therefore subject to the Act.[32] The court based its decision on the fact that ATSPAC was a seventeen-member body made up of state, county, regional, and municipal public officials. Further, ATSPAC's decisions affected Travis, Hayes, Caldwell, Bastrop, and Williamson Counties' highway planning, and federal law previously designated ATSPAC as a metropolitan planning organization.

The Austin court of appeals recognized that when the Open Meetings Act was passed in 1967, committees similar to ATSPAC did not exist.[33] The court, however, noted that section 1(c) of the Act included governing boards of special districts that had not yet been created.[34] The court found that ATSPAC was a special district and therefore a governmental body within the meaning of the Open Meetings Act.[35] The court held that ATSPAC was subject to the Open Meetings Act because of the fact that ATSPAC provided benefits and improvements local in nature and brought federal highway funds into the Austin urban area for highway planning and construction.[36]

City of Fort Worth v. Groves[37] involved a trial court ruling that voided an

28. *Id.*
29. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1989).
30. 746 S.W.2d 298 (Tex. App.—Austin 1988, no writ).
31. *Id.* at 301.
32. *Id.* at 300.
33. *Id.* at 301.
34. *Id.* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 1(c) (Vernon Supp. 1989) states:
> As used in this Act: . . . 'Governmental body' means any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; *and the governing board of every special district heretofore or hereafter created by law.*" (emphasis added).
35. 746 S.W.2d at 301.
36. *Id.*
37. 746 S.W.2d 907 (Tex. App.—Fort Worth 1988, no writ).

agreement between Tarrant County and the city of Fort Worth. In the agreement Tarrant County leased the Tarrant County Convention Center to the city of Fort Worth for $30.00. The trial court voided the agreement because of Tarrant County's failure to comply with the Open Meetings Act. The Fort Worth court of appeals, sitting en banc, sustained the trial court's determination that the lease was void on the grounds that it violated the Open Meetings Act.[38] The court first found that the plaintiff had standing to bring an action under the Open Meetings Act.[39] The court held that the individual citizens should serve as a guide, by voicing their opinions to government bodies such as the commissioner's court, and should be given the chance to hear and be heard.[40] The court did note, however, that it was not likely that the legislature intended to allow just anybody to have their day in court, and limited this group of people to only those who had standing.[41] The court recognized that while it was easy to determine standing when the government has injured someone in the tort or breach of contract context, it was difficult to determine standing in the breach of notice requirement context.[42] In the original Open Meetings Act, the court noted, the plaintiff would be limited to remedies either by mandamus or injunction.[43] Under section 3a of the new Open Meetings Act, however, an action becomes voidable if the government is in violation of the requirement.[44]

The court then turned to the issue of whether the county had complied with the Open Meetings Act. The notice requirements of the Act provide that notice of a meeting must be posted in a place readily accessible to the public at all times seventy-two hours prior to the meeting.[45] In this case the

38. *Id.* at 915.
39. *Id.*
40. *Id.* at 912.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3(a) (Vernon Supp. 1989) allows "any interested person, including bona fide members of the news media, [to] commence an action either by mandamus or injunctions for the purpose of stopping, preventing, or reversing violations or threatened violations of this Act by members of a governing body. An action taken by a governmental body in violation of this Act is voidable."
45. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A(h) (Vernon Supp. 1989). The new provision provides:

> Notice of a meeting must be posted in a place readily accessible to the general public at all times for at least 72 hours preceding the scheduled time of the meeting, except that notice of a meeting of a state board, commission, department, or officer having statewide jurisdiction, other than the Industrial Accident Board or the governing board of an institution of higher education, must be posted by the Secretary of State for at least seven days preceding the day of the meeting. In case of emergency public necessity, which shall be clearly identified in the notice, it shall be sufficient if the notice is posted two hours before the meeting is convened. Any public official or person who is designated or authorized to post notices of meetings by a governmental body in accordance with Section 3A of this Act shall post the notice taking at face value the reason for the emergency as stated by the governmental body. Cases of emergency and urgent public necessity are limited to imminent threats to public health and safety or reasonably unforeseeable situations requiring immediate action by the governmental body. Provided further, that where a meeting has been called with notice thereof posted in accordance with this subsection, additional sub-

notice was posted in the basement of the Tarrant County Courthouse, but the seventy-two-hour period in this case spanned only nights and a weekend. Moreover, the notice was not available for public inspection because access to the basement during nights and weekends was granted only by the security guard. This security guard was unavailable, many times, to respond to requests by the public. Since the notice requirements were not fully complied with, the Fort Worth court of appeals held that the Act had been violated.[46] The trial court also awarded attorneys' fees for obtaining a declaratory judgment with respect to the Open Meetings Act violation. The Fort Worth court of appeals found that the award was reasonable and affirmed the lower court's decision.[47]

In *Bells v. Greater Texoma Utility Authority*[48] the Dallas court of appeals vacated the judgment of the trial court and dismissed the case on the grounds that the governmental plaintiff had failed to comply with the Open Meetings Act by not properly giving notice of its meeting that authorized counsel to file suit.[49] The governmental body defended the appeal on the basis that it had substantially complied with the notice provisions of the Act. The Dallas court of appeals, however, found that substantial compliance is not sufficient and that literal compliance is required under the Act.[50] The court went on to hold that since the Greater Texoma Utility Authority did not literally comply with the Act, actions taken were subject to invalidation by the court.[51] A similar result was reached in *Gulf Regional Education Television Affiliates v. University of Houston*[52] where the Houston court of appeals affirmed the dismissal of a suit because the governmental body had not complied with the Open Meetings Act when it hired counsel and authorized suit.[53]

Three important cases decided by district courts during the Survey period are all pending before appellate courts. The first case, *The Dallas Morning*

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jects may be added to the agenda for such meeting by posting a supplemental notice, in which the emergency or urgent public necessity requiring consideration of such additional subjects is expressed. In the event of an emergency meeting, or in the event any subject is added to the agenda in a supplemental notice posted for a meeting other than an emergency meeting, it shall be sufficient if the notice or supplemental notice is posted two hours before the meeting is convened, and the presiding officer or the member calling such emergency meeting or posting supplemental notice to the agenda for any other meeting shall, if request therefor containing all pertinent information has previously been filed at the headquarters of the governmental body, give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the governmental body in providing such special notice. The notice provisions for legislative committee meetings shall be as provided by the rules of the house and senate.

Id.

46. 746 S.W.2d at 915.
47. *Id.*
48. 744 S.W.2d 636 (Tex. App.—Dallas 1987, no writ).
49. *Id.* at 640.
50. *Id.*
51. *Id.*
52. 746 S.W.2d 803 (Tex. App.—Houston [14th Dist.] 1988, no writ).
53. *Id.* at 809.

News Company v. Bill Long, District Clerk, Dallas County, Texas,[54] was a declaratory judgment action. This action was brought by the *Dallas Morning News*, which sought to invalidate Dallas Civil District Court Rule 1.33[55] as a violation of the first amendment to the United States Constitution,[56] article I, sections 8 and 13 of the Texas Constitution,[57] as well as the common law.

In an unpublished opinion, District Judge John Marshall declared that the rule was not violative of the public's common law right of access to public records. The court held, however, that there were additional requirements beyond the provisions of rule 1.33.[58] The court ordered that the judgments and orders that attempted to limit public access to court records must include a good cause explanation.[59] Further, only necessary portions of the document shall be sealed while the remaining portions must continue to be accessible to the public.[60]

The district court declined to find that the rule violated any of the constitutional provisions cited by the *Morning News*.[61] The newspaper appealed, claiming that the trial court erred in failing to enter a declaratory judgment ruling that the Texas Constitution, the United States Constitution, and the common law all required civil court records to remain open for public inspection. The *Morning News* also claimed that court documents may be sealed only if: (1) the public and press are given adequate notice of a hearing and the opportunity to be heard before a court rules on whether a record must be sealed; (2) a party shows "most compelling reasons" why the record must be sealed so that the greater interest may be protected; and (3) sealing

54. CA 88-6107, 14th Judicial District Court, Dallas County, Texas.

55. DALLAS CIV. DIST. CT. R. 1.33 provides:

> Any party or his attorney may obtain an order for the suppression of any pleading filed in any action by filing a petition with the Court in which the action is filed showing good cause for such suppression. No person except the parties to an action or their attorneys shall examine or publish, in whole or in part, any papers so suppressed until such action, or some phase shall be heard in open court or upon the order of the court. Upon the entry of a suppression order, the Clerk shall suppress all papers filed in such action and shall prevent all persons, except those herein designated, from having access thereto.

56. U.S. CONST. amend. I.

57. TEX. CONST. art. I, §§ 8, 13 provide:

> Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.
>
> Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

58. CA 88-6107; *see supra* note 54.

59. *Id.*

60. Order dated August 16, 1988, CA 88-6107, 14th Judicial District Court, Dallas County, Texas.

61. *Id.*

the court record is the least restrictive method of protecting the greater interest.[62]

The second of the three most important cases at the district court level dealing with sealed recordings was *Jimenez v. Fernandez*.[63] This case was brought before the 131st Judicial District Court of Bexar County. In this case, a judgment entered on September 16, 1988, stated that all records and pleadings in the case would be sealed. The lawsuit was filed May 4, 1988, after Federico Fernandez, a Franciscan friar and former parish priest in San Antonio, was indicted on two criminal counts of indecency with a child. The plaintiffs alleged that the minor plaintiffs and their brother had been victims of the priest's sexual perversions and sought damages of $6 million from the three named defendants. On September 28, 1988, the Express News Corporation, publisher of the *San Antonio Express News*, filed a plea in intervention and motion in relation to the sealed court records. The Express News Corporation also moved that free access should be given to all documents, pleadings, and agreements filed in the case. The district court judge, the Honorable Carolyn Spears, granted the Franciscan Friars of the Chicago, St. Louis Province of Sacred Heart's motion to strike the intervention. A motion for leave to file petition for writ of mandamus was filed with the San Antonio court of appeals and is pending.[64]

The final case, *Chapman v. Maddox*,[65] deals with whether the disclosure of college transcripts of professional school employees is required or prevented under the Texas Open Records Act. The trial court prohibited the Texas attorney general from ruling upon a request by the *Houston Chronicle* on this issue until completion of the regular session of the Seventy-First Texas Legislature.[66] The Houston Chronicle Publishing Company, publisher of the *Houston Chronicle*, filed a motion for leave to file petition for writ of mandamus against the attorney general and the trial judge requesting that the lower court ruling be overruled and that the attorney general be required to issue an opinion.[67] The court granted the motion for leave, and the case is currently pending before the Texas Supreme Court.

