



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 5, 1992

Mr. Robert J. Provan
General Counsel
Texas State University System
505 Sam Houston Building
Austin, Texas 78701

OR92-89

Dear Mr. Provan:

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# 14894.

You have received a request for copies of a certain employee's employee evaluation records. You have submitted to us for review various records documenting the employee's performance evaluations since April 1991. The records include an "Annual Performance Review Summary," several "Newton Gresham Library Non-Tenured Faculty Evaluation" forms, a form titled "Sam Houston State University Academic Policy Statement 820317," and an "Evaluation of Probationary Tenure Track Faculty" form. You seek to withhold these documents under section 3(a)(11) of the Open Records Act.

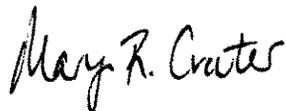
Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. *See, e.g., Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 538 (1990); 470 (1987). Advice, opinion, and recommendations recorded in a performance evaluation of an employee are protected from public disclosure if they are used in the deliberative process. Open Records Decision No. 468 (1987) at 1; *see also* Open Records Decision Nos. 464 (1987); 345 (1982). Purely factual information, however, does not constitute advice, opinion, or

recommendation and may not be withheld under section 3(a)(11). Open Records Decision No. 450 (1986).

The "Annual Performance Review Summary" includes some factual information; however, this information is inextricably intertwined with information excepted from required public disclosure under section 3(a)(11). Accordingly, the entire document may be withheld from required public disclosure under section 3(a)(11). The "Newton Gresham Library Non-Tenured Faculty Evaluation" forms include pre-printed evaluation criteria and blank spaces for comments. The pre-printed information contained on the form, the name of the faculty member, and the date are factual information and may not be excepted under section 3(a)(11). The remaining information, including the evaluators' markings and comments, however, constitutes advice, opinion, or recommendation and may be excepted from disclosure under section 3(a)(11). The numeric scores represented on the "Sam Houston State University Academic Policy Statement 820317" may be withheld from required public disclosure under section 3(a)(11) as information constituting advice, opinion, or recommendation. The remainder of the document must be released. The "Evaluation of Probationary Tenure Track Faculty," however, contains no advice, opinion, or recommendation, and must therefore be released.¹

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 OR92-89.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

¹If information has already been publicly disclosed, it ordinarily may not be withheld in the future. Open Records Decision No. 436 (1986). Where a governmental body allows an employee access to evaluations in his role as an employee, the governmental body does not thereby disclose those documents to the public. Open Records Decision No. 468 (1987) at 3-4. Therefore, although the requestor signed and thus appears to have had prior access to the latter two records, they have not been disclosed to the public and are not excluded from the protection of section 3(a)(11). *See id.*

MRC/GK/mc

Ref.: ID# 14894

Enclosures: Returned Documents

cc: Mr. Michael C. Finkelman
Sam Houston State University
Newton Gresham Library
Huntsville, Texas 77341