



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

April 10, 1991

Ms. Leslie L. McCollom  
Assistant Attorney General  
P. O. Box 12017  
Austin, Texas 78711-2017

OR91-172

Dear Ms. McCollom:

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# 11666; your most recent correspondence to this office was assigned ID# 11713.

The Office of the Attorney General received an open records request from an attorney representing a former employee of the attorney general for

(a) all documents referencing inquiries, and communications (verbal, written, or electronic) made in any capacity to the Attorney General's Office relating to [the former employee]; [and] (b) all documents given to or withheld from prospective employers since the date of [the employee's] discharge . . . evidencing character references, job performance evaluations, duration of employment, or salary history of [the employee].

You state that there does not exist any document coming within the ambit of request (b); consequently you need not comply with this portion of the request. Open Records Decision No. 342 (1982) at 3.

You contend that the records sought in request (a) come under the protection of section 3(a)(3) of the Open Records Act. To secure the protection of section 3(a)(3), a

governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). Further, the governmental body's attorney must show that the requested material relates to the litigation. *See generally* Open Records Decision No. 551 (1990).

You state that the former employee has filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) with regard to his employment with the attorney general and that the complaint is still pending. We also note that the requestor has threatened a lawsuit against the attorney general if a settlement cannot be reached between the opposing parties. Given these facts, it is not unreasonable to anticipate litigation with regard to this matter. *See* Open Records Decision No. 328 (1982). It is also clear that the requested materials "relate" to the anticipated litigation. *See* Open Records Decision No. 551.

We note, however, that some of the information in the records at issue has previously been made available to the requestor or her client. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982) (copies enclosed). To the extent that the former employee has previously had access to any of these records, such as any correspondence or memoranda that he wrote or received during the time of his employment, there is no justification for now withholding that information from the requestor pursuant to section 3(a)(3).

Although this office will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision Nos. 455 (1987); 325 (1982), we will raise section 3(a)(1) because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. *See* V.T.C.S. art. 6252-17a, § 10(e). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common law right of privacy. We note, however, that some of the information in question implicates the privacy interests of the former employee and another party. Since these documents were written by or received by the requestor, no privacy rights are violated by making them available to him. However, if a third party were to request this information, the issue of privacy would have to be addressed. Accordingly, you may withhold pursuant to section 3(a)(3) only those documents to which the requestor or her client has not had previous access.

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 OR91-172.

Yours very truly,



Susan Garrison  
Assistant Attorney General  
Opinion Committee

SG/RWP/lcd

Ref.: ID# 11713  
ID# 11666

Enclosures: Open Records Decision Nos. 349, 320  
Submitted documents

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