C. Attorney General Opinions Under The Open Records Act

The following attorney general decisions deal exclusively with requests for information under the Texas Open Records Act.

ORD-481. This opinion dealt with whether the Airport Board could lawfully have denied an unsuccessful applicant's request to review records concerning his application for employment with the Dallas/Fort Worth

62. Brief of Appellant Dallas Morning News in No. 05-88-01131-CV, Court of Appeals for the Fifth Supreme Judicial District of Texas, October 20, 1988.

63. CA 88CA-07960, 131st Judicial District Court, Bexar County, Texas.

64. The Express-News Corp. v. Spears, No. 04-88-00526-CV, Court of Appeals for the Fourth Supreme Judicial District of Texas, October 13, 1988.

65. CA 88-24250, 152nd Judicial District Court, Harris County, Texas.

66. Order dated August 15, 1988, CA 88-24250, 152nd Judicial District Court, Harris County, Texas.

67. C-7911, in Supreme Court of Texas.

International Airport.[68] The first type of information at issue was financial information concerning the applicant and his wife. The attorney general held that while a privacy interest might be implicated, it was unclear whose privacy the Airport Board was attempting to protect.[69] The attorney general held that the privacy of the person furnishing the information (a financial institution in this case) was not implicated because there was no constitutionally protected privacy interest absent highly intimate or embarrassing information.[70] The attorney general also held that privacy rights were not implicated when the governmental body was asked to furnish information about the person who actually requested such information.[71]

The opinion then turned to whether the Airport Board must release a polygraph examination that was taken by the applicant. The attorney general held that the Airport Board may release the report, but is not required to do so.[72] The next type of information requested was a psychological evaluation of the applicant. The attorney general found that the report consisted entirely of an opinion and recommendation of the psychologist and therefore could be withheld under section 3(a)(11) of the Act.[73] The next type of information at issue was a checklist that contained reasons why the Airport Board denied employment to the applicant. With one exception, the attorney general held that this information must be released.[74] The attorney general held that a document indicating the Board's agreement or disagreement regarding the applicant could be withheld under the section 3(a)(11) recommendation exception.[75] A document regarding background checks on the applicant must, however, be disclosed.[76]

ORD-482. This request produced two important rulings from the attorney general.[77] The first was that physician-created or physician-kept records concerning the identity, diagnosis, evaluation, or treatment of a patient may not be disclosed.[78] The attorney general noted that the legislature had not repealed article 4495b, section 5.08(b), despite a notation to that effect in the Texas Civil Statutes pocket part for 1987.[79] The attorney general held that

68. Tex. Att'y Gen. ORD-481 (1987).

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 4.

72. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 4413 (29cc), § 19a (Vernon Supp. 1989) (sets out conditions under which results of polygraph examination may be released).

73. ORD-481 at 10. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Vernon Supp. 1989) specifies that all information compiled by governmental bodies "pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public . . . with the following exceptions only: . . . (11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency . . . ."

74. ORD-481 at 11. The one exception was a part of the exhibit labeled "recommendation."

75. *Id.*

76. *Id.*

77. Tex. Att'y Gen. ORD-482 (1987).

78. ORD-482 at 4-5; *see* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(11) (Vernon Supp. 1989).

79. ORD-482 at 4-5.

the section is valid with respect to records maintained by physicians that reflect the identity, diagnosis, evaluation, or treatment of the patient.[80]

The attorney general also discussed the scope of the Open Records exemption in section 3(a)(6).[81] The requesting party in this decision had asked for all information concerning the drafting of a city ordinance, including the names of the drafters. The attorney general held that the names of the drafters were not excluded by section 3(a)(6).[82] In addition, the attorney general held that if the governmental body incorporates information in a final document that it disclosed to the public or in materials that explain to the public the basis for a decision, then section 3(a)(6) provides no protection.[83]

ORD-483. This decision dealt with whether certain information held by the Texas Savings and Loan Department was excepted from public disclosure. The requesting party sought detailed information regarding an overview of a Texas savings and loan that included its lending practice and financial situation.[84] Another party requested any information concerning the entire Texas savings and loan industry during 1986 and 1987. The second request also wanted the identification of the savings and loan institutions that had experienced financial trouble during the same period. The attorney general held that the first two categories of information, namely the report and order from the investigation and the monthly monitoring reports, are protected under sections 11.18 and 8.05(d) of the Savings and Loan Act.[85] The attorney general stated, however, that general information about the condition of the savings and loan industry may not be withheld.[86] For example, a report that provided a brief historical overview of the savings and loan industry in Texas or a document that described the current status of the savings and loan department must be disclosed.[87] In addition, exhibits that have been incorporated into these documents and contain statistical data on the general condition of the industry may not be withheld.[88]

ORD-484. The city attorney of El Paso, Texas asked the attorney general to rule on a request for information regarding complaints about sixty-eight El Paso Police Department officers. The requesting party sought documents relating to complaints that had been directed toward the officers, identification of complaints, and the status of the complaints. The El Paso city attorney sought to keep this information confidential by maintaining "history cards" for each police officer.[89] These cards included information regarding complaints and their disposition. The city sought to protect the records of

80. *Id.* at 6.

81. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(6) (Vernon Supp. 1989) exempts "drafts and working papers involved in the preparation of proposed legislation . . . ."

82. ORD-482 at 9.

83. *Id.* at 10.

84. Tex. Att'y Gen. ORD-483 (1987).

85. *Id.* at 7; TEX. REV. CIV. STAT. ANN. art. 852a, §§ 8.05(d) 11.18 (Vernon Supp. 1989).

86. ORD-483 at 8.

87. *Id.* at 7-8.

88. *Id.* at 9.

89. The cards included hearings indicating the disposition of each case. For example, among the various categories were "unfunded, not sustained, sustain, [and] information only." Tex. Att'y Gen. ORD-484 at 1 (1987).

those officers whose cards had the notation "unfounded" or "not sustained," arguing that releasing the records would be a false-light invasion of privacy since the governmental body had serious doubt about the truth of the allegations. The attorney general held, however, that even if the documents might be construed as a false-light invasion of privacy,[90] the public interest in knowing how the El Paso Police Department had resolved these complaints against its officers outweighed the officers' interests in keeping the information confidential.[91] The attorney general did, however allow the city attorney to withhold from disclosure certain details about officers' off-duty life.[92]

ORD-485. This decision dealt with whether oral or written information that was presented to a governmental body during an executive session, pursuant to the Open Meetings Act, was confidential under the Open Records Act. The attorney general held that if the document submitted to the governmental body in executive session was otherwise excepted from disclosure under the Open Records Act, then the governmental body could withhold that document.[93] If a party submitted an otherwise disclosable document under the Open Records Act to a governmental body in executive session, however, the document was not exempt from public disclosure.[94]

ORD-486. This open records decision dealt with a recent amendment to section 3(a)(15) of the Act dealing with the availability of birth and death records. The Seventieth Legislature amended section 3(a)(15) to include birth and death records maintained not only by the Bureau of Vital Statistics of the Texas Department of Health but also by a local registration official.[95] The attorney general, in reviewing legislative history, found that the legislature, through this amendment, wanted to prevent incidents of fraud.[96] The legislature was concerned about people who created false identities for themselves by obtaining information and copies of birth and death records.[97] The legislature was also attempting to safeguard against the potential abuse of information that is included in birth and death records.[98] The attorney general held that section 3(a)(15) does, in fact, restrict access to birth and death certificates.[99] This protection, however, did not extend to summary lists of births and deaths and, accordingly, these lists were disclosable.[100] In addition, under section 3(a)(15) governmental bodies have the discretion to disclose the information protected by that section because this exception is a

90. *Id.* at 5. The false light privacy doctrine permits the police department to withhold unfounded charges against the police.

91. *Id.* at 5.

92. *Id.* at 6.

93. Tex. Att'y Gen. ORD-485 (1987).

94. *Id.* at 10.

95. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(15) (Vernon Supp. 1989) exempts "birth and death records maintained by the Bureau of Vital Statistics of the Texas Department of Health or by a local registration official . . . ."

96. Tex. Att'y Gen. ORD-4862 (1987).

97. *Id.*

98. *Id.*

99. *Id.* at 3.

100. *Id.*

permissive one.[101]

ORD-487. This open records request dealt with the transfer of patients from one hospital to another. This practice is often referred to as "patient dumping," and is carried out when patients cannot guarantee payment for medical care. The requesting party sought information regarding the Texas Department of Health's investigation of patient transfer complaints. The requesting party wanted the governmental body to release hospital patient transfer information. The attorney general held that there were certain documents that were protected from disclosure.[102] For example, the attorney general authorized the withholding of documents entitled "memorandum of transfer," when the particular form identified a patient and was prepared by a physician acting as a physician or by a person acting under a physician's direction.[103] The form could not be withheld, however, if the physician signed the form as a part of a purely administrative duty.[104] The attorney general found, however, that certain of the other information was exempt under section 5.08 of the Texas Medical Practices Act.[105]

ORD-488. The Sixty-Ninth Texas Legislature amended the Open Records Act to protect public employees from the disclosure of their home addresses and telephone numbers.[106] In addition, officials who choose to withhold the disclosure of such information may do so under section 3(a)(17) and section 4 of the Act.[107] The city attorney of Dallas received a request for the addresses of retired city of Dallas employees. The attorney general held that the information concerning those retirees, who were not peace officers and who retired prior to the effective date of the amendment, must be disclosed.[108] The attorney general also dealt with the cost of reproducing records, which is governed by section 9(a) of the Act.[109] The attorney general held that under section 9(a) the party requesting such information must carry the cost, which included the labor and materials needed to access and copy the information, unless the request was for fewer than fifty pages of material that was readily available.[110] If the party does request fewer than fifty pages, the materials and labor required to delete the information that is not available under the Open Records Act may be calculated into the determination of whether such information is actually readily available.[111]

