



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 21, 1991

Mr. John R. Hale
Commissioner
Credit Union Department
914 East Anderson Lane
Austin, Texas 78752-1699

OR91-144

Dear Mr. Hale

You inform us that the Texas Credit Union Department (the department) received separate requests for access to or copies of the following:

- (1) "call reports" of the Texas Share Guaranty Credit Union, an institution regulated by the department, for the periods ending on the following dates: December 31, 1988; June 30, 1989; December 31, 1989; and June 30, 1990;
- (2) a computer diskette containing financial information about state-chartered credit unions that was redacted from call reports filed with the department for periods ending June 30, 1990, or December 31, 1990; and
- (3) the "problem" or "monitoring" list of credit unions deemed "worthy of special regulatory attention."

You have submitted for our inspection a copy of a form entitled "Credit Union Annual Report," which is referred to in an accompanying instruction sheet as the "Year-end Call Report." You have also submitted a copy of the list sought by the third request. You claim that each of the requested items is excepted from public disclosure by section 3(a)(12) of the Open Records Act. You have also asked that we consider -- presumably in connection with section 3(a)(1) of the Open Records Act -- section 11.12(b) of the Credit Union Act (V.T.C.S. article 2461-11.12(b)) as well as Open Records Decision Nos. 446 (1986), 187 (1978), and 28 (1974).

Section 3(a)(12) of the Open Records Act excepts from required public disclosure

information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act.

V.T.C.S. art. 6252-17a, § 3(a)(12). As noted in your letter, this provision has been held to except various records and information submitted to or prepared by the department concerning the condition of credit unions such as credit union balance sheets, financial statements, annual reports, information concerning current and projected financial conditions and operations of a credit union, and the department's report and memorandum concerning the examination of a credit union. *See* Open Record Decision Nos. 446 (1986); 187 (1978); 28 (1974). The call reports of state-chartered credit unions contain detailed data concerning the condition of the reporting institution, including a financial statement as of the closing date of the period covered by the report and a statement of income and expense for the same period. The call reports and the computer diskette that contains information taken from the call reports may therefore be excepted from disclosure pursuant to section 3(a)(12) of the Open Records Act.

You have not, however, established that the "monitoring" or "problem" list is excepted by section 3(a)(12). When requesting an open records decision from the attorney general, the governmental body bears the burden of demonstrating which exceptions from disclosure apply to the requested information. *See* Attorney General Opinion JM-672 (1987). In this instance you have failed to show that the list is "contained in or related to examination, operating, or condition reports" prepared by or on behalf of or for the use of the department. Consequently, we conclude that the list is not excepted by section 3(a)(12).

Portions of the "problem" or "monitoring" list may, however, be excepted from disclosure by section 11.12(b) of the Texas Credit Union Act, as are the call reports and the data contained in them. Section 11.12(b) provides the following:

All information, except statements intended for publication, obtained by the department relative to the financial conditions of credit unions, whether obtained through examination or otherwise, and all files and records of the department relative to that information are confidential and not for public record or inspection. The commissioner may disclose to the commission any information, files, or records pertinent to any hearing or matter pending before the commission or the commissioner. If the commissioner determines it is necessary or proper for the enforcement of the laws of this state applicable to credit

unions or rules adopted under those laws, the commissioner may disclose any files, records, or other information of the department to the Texas Share Guaranty Credit Union or any department, agency, or instrumentality of this state or the United States.

V.T.C.S. art. 2461-11.12(b).

Article 2461 - 11.12(b) exhibits three significant features. First, with the exception of "statements intended for publication," it applies to all information obtained by the department relative to the financial condition of a credit union, regardless of source, and all records relative to that information. Article 2461 - 11.12(b) is thus much broader than section 3(a)(12) of the Open Records Act. Second, the statute expressly makes such information confidential for purposes of the Open Records Act, which in section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." *See* Open Records Decision No. 446 (1986). Finally, article 2461 - 11.12(b) carefully describes the conditions under which the commissioner of the Credit Union Department may disclose any information covered by the statute.

Call reports contain detailed information concerning the financial condition of a credit union, and are therefore clearly confidential under article 2461 - 11.12(b). The data contained in the reports remain confidential when converted to other formats, such as computer diskettes. *See generally* Attorney General Opinions JM-1224 (1990); JM-672 (1987). The "problem" or "monitoring" list may also be kept confidential to the extent it contains information relative to the financial condition of credit unions regulated by the department.

