



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

September 9, 1991

Ms. Susan O. Bradshaw
Senior Attorney
Office of General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR91-371

Dear Ms. Bradshaw:

You ask whether certain memoranda and reports of the University of Texas Law School Admissions Committee relating to minority admissions are subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12990.

We have considered the exception you claimed and have reviewed the documents at issue. You assert the section 3(a)(11) exception to required disclosure for some of the requested information. Section 3(a)(11) permits withholding of inter- or intra-agency communications consisting of advice, opinion, or recommendations to be used in a deliberative process. We agree that much of the requested information for which you have claimed section 3(a)(11) protection does fall within that exception. Some of that information, however, consists of factual or other material which is not within section 3(a)(11). *See* Open Records Decision Nos. 559, 538 (1990). We have marked the information you may withhold under section 3(a)(11).¹

¹We note that one of the documents you submitted is a preliminary draft of a response to a newspaper article about law school admissions. While a draft may generally be characterized as advice or recommendation within the section 3(a)(11) exception, this office has ruled in previous open records decisions that severable factual material in the draft is nevertheless public. However, to the extent that factual information is released in the final version of the document, the requirement of public disclosure is satisfied. Open Records Decision Nos. 559, 547 (1990). In this case, the final published version which you have submitted contains all of the factual material which was contained in the draft.

You also claim that you must withhold certain information on the basis of the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), also known as the "Buckley Amendment." The federal act requires withholding certain individually identifiable student records. *See also* V.T.C.S. art. 6252-17a, §§ 3(a)(14) (permitting withholding of certain student records) and 14(e) (educational records may only be released in conformity with the "Buckley Amendment"); Open Records Decision Nos. 539 (1990) and 431 (1985). These exceptions apply only to *student* records. *See* 20 U.S.C. § 1232g(a)(6) ("student" does not include a person who has not been in attendance at institution). It appears that the individuals referred to in the information in question here were applicants for admission, or had been accepted for admission, but had not actually enrolled as students at the time the information was created. It may be anticipated, however, that at least some of the individuals referred to will eventually enroll. We note that Open Records Decision No. 539 concluded that once a person has attended an institution, records maintained by the institution relating to his pre-attendance contacts with the institution become "student records" under the Buckley Amendment.

The situation you present raises concerns about the proper application of the Buckley Amendment. It has been the policy of this office to defer to the recommendations of the federal agency administering that law in matters where its applicability is not clear. Please address your concerns about the confidentiality of the information in question to:

Family Policy and Regulations Office
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202
Tel. (202) 401-2057

We have marked the information at issue. We advise you to withhold it pending resolution of the applicability of federal law. If after resolving the federal questions, withholding the material under the Open Records Act remains at issue, you should again seek our determination, and also apprise us at that time whether the individuals in question have since actually enrolled as students.

Assuming that you have released, or will release, the final version of the document to the requestor, you may withhold the entire draft.

In summary, you must release those portions of the requested information which we have not indicated as falling within section 3(a)(11) or 3(a)(14). You should contact the U.S. Department of Education for those portions of records that may be subject to the Buckley Amendment and/or section 3(a)(14). Because case law and prior published open records decisions resolve your section 3(a)(11) claim, and because we are deferring to the appropriate federal authorities on the question of the confidentiality of the identifiable applicant information, 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 OR91-371.

Yours very truly,



William Walker
Assistant Attorney General
Opinion Committee

WW/mc

Ref.: ID# 12990

Enclosures: Open Records Decision Nos. 559, 547, 539, 538, 431

cc: Mr. Andy Panos
204 Kinsolving
2605 Whitis Ave.
Austin, Texas 78705