ORD-489. This request dealt with whether the mailing addresses of sub-

101. *Id.*
102. Tex. Att'y Gen. ORD-487 at 3-6 (1988).
103. *Id.* at 3-4.
104. *Id.* at 4.
105. TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1989).
106. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(17) (Vernon Supp. 1989) allows agencies to withhold "the home addresses and home telephone numbers of each official and employee of a governmental body except as otherwise provided by section 3A of this Act, and of peace officers as defined by article 2.12, Code of Criminal Procedure 1964, as amended, or by section 51.212, Texas Education Code; . . . ."
107. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(17), 3A, 4 (Vernon Supp. 1989).
108. Tex. Att'y Gen. ORD-488 at 3 (1988).
109. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 9(a) (Vernon Supp. 1989).
110. ORD-488 at 7.
111. *Id.* at 9.

scribers to the Texas Highways Magazine was subject to public disclosure under the Act. The State Highway Department claimed that releasing the list would invade the privacy interest of the subscribers, but the attorney general rejected this allegation.[112] The Highway Department then sought to obtain the "market price" for the subscriber list, but the attorney general rejected this argument as well, stating that the department could charge no more than its actual costs for production of the subscriber list.[113]

ORD-490. The Board of Vocational Nurse Examiners asked the attorney general whether it must disclose certain information to the Texas Peer Assistance Program for Impaired Nurses (TPAPIN).[114] The TPAPIN sought information dealing with a complaint against a particular licensed vocational nurse. The attorney general held that the information requested could be disseminated to health care personnel to whom the impaired nurse had been referred.[115] The attorney general also held that since the transfer was authorized by statute, it would not violate section 10(a) of the Texas Open Records Act,[116] which prohibits the release of information deemed confidential by law. The attorney general went on to hold that the information, although disclosable in this instance, could not be disclosed to the general public.[117]

ORD-491. The city attorney of Texarkana asked whether the meeting minutes of the Law Enforcement Advisory Committee (LEAC) are subject to disclosure under the Open Records Act. Included in this committee were the chief of police of Texarkana, Texas, the chief of police of Texarkana, Arkansas, the sheriff of Bowie County, Texas, and the sheriff of Miller County, Arkansas. The agencies were located in a building that sat on the border between Texas and Arkansas. Because of the location of the building and the representatives involved, special legislation was needed to set up this law enforcement committee. LEAC was designed to oversee the operation and maintenance of the building and the joint records. The attorney general skirted the question of whether LEAC was a governmental body itself under section 2(1)(f) of the Open Records Act[118] and instead relied upon other grounds. Since it was the city of Texarkana that was requested to disclose the information and was subject to the Act, then any LEAC minutes held by

112. Tex. Att'y Gen. ORD-489 at 4 (1988).

113. *Id.* at 6.

114. The Texas Peer Assistance Program for Impaired Nurses provides help for nurses dealing with drug related problems or mental illness. Such help is provided pursuant to a contract between TPAPIN and the Board of Vocational Nurse Examiners. *See* TEX. REV. CIV. STAT. ANN. art. 5561C-3 (Vernon Supp. 1989).

115. Tex. Att'y Gen. ORD-490 at 4 (1988).

116. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 10(a) (Vernon Supp. 1989) ("information deemed confidential under the terms of this Act shall not be distributed").

117. ORD-490 at 4-5.

118. Tex. Att'y Gen. ORD-491 at 2 (1988). TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1f) (Vernon Supp. 1989) defines "Governmental body" as "the part, section, or portion of every organization, corporation, commission, committee, institution or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof . . . ."

the chief of police were also subject to the Act.[119] In deciding the case, the attorney general called into question, if not outright overruled, prior Open Records Decision No. 461.[120] The attorney general held that a majority of the documents should be disclosed.[121]

ORD-492. Bob Bullock, the comptroller of public accounts, asked the attorney general to consider whether information to which the government has access but that has been stored in a private business computer was subject to disclosure under the Texas Open Records Act. The comptroller also inquired as to whether economic forecasts are protected by subsections 3(a)(10) or 3(a)(11) of the Act.[122] The attorney general held that if the information was in the form of raw data and economic projections and had not been attained through the authority of a governmental body, then the state comptroller or some other governmental entity can, on an as-needed basis, access such information from the private consultant, and the information that remains with that consultant is not subject to the Act.[123] The attorney general did hold, however, that if the raw data and projections were accessed and stored by the governmental body or if the information appeared in the comptroller's revenue estimates, then such information must be disclosed.[124] The specific economic forecast that the comptroller submitted for review consisted of advice and recommendations and were protected from required disclosure under section 3(a)(11).[125]

ORD-493. The information sought was the negotiations of the Texas State Board of Pharmacy concerning disciplinary action against a licensee. The Texas Board of Pharmacy asked the attorney general to reconsider prior Open Records Decision No. 474, but the attorney general declined to reverse his position. The attorney general held that certain items of information were subject to disclosure under the Act including, for example, correspondence between the Texas Board of Pharmacy and a licensee dealing with informal conferences, proposed notice of hearings, and charges or agreed Board orders.[126] Although the Board argued that this information could be withheld under the exception of section 3(a)(3),[127] the attorney general held that this information could only be withheld if the Board thought such non-

119. ORD-491 at 3.

120. *Id.* at 4.

121. *Id.* at 7-8.

122. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(10), (11) (Vernon Supp. 1989) exempt "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision . . . [, and] inter-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency . . . ."

123. Tex. Att'y Gen. ORD-492 at 6 (1988).

124. *Id.* at 3.

125. *Id.* at 6.

126. Tex. Att'y Gen. ORD-493 (1988).

127. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(3) (Vernon Supp. 1989). This section exempts information pertaining to civil or criminal litigation or 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 . . . ."

disclosure was necessary to maintain its strategy when dealing with licensees who have not seen the information.[128] The attorney general held that the information could also be withheld if the disclosure of the information would unduly hamper law enforcement in a criminal investigation.[129] The attorney general also held that information concerning the Board's investigative reports about chemically, mentally, or physically impaired pharmacists could be withheld.[130]

ORD-494. The executive director of the Texas Water Commission asked the attorney general whether certain information reported to the Texas Water Commission in accordance with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) is subject to the Open Records Act. The information dealt with hazardous substances and the reports in question were required by the federal government. Union Carbide wrote one of these mandatory reports and asked if the information dealing with the chemical releases of hazardous substances could be kept confidential. Union Carbide wanted to withhold this information since the public dissemination of the locations would reveal its customers' identities, and such disclosure would be tantamount to releasing a customer list. The water commission sought to protect the information pursuant to section 3(a)(10),[131] which covers trade secrets and commercial or financial information. The attorney general held, however that this information could not be withheld under the Act and reasoned that neither the Texas Water Commission nor the company in question had met the trade secret criteria that would have allowed an exception.[132] Furthermore, there was no showing how the customer information would have caused substantial competitive harm.[133] Absent this type of showing, the attorney general held that the information was not entitled to the exception.[134]

ORD-495. The request for information was directed toward the Capital Metropolitan Transportation Authority, pursuant to the Open Records Act. The information sought was for a copy of the minutes or a tape recording of an executive session held by the Board in 1987. The Amalgamated Transit Union argued that the executive session itself was in violation of the Open Meetings Act and that this violation should render the information disclosable. The attorney general held that he not only lacked the authority to make the determination whether the Open Meetings Act had been violated, but also that he lacked the authority to enforce the Open Meetings Act.[135] The attorney general held that the Open Meetings Act applied, but the requesting parting could obtain the material only through an Open Meetings

128. ORD-493 at 2.
129. *Id.*
130. *Id.*
131. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(10) (Vernon Supp. 1989) (exempts trade secrets and commercial or financial information obtained under specific circumstances).
132. Tex. Att'y Gen. ORD-494 at 5 (1988).
133. *Id.* at 7.
134. *Id.*
135. Tex. Att'y Gen. ORD-495 at 7 (1988).

Act proceeding.[136]

ORD-496. This request dealt with whether "waybill samples"[137] provided to the Texas Railroad Commission by the Interstate Commerce Commission were subject to the Open Records Act. Although much of this waybill information is available for the public by way of federal law, some of the information may remain confidential.[138] For example, highly sensitive commercial and financial data is not subject to disclosure under federal law.[139] The ICC created the disclosure rules concerning waybill information.[140] The Railroad Commission asked whether these ICC rules preempted the Texas Open Records Act. Although the federal regulations did not preempt the Act, the information at issue, if released, clearly would have impaired the Railroad Commission's ability to obtain the information in the future.[141] Due to this result, the information was not subject to disclosure under section 3(a)(10) of the Act.[142]

ORD-497. The chairman of the Board of Regents of the University of Houston system was asked for documents that related to patent applications on the super-conductivity research at the University of Houston. The University counsel asked whether it was proper for the chairman of the Board of Regents to receive the request for information instead of the custodian of the information, pursuant to section 5(a) of the Act.[143] The university contended that the chancellor rather than the chairman is the custodian of the information. The attorney general rejected the university's contention that the Act requires members of the public to request information specifically from the chief administrative officer of a governmental body and that a failure do so would render a request invalid.[144] The attorney general held that the thrust behind sections 4 and 5 of the Act[145] was simply to produce information for the public and not impose a requirement on the requestor to use special language.[146] Furthermore, according to the attorney general, chief

136. *Id.* at 4.

137. Tex. Att'y Gen. ORD-496 (1988). "A 'waybill' is a document prepared from the bill of lading contract or shipper's instructions about the disposition of freight. It forms the basis for determining freight charges and interline settlements." *Id.*

138. *Id.* at 1.

139. *Id.*

140. *Id.*

141. *Id.* at 4.

142. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(10) (Vernon Supp. 1989); *see supra* note 131.

143. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 5(a) (Vernon Supp. 1989) provides:

> The chief administrative officer of the governmental body shall be the custodian of public records of the governmental body. It shall be the duty of the custodian of public records, subject to penalties provided in this Act, to see that the public records are made available for public inspection and copying; that the records are carefully protected and preserved from deterioration, alteration, mutilation, loss, removal, or destruction; and that public records are repaired, renovated, or rebound when necessary to preserve them properly. When records are no longer currently in use, it shall be within the discretion of the agency to determine a period of time of which said records will be preserved.

144. Tex. Att'y Gen. ORD-497 (1988).

145. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 4, 5 (Vernon Supp. 1989).

