



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 9, 1989

Elena M. Gallegos
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Attorney for Allison Independent
School District
P. O. Box 2156
Austin, Texas 78768

Dear Ms. Gallegos:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5196; this decision is OR89-010.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Allison Independent School District (AISD) received a request from a teacher at AISD for copies of letters from and to the AISD Board of Trustees and Superintendent dated November 22, 1988 and December 1, 1988. In your letter to this office requesting a decision, you advise:

The letter from the Board to the Superintendent was for the purpose of advising the Superintendent regarding his job performance. As such, a copy of the letter will be maintained in the personnel file of the Superintendent. . . . The letter from the Superintendent to the Board is a response

to each of the matters raised by the Board concerning his job performance....

The letter from the Board was hand delivered to the Superintendent in an open meeting of the Board. At the Superintendent's request, the letter from the Board was read aloud in open session....

You suggest that although this letter has been disclosed at an open meeting, it should now be closed to the public to protect the privacy interests of other persons named in the letter.

The Open Records Act requires that once a governmental body exercises its discretion to release information protected by "permissive exceptions," it must release it "to any person." See V.T.C.S. art. 6252-17a, §14(a). The Open Records Act prohibits selective disclosure. Open Records Decision Nos. 463 (1987); 192 (1978). If a governmental body releases information to one member of the public, the act's exceptions to disclosure are waived unless the information is deemed confidential under the act. See id.; see also Open Records Decision No. 163 (1977). Because the letter from the board to the superintendent has been disclosed at an open school board meeting, it cannot now be withheld from the requestor. We have found no exception within the act that exempts this letter from public disclosure; consequently this letter must be released.

You have also advised that "[t]he reply letter from the Superintendent to the Board has not been publicly disclosed." You urge that this letter "constitute[s] advice, opinion and recommendation, and therefore [is] exempt from disclosure under the Open Records Act."

Section 3(a)(11) of the act protects:

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.

Section 3(a)(11) protects advice and opinion on policy matters in order to encourage open and frank discussion between subordinates and supervisors in the deliberative process. The information must consist of advice, opinion, or recommendation to be protected under this exception. See Open Records Decision No. 464 (1987). Facts and written observations of facts and events, when such information is severable from advice, opinion, or recommendation, cannot be

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withheld under section 3(a)(11). Id. The superintendent's reply letter contains both written observations of fact and opinion. However, your argument that the factual content of the letter is so intertwined with opinion and recommendation as to make separation impossible, is reasonable. The superintendent's reply may be withheld.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-010.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
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