In the course of preparing this decision, a separate issue arose that must be addressed. Both requestors in this case claim that much of the data contained in the call reports has in the past been shared with a private consulting agency that publishes and sells a directory of state-chartered credit unions.¹ The directory contains some of the information appearing on the call reports. You acknowledge that the department has provided this information to the consulting firm and to the Credit Union National Association (CUNA), a national trade association, on computer diskette. The information was supplied with the understanding that only such information as the consulting firm needed to compile the directory and the CUNA needed to compute statistics would be released to the public. The computer diskette is the subject of the second request for information.

¹ The requestors make no claim regarding the prior disclosure of the "problem" or "monitoring" list, and you state that the list has never been released to the public.

The requestors argue that the release of call report data under these circumstances constitutes a selective disclosure of information and a waiver of any exception to disclosure the department might have claimed under the Open Records Act. It is well established that a governmental body may not engage in the selective disclosure of public information. *See* Open Records Decision Nos. 463 (1987); 192 (1978). Section 14(a) of the act states that

[t]his Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, *unless expressly prohibited by law*; provided that such records shall then be available to any person. [Emphasis added.]

Section 6(15) of the Open Records Act also recognizes that, as a general matter, "information currently regarded by agency policy as open to the public" is public information for purposes of the act.

These principles apply only to the disclosure of information excepted by any of the Open Records Act's so-called "permissive exceptions." If a governmental body discloses to any member of the public information covered by one of these exceptions, it may not assert that exception against any other member of the public. Section 3(a)(1) of the Open Records Act is not a permissive exception. Indeed, because section 10 of the act prohibits and imposes criminal penalties for the distribution of "information deemed confidential under the terms of this Act," governmental bodies have an overarching duty not to release information recognized as confidential under section 3(a)(1) except in limited circumstances. *See, e.g.,* V.T.C.S. arts. 6252-17a, §§ 3B (special rights of access to confidential information); 2461-11.12(b) (describing conditions under which commissioner of Credit Union Department may share information covered by article 2461 - 11.12(b)); *see also* Open Records Decision Nos. 468 (1987) (transfer of information from one individual to another within the governmental body authorized to have the information); 272 (1981) (transfer of information from one governmental body to another that is authorized by law to have the information). The governmental body therefore does not, by virtue of its erroneous release of confidential information in the past, waive the right to claim section 3(a)(1) as an exception to subsequent requests for the same information. To conclude otherwise would produce the absurd result of requiring the governmental body to violate the law every time a member of the public requests the confidential information.

It is obvious the department has never considered call report data public information. It is also evident that the department does not necessarily consider the release of call report data to the consulting firm and the CUNA a public disclosure of information, though it would appear that these organizations have no greater right to

obtain the information than the public in general.² Article 2461 - 11.12(b), furthermore, expressly states that information such as that contained in the call reports is "confidential and not for public record or inspection." Its release is therefore prohibited by section 10(a) of the Open Records Act, and the department consequently has not waived the right to claim section 3(a)(1) as an exception to disclosure.

To summarize, we conclude that call reports submitted to the Credit Union Department and computer diskettes containing information appearing in the call reports, are excepted from required public disclosure by sections 3(a)(1) of the Open Records Act in conjunction with section 11.12(b) of the Texas Credit Union Act, V.T.C.S. article 2461-11.12(b). The call reports and the computer diskette are also excepted from disclosure by section 3(a)(12) of the Open Records Act. A document referred to as the "problem" or "monitoring" list is not excepted from disclosure by section 3(a)(12) of the Open Records Act, but may be withheld from disclosure pursuant to section 11.12(b) of the Credit Union Act to the extent it contains information relative to the financial condition of credit unions regulated by the department. The Credit Union Department is not required to provide access to the call reports or to data redacted from the reports and stored on computer diskettes by virtue of its erroneous release of such information to private parties in the past.

Yours very truly,



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Assistant Attorney General
Opinion Committee

SA/lcd

Ref.: ID# 11468, 11512, 11629, 11636, 11611, 11690

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² In the letter seeking our decision on the request for the computer diskette, however, you state that the department's practice of sharing call report data with selected entities will cease.

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