146. ORD-497 at 2.

administrative officers have a duty to comply with the Act and make known to the public the identity of persons to whom an open records request should be directed.[147] The attorney general held that section 51.911 of the Texas Education Code protects from disclosure information related to the commercial application or use of super-conductivity research at the University of Houston.[148]

ORD-498. The Texas Department of Public Safety asked whether information obtained from drivers' license records and in the form of a class type listing was protected from disclosure. The attorney general noted that the legislature added subsection (j) to section 21 of article 6687b[149] and consequently overruled the holding of prior Open Records Decision No. 465.[150] The attorney general found that the lists at issue in this request were covered by article 6687b and therefore, the documents should not be released to the public.[151]

ORD-499. In this decision, the attorney general addressed the issue of whether information created and maintained by a private attorney working for the city was subject to disclosure under the Texas Open Records Act. This particular decision dealt with two similar situations. In one, a request was made for information that related to official city business. This information was compiled and maintained by a local private attorney. The other situation dealt with information on the rate of compensation paid to a city-hired private attorney acting as an independent investigator for the city. In both situations, the private attorneys had their own practices, offices, and files, and worked for the cities on an at-will basis. Both attorneys had agreements with their cities indicating that it was only when the work was completed that the information became a government record.

The attorney general applied a three-part test for determining when information collected by outside consultants was subject to the Open Records Act.[152] The attorney general concluded that records relating to legal services performed by the private attorney are subject to the Act if the attorney performed such services at the request of the municipality.[153] The attorney general did recognize, however, that some information sought may fall within an exception under the Act, but absent a showing that it does, such information must be disclosed.[154]

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147. *Id.*

148. *Id.* at 7.

149. TEX. REV. CIV. STAT. ANN. art. 6687(21)(j) (Vernon Supp. 1989) states, "[t]he department is not authorized to provide class-type listings from the basic drivers license record file to any person or business; provided, however, such information may be made available to an official of the federal government, the state, a city, town, county, special district, or other political subdivision for official governmental purposes only."

150. Tex. Att'y Gen. ORD-498 at 7 (1988).

151. *Id.*

152. Tex. Att'y Gen. ORD-499 at 2 (1988). The three-part test inquired whether "(1) the information relates to the governmental body's official duties or business; (2) the consultant acts as agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information." *Id.*

153. *Id.* at 5.

154. *Id.* at 7.

ORD-500. The chief appraiser of the Harris County Appraisal District asked the attorney general to rule on whether information submitted in accordance with section 22.27 of the Texas Tax Code, which attempted to keep such information confidential, was exempted from public disclosure under the Open Records Act. Ordinarily, agreements made to preserve the confidentiality of certain information cannot circumvent the purpose of the Open Records Act. The attorney general held, however, that section 22.27 of the Tax Code did permit the appraisal district to enter into the confidentiality agreement that categorized the sought after information as not subject to disclosure.[155]

ORD-501. The Stewart Title Company sought the annual escrow audit maintained by the State Board of Insurance and filed for the Atascosa County Abstract & Title Company. The State Board of Insurance contended that the information was confidential, by law, pursuant to article 9.39 of the Texas Insurance Code. The attorney general found that the Insurance Code provision was controlling and, consequently, the documents must be withheld from the general public.[156] The attorney general went on to hold, however, that according to the same Insurance Code provision, while the public was not entitled to the information, Stewart Title was entitled to receive the report.[157]

ORD-502. In this decision, the attorney general addressed the issue of whether photographs of police officers are excepted from public disclosure under section 3(a)(19) of the Open Records Act.[158] The photographs sought were of officers that had been injured in a shooting incident and photographs of off-duty officers who were injured in an automobile accident.

After an exhaustive legislative history of the amendment, the attorney general noted a potential conflict between sections 3(a)(19) and 3(c) of the Act.[159] The attorney general recognized that one application of 3(a)(19) could be that photographs of peace officers would be protected from disclosure only if the release of the photographs would place a police officer's life or physical safety in danger.[160] Under this interpretation, however, the attorney general noted that not all photographs of peace officers would be pro-

155. Tex. Att'y Gen. ORD-500 at 9-10 (1988).

156. Tex. Att'y Gen. ORD-501 at 3 (1988).

157. *Id.*

158. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(19) (Vernon Supp. 1989) exempts:

> photographs that depict a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer unless: (A) the officer is under indictment or charged with an offense by information; or (B) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (C) the photograph is introduced as evidence in a judicial proceeding.

159. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(c) (Vernon Supp. 1989) allows the custodian of records to exercise discretion to "make public any information contained within Section 3, Subsection (a)6, 9, 11, and 15. The custodian of a photograph exempt from disclosure under Section 3(a)(19) may make the photograph public, but only if the officer gives written consent to the disclosure."

160. Tex. Att'y Gen. ORD-502 at 4 (1988).

tected by section 3(a)(19).[161] Under another interpretation of section 3(a)(19) the attorney general stated that such photographs would not be subject to disclosure because the release of the pictures would endanger the officers.[162] The first interpretation is based on an "only if" standard, while the second interpretation does not require such a finding.[163] The attorney general chose this second interpretation as reflecting legislative intent.[164]

ORD-503. The requestor wanted information regarding the conservatorship and receivership of a company investigated by the State Board of Insurance. The State Board of Insurance had investigated First Title of Houston and initiated a judicial proceeding that allowed for the appointment of a conservator. The judicial proceeding was subsequently nonsuited. A member of the public sought information regarding the Board's investigation and actions in respect to First Title of Houston's receivership and conservatorship. The attorney general held, however that the material requested was not available for disclosure because of section 3A of article 21.28-A of the Texas Insurance Code.[165] This provision shields from disclosure information and material maintained by the State Board of Insurance concerning the supervision or conservatorship of any insurance company. The attorney general held that the protection of the insurance code provision does not extend to material dealing with the appointment of a receiver for the insurance company.[166]

ORD-504. The Texas Railroad Commission received a request for information that concerned hydrological work carried out by Texaco at a gas processing plant. The information requested consisted of ground water quality assessment reports, hydrological work summaries, and many maps, graphs, and charts. Texaco prepared this information pursuant to its pollution abatement activities. The attorney general held that the Act did not protect this information from disclosure because the Railroad Commission failed to establish how the disclosure of such information would create difficulties in obtaining information in the future.[167] Furthermore, the attorney general held that there was no indication that trade secrets would be revealed or that such disclosure would result in substantial competitive injury to Texaco.[168] This decision also overruled ORD-479.[169]

ORD-505. The El Paso county attorney asked the attorney general to rule on a request that sought voter ballots from the March 1988 primary elections in El Paso County and the accompanying computer software that was utilized in vote tabulation. The attorney general ruled that voter ballots that are kept by the election record custodian after a twenty-two-month retention

161. *Id.*
162. *Id.* at 5.
163. *Id.* at 6.
164. *Id.*
165. Tex. Att'y Gen. ORD-503 at 3 (1988).
166. *Id.*
167. Tex. Att'y Gen. ORD-504 at 7 (1988).
168. *Id.*
169. *Id.* at 5.

period are subject to the Open Records Act.[170] Accordingly, these records are exempt from public disclosure prior to the duration of this retention period.[171] The attorney general held that the computer software programs used to tabulate the votes that had been copyrighted pursuant to the Copyright Act were not disclosable to the requestor.[172]

ORD-506. The requesting party in this decision asked for disclosure of cellular mobile telephone numbers of county officials and employees. The attorney general held that the cellular mobile telephone numbers given to vehicles, both public and private, used by county officials and employees with specific law enforcement responsibilities are not subject to disclosure pursuant to section 3(a)(8) of the Act.[173] The attorney general held that no other provision of the Open Records Act protected the information from disclosure unless the county official or employee had fulfilled certain requirements.[174] The officials or employees must pay directly for the purchase, installation, and billing of the phones installed in their private vehicles and request that the numbers be maintained as confidential.[175]

II. ELECTIONS

The most celebrated election law case during the Survey period was *Texas Democratic Executive Committee v. Rains.*[176] After the resignation of Justice Rudolph Esquivel, effective January 1, 1989, the chairman of the Texas Democratic Executive Committee sought to get acceptance of the certification enabling Ron Carr to assume the Democratic candidate position for the unexpired term of Justice Esquivel.

Though the resignation was received in June 1988, Justice Esquivel was informed that it would not be accepted until November of that same year. Because the governor's office had not accepted the resignation, there was no vacancy on the San Antonio court of appeals. Absent a vacancy on the court, the secretary of state claimed that there was neither a duly nor the authority to accept the certification of Ron Carr. A mandamus proceeding under Texas Government Code section 22.002(c) and Texas Election Code section 273.061 followed.

The court held that the governor was obligated to accept the resignation given by Justice Esquivel.[177] Once accepted, the court recognized that a vacancy had been created on the court of appeals that, in turn, required the

170. Tex. Att'y Gen. ORD-505 at 3 (1988).
171. *Id.* at 4.
172. *Id.* at 5.
173. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Vernon Supp. 1989) exempts disclosure of "records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution . . . ."
174. Tex. Att'y Gen. ORD-505 at 4.
175. *Id.* at 6.
176. 756 S.W.2d 306 (Tex. 1988).
177. *Id.* at 307.

secretary of state to act.[178] According to the Supreme Court of Texas, an effective resignation must include only written, signed, and delivered documents.[179] Here, since all requirements had been met, the resignation was valid.[180] The court rejected the secretary of state's assertion that a resignation, to be effective, must include an acceptance.[181] Accordingly, the court ordered the secretary of state to certify Mr. Carr as a candidate for the unexpired term of the justice.[182]

The United States Court of Appeals for the Fifth Circuit decided two cases during the Survey period that dealt with important rights under the Election Code and the Federal Voting Rights Act. The first was *League of United Latin American Citizens Counsel No. 4386 v. Midland Independent School District*.[183] The Fifth Circuit affirmed the district court, which ordered that the Midland Independent School District be divided into seven single member districts for voting purposes.[184] The case was originally decided by a panel of the Fifth Circuit[185] but was vacated when the court decided to consider the case en banc. The per curiam en banc decision considered the Midland Independent School Board's argument that legislative deference, owed by the federal courts, required that one of the school board's, and not the district court's, redistricting proposals be put into effect. The court found, however, that the school board's plans violated Texas Education Code section 23.204(b) because its proposals allowed fewer than seventy percent of the board members to be elected from single member districts.[186] Accordingly, the court found that the proposals of the school board were not subject to any deference on the part of the federal court.[187]

The second case decided by the Fifth Circuit that dealt with important rights under the Election Code and the Federal Voting Rights Act was *Leroy v. City of Houston*.[188] The case set out the appropriate procedures for obtaining an award of attorneys' fees in cases brought under the Voting Rights Act.[189] At the district court level the plaintiffs were awarded more than $1

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. 829 F.2d 546 (5th Cir. 1987) (en banc) (per curiam).
184. *Id.* at 548.
185. 812 F.2d 1494 (5th Cir. 1986).
186. 829 F.2d at 547. TEX. REV. CIV. STAT. ANN. art. 23.024(b) (1987) states:
> The board of trustees of a school district, on its own motion, may order that trustees of the district are to be elected from single-member trustee districts or that not fewer than 70 percent of the members of the board of trustees are to be elected from single-member trustee districts with remaining trustees to be elected from the district at large. Before entering the order, the board must: (1) hold a public hearing at which registered voters of the district are given an opportunity to comment on whether or not they favor the election of trustees in the manner proposed by the board; and (2) publish notice of the hearing in a newspaper that has general circulation in the district, not later than the seventh day before the day of the hearing.

