



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**JOHN L. HILL  
ATTORNEY GENERAL**

January 9, 1975

The Honorable C. C. Nolen, President  
North Texas State University  
Denton, Texas 76203

Open Records Decision No. 64

Re: Faculty evaluations of  
students made pursuant  
to promise of confidentiality.

Dear Mr. Nolen:

Pursuant to section 7 of the Open Records Act, article 6252-17a, V. T. C. S., you have requested our decision as to whether student teaching evaluations and faculty recommendations in students' files in the placement office and in the college of education office are required to be disclosed to the student.

You have received three requests for access to letters of recommendation and student teaching evaluations. Two of the requests are from former students, and one is from a graduate student who seeks recommendations and evaluations made while he was an undergraduate. In two cases, all of the information in the files sought was written prior to June 14, 1973, the effective date of the Open Records Act. In the other case, all of the information was written after that date.

You state that you have declined to disclose the requested information because it was written by the faculty member or supervising teacher in confidence pursuant to an agreement that the appraisal would not be disclosed to the subject of the appraisal.

Evidence of the nature of the understanding or agreement is found on the forms on which some of the appraisals are written. One form is prominently headed: "Instructor's Confidential Appraisal." The form asks the instructor to "Please give your estimate of personality traits, attitudes, ability and other qualities that will help rate this person as a prospective candidate," and requests the form to be returned to the director of the placement office. Another form used is even more explicit. It is headed "Confidential Recommendation Sheet." Immediately above the space provided for comment appears the following:

**TO THE FACULTY MEMBER OR OTHER REFERENCES:** Please write in the space below your estimate of the above candidate. Please be assured that whatever you say will be held in the strictest confidence. It is suggested that information regarding ability, character, personality and type of employment for which applicant is best fitted be included.

A printed sheet used to forward information to prospective employers is further evidence of the purpose and treatment of the information by the placement office. The words "CONFIDENTIAL INFORMATION" are prominently displayed, with the following information:

These are the confidential placement credentials of: [blank for name].

**EMPLOYING OFFICIALS PLEASE REGARD:**  
This file has been compiled to assist you in evaluating the prospective employee. In no case should the confidential appraisal form be discussed with or made available to the candidate.

Please destroy these papers when they have served their purpose.

We believe that where it is reliably shown that the evaluations were in fact made pursuant to an agreement between the University and the evaluator, and where it is clear that the University has promised to maintain confidentiality in order to obtain a frank and candid evaluation and where the faculty member actually relied on the University's promise of confidentiality in making the evaluation, a valid and enforceable contract exists which the University had authority to make prior to the effective date of the Open Records Act. In the two cases in question where the information was written prior to June 14, 1973, we believe that such contracts of confidentiality were in fact made.

Both the Texas and United States Constitutions prohibit state laws impairing the obligations of contracts. Tex. Const. art. 1, §16; U.S. Const. art. 1, §10. We believe that these provisions limit the application of

section 3(a)(14) of the Open Records Act in regard to information which is the subject of a valid agreement or contract of confidentiality made prior to June 14, 1973. Otherwise, the University's obligation under the agreement would be impaired. Of course, the right to performance of the contract is that of the evaluator and may be waived by his consent, and the information should then be disclosed.

However, we have held that the enactment of the Open Records Act restricted the authority of a governmental body to make agreements to keep information confidential. A governmental body cannot create exceptions to the Act by a promise of confidentiality if the Act requires the information to be disclosed. Attorney General Opinion H-258 (1974). See Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973); Getman v. N. L. R. B., 450 F.2d 670, 673 (D. C. Cir. 1971); Ditlow v. Volpe, 362 F.Supp. 1321 (D. C. 1973); Legal Aid Society of Alameda County v. Shultz, 349 F.Supp. 771, 776 (N. D. Cal. 1972); Papadopoulos v. State Board of Higher Education, 494 P.2d 260 (Or. App. 1972).

It is our decision that those faculty recommendations and student teacher evaluations made prior to June 14, 1973, pursuant to a proven agreement that they would be treated as confidential by the University are not required to be disclosed by the Open Records Act. Such information collected after that date is subject to disclosure to the student under section 3(a)(14) of the Act.

In your request you ask about the application of Public Law 93-380 (August 21, 1974) (the Buckley amendment) to these records. While the Contract Clause of the United States Constitution applies only to state legislation, congressional power to impair contracts and vested rights is similarly restricted by the Due Process Clause of the Fifth Amendment. Lynch v. United States, 292 U.S. 571 (1934).

Thus, the Buckley amendment may be limited by the Due Process Clause from operating to require disclosure to the student of information made confidential by a contract that was valid when made, since this would require the breach of the contract and violation of the faculty member's rights under it.

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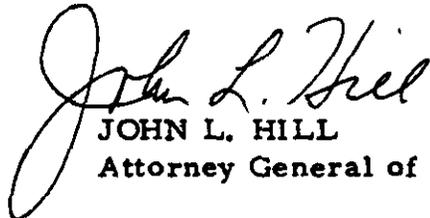
However, other provisions of the federal legislation must be considered. Section 438 (b)(2) of Part C of the General Education Provisions Act as added by Public Law 93-380 provides in part as follows:

(2) No funds shall be made available . . . to any . . . educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons . . . unless -

(A) there is written consent from [the 18 year old student] . . . specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to . . . [the 18 year old student] . . . if desired . . . (Emphasis added)

Thus, while it is possible that the vested rights of a faculty member to confidentiality of his evaluation made under a valid contract may be protected from disclosure by due process, the quoted provision would seem to effectively prohibit any distribution of such an evaluation after the effective date of the federal legislation, unless the student is provided a copy of it.

Very truly yours,

  
JOHN L. HILL  
Attorney General of Texas

APPROVED:

  
DAVID M. KENDALL, First Assistant

  
C. ROBERT HEATH, Chairman  
Opinion Committee