



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

February 27, 1989

Mr. John C. West, Jr.
Chief, Legal Services
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

Dear Mr. West:

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# 5149; this decision is OR89-75.

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 Department of Public Safety received a request from Ms. Shari L. Nichols, an attorney, for the "Biannual Report prepared by the Inspection and Planning Division of the Texas Department of Public Safety for Region 3 . . . in January, 1988." You submitted copies of the reports for traffic law enforcement, internal audit, crime laboratory division, criminal law enforcement, and narcotics service (District 7), stating that these reports are not presently circulated outside the department. You claim that these reports are excepted from disclosure under sections 3(a)(3), 3(a)(8), and 3(a)(11) of the Open Records Act.

Section 6 of the Open Records Act, art. 6252-17a, V.T.C.S., provides that certain information is expressly made public. One category of this information is "reports, audits, evaluations, and investigations made of, for, or by,

Mr. John C. West, Jr.
February 27, 1989
Page 2

governmental bodies upon completion." V.T.C.S. art. 6252-17a, § 6(1). The report you submitted falls within this category. Although the provisions in section 6 of the act do not override the act's exceptions to disclosure, Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 185 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976), they do heighten the governmental body's burden under the act to show which exceptions apply and why. Open Records Decision No. 514 (1988); see also Open Records Decision Nos. 395 (1983); 208 (1978).

You raise section 3(a)(11) which protects "inter-agency or intra-agency memorandums or letters . . ." Information may be excepted under section 3(a)(11) if it consists of advice, opinion, or recommendation used in the deliberative process. Open Records Decision No. 464 (1987) (copy enclosed). Factual information cannot be withheld under section 3(a)(11) unless it is so intertwined with advice, recommendation, or opinion that it cannot be severed. Id.

The reports in question do contain some information which falls within section 3(a)(11). However, a great deal of the information is factual and can be severed and released. In addition, most of the information consists of evaluations using a set criteria, not unlike the use of a number rating system. A situation of that sort was addressed in Open Records Decision No. 464, where evaluations of faculty members were requested. In that decision, the attorney general determined that anonymous evaluations, based on set criteria rather than individual comments, were not excepted from disclosure under the Open Records Act. Thus, while you may omit from the report the name of the evaluator, the evaluations based on the set of criteria must be released.

You also claim exceptions under sections 3(a)(3) and 3(a)(8) of the Open Records Act. Section 3(a)(3), which excepts information used in litigation, may only be claimed if litigation is pending or reasonably anticipated. Open Records Decision Nos. 478 (1987); 416 (1984). You state, however, that litigation based on this information is merely speculative. Therefore, none of this information may be withheld under section 3(a)(3).

Section 3(a)(8) excepts information when its disclosure would unduly interfere with law enforcement and crime prevention. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You give two examples of statements which you feel would help people to evade the law. We agree that the two

Mr. John C. West, Jr.
February 27, 1989
Page 3

statements mentioned may be withheld under section 3(a)(8). However, you do not mention, nor do we find, any other information that falls within this exception.

We have marked one of the reports you submitted as a representative sample of the type of information you may withhold. Information which may be withheld under sections 3(a)(8) or 3(a)(11) has been marked. The rest must be released.

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 OR89-75.

Yours very truly,

Open Government Section
of the Opinion Committee 

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

SA/BLS/bc

cc: Shari Nichols

Enclosure: Marked Documents
ORD-464

Ref: ID# 5149