187. 829 F.2d at 548.
188. 831 F.2d 576 (5th Cir. 1987).
189. 42 U.S.C. § 1973c (1982).

million for attorneys' fees and costs. With only two judges sitting on the court of appeals panel, the Fifth Circuit reversed.[190]

Under the Voting Rights Act,[191] one must be a "prevailing party" to trigger an award of attorney's fees. If a plaintiff becomes a "prevailing party" as the result of a judgment, then he is undoubtedly entitled to recover the expense of attorney's fees.[192] If the plaintiff becomes a "prevailing party" as the result of other means, such as settlement or other action taken by the defendant, then it is less clear whether attorney's fees will be awarded.[193] The Fifth Circuit held that there were two questions that must be asked to determine who is a "prevailing party."[194] The first question asked must be one that determines whether the plaintiff's case brought forth the defendant's action. If so, the next question must determine the scope of compensable action. In this case, the Fifth Circuit declined to disturb the fact finding of the district court that the plaintiffs' litigation was a significant catalyst to the city's adoption of single member districts.[195] The Fifth Circuit did not agree, however, to the finding that the litigants had a substantial effect on the Justice Department's treatment of the voting rights dispute.[196] This error by the trial court, however, was not sufficient to overturn the finding that the plaintiffs were entitled to some fees.[197] The Fifth Circuit found that not all of the fees awarded were legally compensable.[198] For example, one of the fees awarded by the district court, for the lobbying activity of the plaintiffs' attorney, was, according to the Fifth Circuit, not compensable.[199]

Perhaps the most significant aspect of the case was the Fifth Circuit's rejection of the trial court's contingency multiplier. The Fifth Circuit's decision followed the Supreme Court's plurality decision in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*.[200] In order to qualify for a contingency multiplier, the Fifth Circuit held that both the need and justification for such an award must be in the record with supporting evidence.[201] In addition, the district court must make a specific finding of fact in order for the court of appeals to affirm such a finding.[202] The Fifth Circuit also found that expert witness fees, beyond the stated expenses, may not be awarded to a prevailing party under a fee-shifting statute unless the applicable statute explicitly awards such costs.[203] The Fifth Circuit modified the award to $693,805.00 and remanded for an entry of judgment in that

190. 831 F.2d at 586.
191. 42 U.S.C. § 19731(e) (1982).
192. 831 F.2d at 579.
193. *Id.*
194. *Id.*
195. *Id.* at 580.
196. *Id.*
197. *Id.* at 581.
198. *Id.* at 581-83.
199. *Id.* at 582.
200. 483 U.S. 711 (1987).
201. 831 F.2d at 584.
202. *Id.*
203. *Id.*

amount.[204]

The Texas secretary of state, Jack Rains, was kept busy during the Survey period, which corresponded with a general election. In *Cohen v. Rains*[205] an incumbent justice of the Houston court of appeals (First District) brought a mandamus action against the secretary of state, the Texas Republican Executive Committee, and a number of Republican Party officials. The mandamus sough to exclude the name of Jim Scott from the 1988 Republican general primary election ballot. Jim Scott was running for the position of justice of the First Court of Appeals District Place 4. Justice Cohen was the incumbent and the only candidate for the office on the Democratic ticket. Cohen alleged that Scott's application did not pass the Texas Election Code muster because it lacked the needed 750 signatures.[206]

On the merits, the court found that of the 1,071 signatures presented, 421 were duplicate signatures. When the duplicates were subtracted, the net total of valid signatures equaled 650. Justice Cohen contended that this was less than the 750 required by law. Mr. Scott, on the other hand, argued that duplicative signatures were permissible because of the two different petition forms furnished by the secretary of state's office. The court of appeals rejected these arguments and held that Jim Scott was not entitled to have his name placed on the ballot.[207] The court issued a writ of mandamus to George Strake as chairman of the Republican Executive Committee.[208]

Secretary of state Rains was in court again in a case brought by three individuals and the Libertarian Party of Texas in *Pilcher v. Rains*.[209] The plaintiffs alleged that sections 141.062(a)(3), 141.063(2)(B), and 181.006(b)(1) of the Texas Election Code were unconstitutional. The court found that the secretary of state failed to show a need for the voter registration numbers on petitions seeking new party ballot recognition.[210]

The court held that the integrity of the election process may be adequately maintained without the use of the voter registration numbers.[211] For example, the state would have been able to verify signatures by using the signer's name and, if needed, address. In light of this, the court found that voter registration numbers were unnecessary, and the named provisions of the Texas Election Code were in violation of the first and fourteenth amendments of the Constitution.[212]

In *Bacon v. Harris County Republican Executive Committee*[213] the judge of the 338th Judicial District Court of Harris County asked the court to

204. *Id.*
205. 745 S.W.2d 949 (Tex. App.—Houston [14th Dist.] 1988, no writ); *see also* Plummer v. Veselka, 744 S.W.2d 347 (Tex. App.—Houston [1st Dist.] 1988, no writ).
206. 745 S.W.2d at 950; *see also* Cohen v. Strake, 743 S.W.2d 366 (Tex. App.—Houston [1st Dist.] 1988, no writ).
207. 745 S.W.2d at 954.
208. *Id.* at 955.
209. 683 F. Supp. 1130 (W.D. Tex. 1988).
210. *Id.* at 1134.
211. *Id.* at 1135.
212. *Id.*
213. 743 S.W.2d 369 (Tex. App.—Houston [14th Dist.] 1988, no writ).

order the secretary of the Harris County Republican Party to omit the name of Mark Sokolow from the Republican party primary election. The judge contended that Sokolow did not state on the petition exactly what office was sought, namely, "Judge," but instead only listed the office sought as that of "338th District Court." The court noted, however, that each of the seventy-five pages of signatures included the office sought as "Judge, 338th Dist. Ct." and that this was sufficient.[214] Furthermore, it was asserted that the application was defective because the signature on the petition accompanying Sokolow's application for a place on the ballot did not contain the word "Texas" as part of the resident's address. The court also rejected this argument.[215]

III. ANNEXATION AND INCORPORATION

In *Mahone v. Addicks Utility District*[216] a land owner brought an action under the federal civil rights and antitrust laws against other land owners and a utility district claiming that his rights were violated when the district refused to annex his land. The district court dismissed the case. The Addicks Utility District of Harris County is organized under Texas law and has been given certain powers. Among these powers are the Addicks Utility District's ability to review property owners' petitions for annexation into the utility district and to make the determination as to which properties are annexed. Within the district, and roughly at its center, was a twenty-acre tract of unannexed property completely surrounded by annexed land. Mahone, the plaintiff and owner of this twenty acres of unannexed land sought to increase its development value by annexing the land into the district. The court denied Mahone's annexation petition, however, because he failed to attach development plans and pay money to certain developers.

Mahone believed, however, that this refusal to annex his property amounted to an illegal conspiracy between the district and developers whose property had already been annexed. Mahone filed a suit in federal court against a number of defendants, claiming civil rights violations. Mahone also filed a claim under the Racketeer Influenced and Corrupt Organization's statute. The defendants filed motions to dismiss the complaint for failure to state a claim, which the district court granted. The Fifth Circuit affirmed with respect to the dismissal of Mahone's voting rights claim.[217] The court held that the power to annex land is a decision that is afforded almost no discretion in the court system and is a decision that should be left entirely to the legislative system, as long as the equal protection clause is not violated.[218] The court also rejected Mahone's allegation that he had been denied due process because there was a failure to show a deprivation of a property interest.[219] The court held that the expectation of annexation was

214. *Id.* at 370.
215. *Id.*
216. 836 F.2d 921 (5th Cir. 1988).
217. *Id.* at 928-29.
218. *Id.* at 928.
219. *Id.* at 931.

not a property interest under the due process clause and therefore not entitled to protection under the Constitution.[220] In addition, the court held that the Texas Water Code, upon which Mahone relied, did not even give him the right to have his tract of land annexed to the district.[221] The court, however, reversed the district court's dismissal of Mahone's equal protection claim.[222] The fundamental purpose of the equal protection clause, the court noted, is that all persons similarly situated are to be treated alike.[223] The court found that Mahone had stated a claim when he alleged that the district had developed two classifications. One group, like Mahone, was required to file development plans before annexation proceedings could begin and a second group, which consisted of persons similarly situated, were given until later in the annexation process to file their plans. The court remanded the equal protection claim to the district court for further consideration.[224] Finally, the court affirmed the dismissal of the plaintiff's antitrust claims.[225]

IV. CONDEMNATION AND DEDICATION

The Texas Supreme Court decided one case in the condemnation area during the Survey period. In *Callejo v. Brazos Electric Power Co-operative, Inc.*[226] the land owner, Callejo, owned a 130.71-acre tract of land. The defendant, Brazos Electric, had an easement across the land to construct, operate, and maintain an electric transmission line. In 1948 Brazos constructed a 69,000-volt transmission line on the tract, which it operated until 1985 when a new line was constructed with a 138,000-volt capacity. After Brazos filed the petition in condemnation the court appointed a special commissioner to assess damages. The land owner, Callejo, disagreed with the amount awarded by the special commissioner and the issue of damages went to the jury.

