



Office of the Attorney General
State of Texas

August 7, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Robert L. Dillard III
Nichols, Jackson, Kirk & Dillard
1800 Lincoln Plaza
500 N. Akard
Dallas, Texas 75201

OR92-458

Dear Mr. Dillard:

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# 16594.

The City of Lewisville (the "city"), which you represent, has received a request for information relating to a libel suit filed against the city mayor. Specifically, the requestor seeks "copies of any responses Ron Neiman made to council or city staff on charges leveled against him by B.C. Groves in the report she delivered to council during a May 18 executive session . . . [and] any further public documents germane to any of my requests." You advise us that some of the requested information has been made available to the requestor. You claim, however, that some of the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(7), and 3(a)(11) of the Open Records Act.

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). "Whether litigation is reasonably anticipated must be determined on a case-by-case basis." Open Records Decision No. 452 (1986) at 4.

You advise us that the city may be party to potential civil litigation. You do not demonstrate, however, how or why, and the documents do not provide an explanation on their face. On the basis of the information provided to us, we are unable to determine whether litigation may be reasonably anticipated. Accordingly, *the requested information for which you exert the litigation exception may not be withheld from required public disclosure under section 3(a)(3) of the Open Records Act.*

You also claim that some of the requested information is excepted from required public disclosure by the attorney-client privilege as incorporated by sections 3(a)(1) and 3(a)(7) into the Open Records Act.¹ Although this office has frequently cited section 3(a)(1) to except from required public disclosure information within the attorney-client privilege, the privilege is more specifically covered under section 3(a)(7). Open Records Decision No. 574 (1990) (copy enclosed). Section 3(a)(7) protects

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure. [Footnote omitted.]

Attorney-client communications, however, may be withheld only to the extent that such communications document confidences of governmental representatives or reveal the attorney's legal opinion and advice. Open Records Decision No. 574 at 3. Records of calls made, meetings attended, or memos sent, so long as no legal advice or client confidences are revealed, may not be excepted under section 3(a)(7). *Id.*

¹You claim that pages 5 and 17 are protected by the attorney-client privilege. As these documents have not been submitted to us for review, we are unable to determine whether they are excepted from required public disclosure.

We have examined the documents submitted to us for review and conclude that they contain information which constitutes legal opinion and advice or reveals client confidences. Accordingly, pages 4A, 4B, 15, and 23 may be withheld from required public disclosure in their entirety under section 3(a)(7) of the Open Records Act.

Finally, you claim that some of the requested information is excepted from required public disclosure by section 3(a)(11), which 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 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). 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).

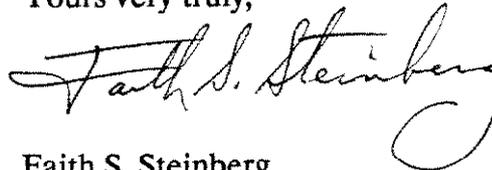
We have examined the documents submitted to us for review for which you claim the section 3(a)(11) exception. We conclude that some of the documents submitted to us for review contain information that constitutes advice, opinion, or recommendation. Accordingly, the marked portions of pages 7, 10, 10A, 13, and the memorandum dated December 17, 1990, from Chuck Owens to Al Judkiewicz may be withheld from required public disclosure under section 3(a)(11).² The remaining information must be made available to the requestor.

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

²You advise us that this memorandum contains three pages. You have submitted to us for review, however, only the first page of the memorandum. Accordingly, we are unable to determine at this time whether the other two pages are excepted from required public disclosure under section 3(a)(11).

a published open records decision. If you have questions about this ruling, please refer to OR92-458.

Yours very truly,



Faith S. Steinberg
Assistant Attorney General
Opinion Committee

FS/GCK/lmm

Ref.: ID# 16594

Enclosures: Open Records Decision No. 574
Marked Documents

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