



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

August 20, 1990

Ms. Rosalinda Garcia
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002

OR90-393

Dear Ms. Garcia:

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# 8976.

You have received a request from a former employee. You have provided some of the requested materials, but raise various exceptions to the release of the following items, which you have submitted for our inspection:

1. the risk management file on a certain employee's worker's compensation claim against Harris County, marked as exhibit D;
2. medical claim forms and supporting medical documents marked as exhibit E;
3. performance evaluations of a certain employee of the Harris County Right of Way Department, marked as exhibit F.

We will consider the public availability of each of these requested items separately.

By your letter, you advise that the investigative file, which was prepared by the Office of Risk Management, is used in making a determination as to the validity of a worker's compensation claim after notice of an injury is filed with the Industrial Accident Board [the board]. The county attorney's office received this file when the claim was denied by the board. You assert this file should not be disclosed to the public based on sections 3(a)(1), 3(a)(3), and 3(a)(7) of the Open Records Act.

In order for the 3(a)(3) exception to apply, the information requested must relate to litigation that is pending or reasonably anticipated. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990). You state that at the present time, Harris County is appealing the board's award in the case to which the investigative file relates. We have examined the pleadings in the case and the investigative file prepared by the Office of Risk Management. We conclude that the investigative file may be withheld pursuant to section 3(a)(3) because it relates to the litigation that is pending. We need not address the other exceptions you raised to the disclosure of this information, as our section 3(a)(3) analysis is dispositive of the request for information in exhibit D.

Exhibit E contains various medical documents which you assert are exempt from required public disclosure based on section 3(a)(1) of the Open Records Act and section 5.08(b) of the Medical Practices Act, article 4495b, V.T.C.S., which provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

The first document in exhibit E is a Harris County claim form. This form was completed and signed by the insured employee. Because this document was not "created . . . by a physician", section 5.08(b) of the Medical Practices Act does not apply and it must be released. Similarly, the time adjustment sheet must also be released as it was not "created by a physician." See also Open Records Decision No 260 (1980).

There are several copies of medical bills among the documents in exhibit E. These may be withheld because they are protected by a common law right of privacy. See Open Records Decision No. 373 (1983).

The remaining forms in exhibit E consist of several work release forms and medical absence reports, all of which are signed by a physician. These may be withheld based on section 3(a)(1) of the Open Records Act and section 5.08(b) of the Medical Practices Act. See Open Records Decision No. 487 (1988).

The final set of documents you sent for our inspection, exhibit F, consists of performance appraisals of an employee and notes of evaluations and counseling sessions performed by a supervisor. You raise exception 3(a)(11) to the release of this information.

Section 3(a)(11) excepts from disclosure:

inter-agency or intra-agency memorandums
or letters which would not be available by
law to a party in litigation with the agency.

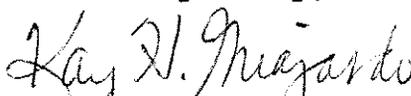
This section was designed to protect advice and opinion on policy matters and to encourage open and frank discussion between subordinate and supervisor concerning administrative action. Open Records Decision No. 308 (1982). Facts and written observations of facts do not constitute advice, opinion, or recommendation and cannot be withheld under section 3(a)(11). Open Records Decision No. 450 (1986). The performance appraisals contain statements of opinion and may therefore be withheld pursuant to section 3(a)(11). See Open Records Decision No. 538 (1990). Some of the documents you submitted contain a factual narrative of a meeting. These must be released and are marked accordingly. See Open Records Decision No. 350 (1982). The report of illness by an employer likewise contains purely facts and must be released. Facts that are inextricably intertwined with opinion, advice, or recommendation need not be released. Open Records Decision Nos. 239 (1980); 174 (1977). We have marked the remaining documents which may be withheld pursuant to section 3(a)(11).

Although you did not send copies for our inspection, you state that included in the requested information are health and hospitalization insurance forms noting the designation or nondesignation of dependents and/or beneficiaries, amounts of payroll deduction for such dependents, and employee retirement forms which reflect the names of beneficiaries and their relationship to the employee. You assert that the information in the insurance and retirement forms which reveals beneficiaries or dependents who may receive health benefits is protected from required disclosure pursuant to section 3(a)(1), and its protection of common-law privacy rights and section 3(a)(2) of the Open Records Act. Since the requestor is Mr. Whitley's attorney who has a written authorization from Mr. Whitley to have his personnel file, he has a right to copies of these forms under section 3B(1) of the Open Records Act.

Finally, you ask about the disclosure of information in federal W-2 forms. These you may withhold under section 3(a)(1) as confidential by judicial decision protecting privacy. See Open Records Decision No. 523 (1989).

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 OR90-393.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/le

Ref.: ID# 8976

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