



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 25, 1989

Ms. Margaret Lalk
Assistant District Attorney
Brazos County, Texas
300 East 26th, Suite 310
Bryan, Texas 77803

Dear Ms. Lalk:

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# 7652; this decision is OR89-340.

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. Attorney General Opinion H-436 (1974). The act does not require this office to raise and consider exceptions that you have not raised.

The Brazos County Juvenile Services Department (JSD) received an open records request for a copy of a former JSD employee's personnel file. You contend that certain information contained in that file comes under the protection of sections 3(a)(1), 3(a)(2), and 3(a)(11) of the Open Records Act.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We note that the employee's personnel file contains an IRS Form W-4. This form constitutes income tax return information that is made confidential by federal law. See 26 U.S.C. § 6103. You may not release this form.

Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test for section 3(a)(2) protection is the same as that for information protected by common-law rights of privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing

facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

This office has held that public employees' home addresses and telephone numbers ordinarily do not come within the scope of common-law privacy. See Open Records Decision No. 169 (1977). The employee in question did not elect to keep this information withheld from the public pursuant to sections 3(a)(17) and 3A of the Open Records Act; consequently this information must be released.

You contend that section 3(a)(11) of the act protects from public disclosure personnel action forms, payroll maintenance reports, and an employee discipline report. Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they reveal policy recommendations in the "executive" or high-level decision-making process. See Attorney General Opinion H-436 (1974). Section 3(a)(11) does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986).

The purpose of section 3(a)(11) is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Section 3(a)(11) does not apply to the type of information at issue here. Consequently, except for the W-4 form discussed above, the personnel file must be released in its entirety.

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 OR89-340.

Yours very truly,

*Open Government Section
of the Opinion Committee*

Open Government Section
of the Opinion Committee
Approved by David A. Newton
Assistant Attorney General