The jury found that Callejo was entitled to $91,232.00, which was the difference between the value of the easement before condemnation and the value after condemnation. The trial court, however, granted a motion for a judgment notwithstanding the verdict and rendered judgment for Callejo in the amount of $422,620.00. The court of appeals reversed, however, and found that there was sufficient evidence to support the jury's finding of post-taking value.

Callejo then applied for a writ of error in the Texas Supreme Court, contending that there was no evidence to support the jury's finding. The supreme court agreed with Callejo and noted that no witness testified to a value higher than $33,541.00 yet the jury found $364,928.80.[227] The supreme court rejected the argument made by Brazos and held that the jury

220. *Id.*
221. *Id.* at 930.
222. *Id.* at 938.
223. *Id.* at 932.
224. *Id.* at 938.
225. *Id.*
226. 755 S.W.2d 73 (Tex. 1988).
227. *Id.* at 75.

could not take all testimony as to both pre- and post-taking values and blend it together to come up with its own finding on post-taking value.[228]

The opinion by Justice Kilgarlan then identified some thirteen opinions that "may" conflict with the *Callejo* ruling.[229] Justice Spears, in a dissent joined by Justices Ray and Culver, noted that in light of all the conflicting opinions that the majority disagreed with, it seemed clear that juries in condemnation cases were free to select any award amount that was in the general range of the testimony presented.[230] The dissent went on to say that if juries were not given this flexibility, then witnesses would no longer help the jury, but instead, control them.[231]

In *Mercer v. Phillips Natural Gas Co.*[232] the gas company instituted a condemnation proceeding in the county court of Fayetteville County, which has no county court at law. The court condemned certain property and awarded the land owners compensation. The land owners did not appeal, but subsequently filed a case in the district court and asserted that the county court's judgment was invalid because of a lack of jurisdiction. The district court found, and this court affirmed, that the trial court did, in fact, have jurisdiction.[233] The court based its decision on a reading of a 1985 law that granted the Fayetteville county court jurisdiction to hear and decide eminent domain proceedings.[234] The court also recognized that the Texas Constitution granted the legislature the authority to vary the jurisdiction of county courts.[235] Although now repealed, the provision provided the legislature with the power to alter, in any way, both the civil and criminal jurisdictions of the county courts.[236]

In *Schneider v. The City Cuero*[237] the land owners brought a suit against the city. The land owners contended that the city's operation of an adjacent landfill was a nuisance and constituted inverse condemnation. The trial court entered a take nothing judgment on the grounds that the city was immune from liability in its operation of the landfill. The court held that the city was immune from liability unless the land owners could show that the operation of the landfill diminished the value of the adjacent property.[238] Here, this was not shown and the judgment from the trial court was affirmed.[239]

In *Oliver v. Oliver*[240] a husband objected to a division of community property pursuant to a divorce. He alleged that the court's action constituted a

228. *Id.*
229. *Id.*
230. *Id.* at 77.
231. *Id.*
232. 746 S.W.2d 933 (Tex. App.—Austin 1988, no writ).
233. *Id.* at 936.
234. 1985 Tex. Sess. Law. Service ch. 948, § 1, at 3209 (TEX. REV. CIV. STAT. ANN. art. 1970-310, since repealed).
235. 746 S.W.2d at 935.
236. *Id.*
237. 749 S.W.2d 614 (Tex. App.—Corpus Christi 1988, no writ).
238. *Id.* at 616.
239. *Id.* at 618.
240. 741 S.W.2d 225 (Tex. App.—Fort Worth 1987, no writ).

taking of property without due process or due compensation. The Fort Worth court of appeals rejected both arguments.[241]

Woodson Lumber Co. v. City of College Station[242] dealt with a land owner that sued the city and alleged inverse condemnation and denial of due process. The land owner claimed that the city council's refusal to approve proposed subdivision plats amounted to condemnation and lack of due process. The Houston court of appeals, First District, affirmed the district court's holding that the city council's refusal to approve a plat that attempted to increase the density level of the area did not amount to a taking of the land owner's property for public purposes.[243] The court also held that the city council based its decision on the belief that the area simply could not adequately maintain that many people, and that the city council's failure to disclose information considered in making its decision did not deprive the land owner of procedural due process.[244]

V. TORT LIABILITY

The current Survey period includes a number of decisions in which courts assessed both the validity of claims for damages resulting from governmental conduct and the propriety and scope of governmental immunity.[245] In addition, a number of decisions in the Survey period addressed the police power of local governments. This section reviews decisions of courts considering the Texas Tort Claims Act[246] and the federal cause of action for deprivation of civil rights.[247]

A. Liability Under 42 U.S.C. Section 1983

Several federal court decisions during the Survey period addressed claims against municipalities under the Civil Rights Act of 1871.[248] In *Reid v. Rolling Fork Public Utility District*[249] the Utility District appealed a judgment premised on a jury verdict that held that the Utility District had denied equal protection to plaintiffs when it declined to grant a sewage treatment commitment for a tract of land owned by plaintiffs. The Fifth Circuit recognized that the Utility District was created by statute pursuant to the Texas Constitution and was a conservation and reclamation dis-

241. *Id.* at 227.
242. 752 S.W.2d 744 (Tex. App.—Houston [1st Dist.] 1988, no writ).
243. *Id.* at 747.
244. *Id.* at 748.
245. For an outline of the scope of Texas governmental immunity, see Babcock & Collins, *Local Government Law, Annual Survey of Texas Law*, 35 SW. L.J. 409, 452 (1981).
246. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1986 & Supp. 1989).
247. 42 U.S.C. § 1983 (1982).
248. *Id.* provides in part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

249. 854 F.2d 751 (5th Cir. 1988).

trict.[250] The court also recognized that when determining whether a district decision is in agreement with the due protection clause, it is the legislative model and not the adjudicatory model that should be followed.[251] The court then reviewed and found clear error in the lower court's jury instruction.[252] The instruction in part was: "[t]he employment of other standards which may not be reasonably related to the legitimate functions of [the Utility District] is sufficient to support a finding of a denial of equal protection under the law."[253] After having found clear error, the court stressed that the rational basis test should have been used.[254] This test, when used in conjunction with the legislative, as opposed to adjudicatory, model helps to put an end to any second guessing by judges or juries.[255] The test set forth by the court requires that there only be "*a* conceivable rational basis for the official action."[256] Because the jury instruction was directly contrary to the law, the court vacated the lower court judgment and remanded the action for a new trial.[257]

In *Peoples National Utility Co. v. City of Houston*[258] the Fifth Circuit determined that federal jurisdiction would not lie in this section 1983 action concerning the city's failure to approve the utility company's rate requests.[259] The Fifth Circuit concurred with the lower court's holding that the Johnson Act[260] denies federal jurisdiction.[261] Here, the utility company failed to establish that it did not have a "plain, speedy and efficient remedy" in the Texas courts.[262] In doing so, the court recognized that a municipality may set utility rates under the Public Utility Regulatory Act,[263] that these rates are reviewed under the Texas Administrative Procedure and Texas Register Act,[264] and that the Texas Legislature "intended to substitute an adequate legal remedy for the equitable power of the court to review a rate

250. *Id.* at 753 (citing TEX. CONST. art. XVI, § 59; TEX. REV. CIV. STAT. ANN. art. 8280-576; and TEX. WATER CODE ANN. ch. 54 (Vernon 1955 & Supp. 1988)).

251. 854 F.2d at 753 (citing Kaplan v. Clearlake City Water Auth., 794 F.2d 1059, 1064 (5th Cir. 1986) (such districts "possess limited legislative or quasi-legislative functions"); Shelton v. City of College Station, 780 F.2d 475, 479-82 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986); Mahone v. Addicks Util. Dist., 836 F.2d 921, 934-35 (5th Cir. 1988)).

252. 854 F.2d at 754.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 755.

258. 837 F.2d 1366 (5th Cir. 1988).

259. The utility company alleged that the failure to approve the rate request was a denial of its due process rights and resulted in an unconstitutional taking and confiscation of its property without just compensation. *Id.* at 1367.

260. The Johnson Act denies federal jurisdiction when four criteria are met: "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and, (2) The order does not interfere with interstate commerce; and, (3) The order has been made after reasonable notice and hearing; and, (4) A plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1342 (1982).

261. 837 F.2d at 1369.

262. *Id.* at 1367-68.

263. TEX. REV. CIV. STAT. ANN. art. 1446c (Vernon Supp. 1989).

264. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1989).

order on *the constitutional ground of confiscation.*"[265] The court was not persuaded by the utility company's arguments that its state remedy was no longer available and that it need not have pursued its administrative remedies before filing this section 1983 action. Regarding the first argument, the court stated that the unavailability of the state remedy was the result of the neglect of the utility company and not the state.[266] Regarding the second argument, the court distinguished *Patsy v. Board of Regents*[267] and held that the Johnson Act is indicative of Congress's intent that the party bringing suit must first avail himself of state remedies.[268]

In *Brawner v. City of Richardson, Texas*[269] a police officer sued the city, the police chief, and the police department director under 42 U.S.C. section 1983, contending that he was fired in retaliation for his exercise of free speech. The officer was fired shortly after his attorney delivered a letter to various city officials and two reporters that complained of official misconduct. Defendants contended that the officer was fired because he refused to cooperate fully in connection with their internal affairs investigation. Defendants' summary judgment motion, premised on their alleged qualified immunity, was denied. On appeal,[270] the Fifth Circuit noted that an employee's speech does not invoke constitutional protection against discharge unless that speech addresses "a matter of public concern."[271] The court then examined the content, form, and context of the speech and determined that the allegation of official misconduct constituted a matter of public concern.[272] The court next went through a balancing test.[273] On one side was the state's interest in maintaining smooth running operations and on the other side is the employee's interest in addressing issues that affect the public.[274] Even accepting defendants' argument that the city and the police department have an interest in conducting thorough internal affairs investigations, the court concluded that such an interest is outweighed by the "public's interest in the disclosure of misconduct or malfeasance."[275] Finally, the

265. 837 F.2d at 1368 (quoting Gulf Water Benefaction Co. v. Public Utility Comm'n, 674 F.2d 462, 467 (5th Cir. 1982)).

266. *Id.*

267. 457 U.S. 496 (1982).

268. 837 F.2d at 1368 (citing Louisiana Power & Light Co. v. Ackel, 616 F. Supp. 445, 447 (M.D. La. 1985); Miller v. N.Y.S. Public Service Comm'n, 807 F.2d 28, 31 (2d Cir. 1986) (deciding that the Johnson Act barred award of compensatory damages under § 1983)). The court elaborated, stating that "plaintiffs may not use § 1983 as an 'end run' around the Johnson Act." 837 F.2d at 1368.

269. 855 F.2d 187 (5th Cir. 1988) (summary calendar).

270. To the extent that it turns on an issue of law, an appeal from a denial of the summary judgment, premised on qualified immunity, is an appealable final decision. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

271. 855 F.2d at 191 (citing Noyola v. Texas Dep't of Human Resources, 837 F.2d 233, 237 (5th Cir. 1988)).

272. The court was persuaded that Brawner, through his attorney's letter, was speaking about possible police misconduct and that such speech "should be classified as speech addressing a matter of public concern." 855 F.2d at 192.

273. *Id.*

274. *Id.* (citing Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).

275. 855 F.2d at 192 (citing Solomon v. Royal Oak Township, 842 F.2d 862, 866 (6th Cir.

court cautioned that "[q]ualified immunity is a defense for public officials only if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "[276] Since the first amendment right of any employee to speak out on a matter of public concern was clearly established at the time the letter was forwarded to the city officials and reporters,[277] the court concluded that in a situation where an employee was discharged for speech that concerned official misconduct, a reasonably objective public official would have known that the discharge was in violation of a clearly established right under the Constitution.[278] The Fifth Circuit, therefore, affirmed the district court's denial of defendants' summary judgment motion.[279]

In *Sherrell v. City of Longview*[280] plaintiff, by and through his guardian, alleged that the city and several police officials deprived him of his constitutional rights due to an assault by an off-duty police officer. Plaintiff claimed that the city knew that the officer had a propensity toward violence and that the officer had assaulted him earlier. Plaintiff also claimed that the city did not arrest the officer in connection with the earlier assault because of a policy that allowed officers who had been involved in an incident of domestic violence not to be arrested but rather assigned to participate in counseling. Defendants then moved to dismiss the suit, arguing that plaintiff failed to allege a constitutional deprivation, failed to show how a municipal policy or custom was the moving force of the injury, or failed to show discriminatory intent on the part of the defendants. The defendants also argued that the plaintiff did not overcome the qualified immunity defense and did not assert a cause of action in connection with the alleged negligent deprivation of civil rights. Because plaintiff pled that he was the victim of a departmental policy that favored police officers accused of domestic violence, the court concluded that there was a constitutional deprivation and held that dismissal of the claim was unwarranted.[281] The court also determined that plaintiff properly pled sufficient facts to establish that a "special relationship" existed between himself and defendants.[282] Because plaintiff alleged that numerous

1988)). The court added that the speech involved here, allegations of official misconduct, could not adversely affect the proper functioning of the police department because the speech, if true, indicated that the police department was already functioning improperly due to corruption. 855 F.2d at 192.

276. 855 F.2d at 192 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

277. 855 F.2d at 192-93 (citing Terrell v. University of Tex. System Police, 792 F.2d 1360, 1363 (5th Cir.), *cert. denied*, 474 U.S. 1101 (1986); Thomas v. Harris County, 784 F.2d 648, 653 (5th Cir. 1986); Gonzales v. Benavides, 712 F.2d 142 (5th Cir. 1983); Solomon v. Royal Oak Township, 842 F.2d 862, 865 (6th Cir. 1988); O'Brien v. Town of Caledonia, 748 F.2d 403, 407 (7th Cir. 1984); Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984)).

278. 855 F.2d at 193.

279. *Id.* at 194.

280. 683 F. Supp. 1108 (E.D. Tex. 1987).

281. Here, the court noted that, "[d]iscrimination in providing protection against private violence would of course violate the equal protection clause of the Fourteenth Amendment." *Id.* at 1112 (quoting Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982)).

282. 683 F. Supp. at 1113. The court noted that a "state by its acts may . . . create a 'special relationship' with a specific individual, that imposes upon it a constitutional duty to care for and protect the individual from know harms." *Id.* (citing Escamilla v. City of Santa

reports of the officer's abuse were made to police and because the police knew of the dangers that the officer posed to plaintiff, the court concluded that a "special relationship" and a duty to protect plaintiff may have existed in this case and accordingly, the court denied defendants' motion to dismiss.[283] The court also rejected defendants' argument that plaintiff failed to plead any facts establishing an official custom or policy other than the facts relating to his own case.[284] While the court recognized that an official custom or policy may not be established by one act or incident carried out by an officer, it found that plaintiff in the case at bar was injured by a number of decisions that a number of the defendants made during the incident.[285] For example, the chief of police decided not to arrest the officer despite the reports of the officer's abusive behavior."[286] The court did accept, however, the defendants' argument that their allegedly negligent acts did not rise to the level of a section 1983 violation.[287] In dismissing plaintiff's negligent deprivation of civil rights claims, the court stated that the plaintiff must show intent to discriminate before an equal protection deprivation claim is valid.[288] The court also dismissed plaintiff's state law claims without prejudice to amend.[289] In doing so, the court noted that plaintiff failed to allege facts that would establish the city's limited waiver of immunity provided by the Texas Tort Claims Act.[290] The court also noted that plaintiff failed to allege that the individual officers, otherwise shielded by sovereign immunity, acted outside the scope of their employment.[291] Finally, the court determined that plaintiff failed properly to plead facts to overcome the qualified immunity defense of the individual defendants.[292] Nevertheless, the court afforded plaintiff additional time to amend his pleadings to claim that the defendants had acted contrary to clearly established law.[293]

Ana, 796 F.2d 266, 268-70 (9th Cir. 1986); Estate of Gilmore v. Buckley, 787 F.2d 714, 782 (1st Cir.), *cert. denied*, 479 U.S. 882 (1986); Estate of Bailey v. County of York, 768 F.2d 503, 510-11 (3d Cir. 1985); Jensen v. Conrad, 747 F.2d 185, 191-94 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982)).

283. 683 F. Supp. at 1114. The court noted that Texas law reflects a special concern for the plight of abused children, as here, and imposes duties upon state officials to receive and investigate child abuse complaints. *Id.* The court also noted that defendants' knowledge of the officer's propensity toward violence further indicated that a duty to protect plaintiff may have existed in this case. *Id.*

284. *Id.* at 1118.

285. *Id.* at 1114-15.

286. *Id.* at 1115. The court further found that an inference of city policy was raised by the repeated refusal of the city to arrest the officer in response to plaintiff's complaints.

287. *Id.* at 1116-17.

288. *Id.* at 1116. In so stating, the court relied upon Daniels v. Williams, 474 U.S. 327 (1986), overruling in part Parratt v. Taylor, 451 U.S. 527 (1981); and Davidson v. Cannon, 474 U.S. 344 (1986). *See also* Love v. King, 784 F.2d 708, 712-13 (5th Cir. 1986); NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 3.02, 3.09 (2d ed. 1986).

289. 683 F. Supp. at 1117.

290. *Id.* at 1118.

291. *Id.* at 1117.

292. *Id.* at 1118.

293. *Id.* at 1117.

B. Liability Under Texas Tort Claims Act

The Texas courts of appeals rendered several decisions of note during the Survey period construing the Texas Tort Claims Act. In two decisions, *Hill v. Bellville General Hospital*[294] and *Bourne v. Nueces County Hospital District*,[295] courts of appeals interpreted the scope of the notice provisions of the Texas Tort Claims Act. In *Hill* the parents of a stillborn baby appealed a summary judgment granted in favor of the county hospital. The county hospital argued that plaintiffs failed to provide it with notice of their claim within six months of the occurrence as required by the Texas Tort Claims Act.[296] The court recognized that an exception to this requirement exists if "the governmental unit has *actual notice* that the death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged."[297] After examining the summary judgment evidence, including evidence of the hospital's investigative report of the incident and evidence that a determination was made by hospital officials regarding the cause of death, the court concluded that a genuine issue of material fact existed with respect to the issue of actual notice.[298] Accordingly, the court reversed the summary judgment in favor of the county hospital and remanded the action to the trial court.[299]

In *Bourne* plaintiff's schizophrenic brother, who was released from confinement by the county hospital, set fire to plaintiff's home, causing the death of plaintiff's husband and young daughter. The trial court granted summary judgment to the hospital because, inter alia, plaintiff failed to provide the hospital with notice of her claims as required by the Texas Tort Claims Act.[300] Plaintiff argued, as did the plaintiff in *Hill*, that the hospital had actual notice of her claim. She asserted that the emergency room records reflect that a house fire caused her injuries as well as the death of her husband and daughter. The court of appeals disagreed, noting that the hospital records contained no indication that the hospital was in any way responsible for the fire.[301] The court also noted that the records failed to establish that the appellant had an intent to file suit against the hospital.[302] The court further held that it would be unreasonable to conclude that the hospital had actual notice from the records alone.[303] Accordingly, the court affirmed the trial court judgment.[304]

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294. 735 S.W.2d 675 (Tex. App.—Houston [1st Dist.] 1987, no writ).
295. 749 S.W.2d 630 (Tex. App.—Corpus Christi 1988, no writ).
296. TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (Vernon 1986).
297. 735 S.W.2d at 677 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c) (Vernon 1986)). The court added that the actual notice exception "means that the governmental entity received the knowledge that it would have received if the appellants had complied with the formal notice requirements." 735 S.W.2d at 677 (citing Collier v. City of Texas City, 598 S.W.2d 356, 358 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (emphasis in original)).
298. 735 S.W.2d at 677.
299. *Id.* at 678.
300. 749 S.W.2d at 632.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 633.

In other decisions courts of appeals interpreted the scope of the Texas Tort Claims Act provisions waiving governmental immunity.[305] In *Bourne* the court recognized that the Texas Tort Claims Act provides for a "waiver of governmental immunity in three general areas: use of publicly owned vehicles, premise defects, and injuries arising from a condition or use of property."[306] Plaintiff argued that her action fell within the waiver relating to injuries arising from a use of property. Plaintiff argued that the hospital's failure to use its building to confine her schizophrenic brother caused her injuries as well as the death of her husband and daughter. The court rejected plaintiff's argument and noted that "the limited waiver of governmental immunity does not extend to 'non-use' of property."[307] Accordingly, the court concluded that plaintiff failed to state a cause of action within the Act's waiver provisions.

In *McCord v. Memorial Medical Center Hospital*,[308] plaintiff sued a hospital because of injuries he allegedly suffered when the hospital security guard assaulted him.[309] At trial, the hospital obtained summary judgment based upon governmental immunity. On appeal, plaintiff argued that the use of the night stick by the security guard was an act for which the legislature waived immunity. The court disagreed, noting that the waiver of governmental immunity, as alleged by plaintiff, is limited by section 101.057,[310] which specifically provides that claims "arising out of assault, battery, false imprisonment, or any other intentional tort" are not actionable.[311] Accordingly, the court affirmed the summary judgment in favor of the hospital.[312]

In *Trevathan v. State*[313] the plaintiff asserted a tort claim against the State of Texas when she was attacked during a camping trip at a state park. The trial court granted summary judgment to the state because of the state's sovereign immunity. The plaintiff's primary argument centered around the contention that the state failed to provide adequate security, which proximately caused her tortious injuries. The court of appeals concluded that the plaintiff's claim fell within the statutory provision providing that the state is immune for "[any] claim based on an injury or death connected with any act or omission . . . arising out of the failure to provide, or the method of providing, police or fire protection."[314] Accordingly, it affirmed the trial court

305. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986).

306. 749 S.W.2d at 632 (citing Salcedo v. El Paso Hospital Dist., 659 S.W.2d 30, 31 (Tex. 1983)).

307. 749 S.W.2d at 632 (citing Seiler v. Guadalupe Valley Hospital, 709 S.W.2d 37, 38 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Floyd v. Willacy County Hospital Dist., 706 S.W.2d 731, 733 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Vela v. Cameron County, 703 S.W.2d 721, 725 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.)).

308. 750 S.W.2d 362 (Tex. App.—Corpus Christi 1988, no writ).

309. In addition, plaintiff alleged causes of action for false imprisonment, malicious prosecution, and negligent hiring and supervision of employees.

310. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (Vernon 1986); *see also* Townsend v. Memorial Medical Center, 529 S.W.2d 264, 267 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

311. 750 S.W.2d at 363.

312. *Id.* at 364.

313. 740 S.W.2d 500 (Tex. App.—Houston [1st Dist.] 1987, writ dism'd).

314. *Id.* at 502; TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon 1986).

judgment. The court went on to note that claims arising out of an assault or any other intentional tort are excluded under the Texas Tort Claims Act[315] and that constitutional challenges to the statutory grant of immunity from liability consistently have been rejected.[316]

VI. POLICE POWER

During the Survey period, a number of courts addressed the constitutionality of city ordinances that regulate the operation of sexually oriented businesses. In *FW/PBS, Inc. v. City of Dallas*.[317] the Fifth Circuit held that a Dallas city ordinance (the Ordinance)[318] that imposed certain licensing and zoning restrictions upon sexually oriented businesses withstood constitutional challenges.[319] Plaintiffs, the owners and operators of sexually oriented businesses, argued that the licensing scheme of the Ordinance regulated the content of expression protected by the first amendment. Relying upon *Freedman v. Maryland*[320] and *Fernandes v. Limmer*,[321] plaintiffs argued that the Ordinance lacked procedural due process protection and, therefore, was unconstitutional. The majority concluded that the licensing scheme of the Ordinance was not content-based regulation and refused to apply the analysis under *Freedman* and *Fernandes*. Rather, the court followed the analysis under *City of Renton v. Playtime Theatres, Inc.*[322] in which the Supreme Court characterized a Washington ordinance that prohibited certain locations of adult motion picture theatres as a time, place, or manner restriction.[323] The court was persuaded that the Dallas Ordinance, like the

315. 740 S.W.2d at 502 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 101.055). The court went on to state that "courts generally are not in the business of reviewing policy decisions that governments must make in deciding how much, if any, police protection to provide for a community and, in this case, the park community." 740 S.W.2d at 502 (citing State v. Terrell, 588 S.W.2d 784, 787 (Tex. 1979)).

316. 704 S.W.2d at 502 (citing Lynch v. Port of Houston Auth., 671 S.W.2d 954 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Duson v. Midland County Indep. School Dist., 627 S.W.2d 428 (Tex. Civ. App.—El Paso 1981, no writ); Swafford v. City of Garland, 491 S.W.2d 175 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.)).

317. 837 F.2d 1298 (5th Cir. 1988).

318. The Ordinance requires that:

> A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The Ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

837 F.2d at 1300.

319. Judge Thornberry dissented in part to the majority opinion.

320. 380 U.S. 51 (1965) (Maryland statute preventing distribution or exhibition of films unapproved by Board of Censors held unconstitutional for lack of procedural due process protection).

321. 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982) (regulation of Dallas Fort Worth Airport authority denying followers of Krishna religion license to solicit at airport held unconstitutional for lack of procedural due process protection).

322. 475 U.S. 41 (1986).

323. 837 F.2d at 1302. The court noted that the Supreme Court "found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented busi-

Washington ordinance, regulated only the secondary effects of sexually oriented businesses and did not constitute regulation of particular speech.[324] Because the city of Dallas demonstrated that the Ordinance furthered a substantial government interest, that of maintaining the qualify of urban life, and because the city of Dallas offered evidence that alternative, feasible locations existed for such businesses, the court determined that the Ordinance met the standards applicable to time, place, and manner restrictions.[325]

Dissenting in part, Judge Thornberry disagreed with the majority's characterization of the licensing scheme as a content-neutral time, place, and manner regulation. Arguing that *Fernandes* was indistinguishable, he noted that the ordinance in *Fernandes* was also ostensibly content-neutral because it purported to prohibit interference with people moving through the airport and to help the flow of pedestrian traffic.[326] Further, he argued that *City of Renton*, the decision relied upon by the majority, was distinguishable because it involved a zoning ordinance that allowed alternative avenues of communications.[327] He also argued that the licensing scheme of the Dallas Ordinance resulted in a greater impact on speech than zoning ordinances because zoning allows other avenues of communication. Conversely, he argued, denying a license results in a total ban on speech.

Several courts of appeals also addressed and upheld the constitutionality of ordinances similar to the Dallas Ordinance.[328] In *Lindsay v. Papageorgiou*[329] the court of appeals reviewed and reversed a district court opinion

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nesses and did so without restricting alternative avenues of communication." *Id.* (citing City of Renton, 106 S. Ct. at 930-32).

324. "What is being limited here is not a particular movie, as in *Freedman*, nor episodic solicitation efforts, as in *Fernandes*, but a long term commercial business." 837 F.2d at 1303. The court also noted that even though particular procedural protections are not immediately provided, the "ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions." *Id.*

325. The majority also rejected licenses to persons convicted of certain crimes. In so doing, the court questioned the appropriate standard upon which to measure such regulation:

> While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny and have not otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, including those laced with activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

837 F.2d at 1305. The court concluded that the Ordinance was "well tailored to sufficiently achieve its ends." *Id.*

326. *Id.* at 1308.

327. *Id.* at 1309.

328. Other decisions have upheld the constitutionality of similar ordinances in the face of challenges that such ordinances are unconstitutionally vague, overboard, violative of due process, preempted by state law, or in conflict with certain state laws. Martinez v. State, 744 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1988, no writ). *But cf.* City of Houston v. Mitchell, 737 S.W.2d 370 (Tex. App.—Houston [14th Dist.] 1987, no writ) (dictum indicating that city may not enforce ordinance relating to lighting and structural configuration of adult arcades by injunction pursuant to § 2(2) of TEX. REV. CIV. STAT. ANN. art. 1175f (Vernon Supp. 1987)).

329. 751 S.W.2d 544 (Tex. App.—Houston [1st Dist.] 1988, no writ).

that declared certain Harris County regulations, which governed the location of sexually oriented enterprises, unconstitutional. Appellants persuaded the court of appeals that the standards set forth in *City of Renton* applied because the Harris County regulations do not forbid sexually oriented commercial enterprises completely, but rather prohibit their existence within a prescribed distance of enumerated land uses.[330] The court then concluded that the record demonstrated that the regulations served a substantial government interest[331] and that the regulations allowed for reasonable avenues of communication. Accordingly, the court concluded that the Harris County regulations withstood the first amendment challenge.[332]

In *Rahmani v. State*[333] the operator of an adult arcade was convicted in municipal court for operating the arcade without a permit that the Houston City Code (the Ordinance) required. The operator appealed his conviction, challenging the constitutionality of the Ordinance provision requiring that arcades be configured to provide an unobstructed view of every area within the arcade.[334] The court of appeals rejected this challenge.[335] The court then relied upon the time, place, and manner test set out in *City of Renton*[336] and concluded that the Ordinance was sufficiently well-tailored to address the secondary effects of adult arcades and that it left open ample alternative channels for communication.[337]

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330. *Id.* at 549.

331. *Id.* The court noted, "concern with the adverse secondary effect of the unrestricted location of the enterprises on the public health, safety, and welfare by their contribution to the decline of residential and business neighbors and the growth of criminal activity . . . ."

332. *Id.* at 550 ("the regulations in question impose only a minimal or incidental burden on protected expression, as they are nothing more than a limitation on the place where such expression may be exercised . . . .").

333. 748 S.W.2d 618 (Tex. App.—Houston [1st Dist.] 1988, no writ).

334. The operator argued that such a requirement impermissibly infringed upon protected speech.

335. 748 S.W.2d at 621 (quoting People v. B & I News, Inc., 164 Cal. App. 3d Supp. 1, 6, 211 Cal. Rptr. 346, 349 (1984)). The court stated:

> No restriction is imposed upon access to the arcade, nor upon the content of the film. The Ordinance does not require the use of fewer arcade devices, limit the number of persons viewing the films, nor reduce the number of film titles that may be shown. The Ordinance "merely requires conformity to its provisions for a visible interior".

Id.

336. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, (1986).

337. 748 S.W.2d at 622. The court also concluded that "[t]he only actual effect of this Ordinance is that patrons of adult arcades will be required to peruse openly, under specified minimum lighting, the entertainment provided." *Id.*