



Office of the Attorney General

State of Texas

April 27, 1993

DAN MORALES

ATTORNEY GENERAL

Ms. Martha C. Agee
Assistant City Attorney
City of Waco
Legal Services
P.O. Box 2570
Waco, Texas 76702-2570

OR93-195

Dear Ms. Agee:

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# 18701.

The mayor of the City of Waco (the "city") has received the following request for information:

- (a) All documents prepared by Dr. Homer Garcia, or any other member of the Board of Commissioners of the Housing Authority of the City of Waco, which contain allegations of wrongdoing by present or former employees of the Waco Housing Authority.
- (b) All documents prepared by Dr. Homer Garcia which were directed to either the Federal or State grand jury.

You advise us that the city can identify no documents responsive to item (b) above.¹ You have submitted Exhibits B, C, C-1, C-2, C-3, D, E, F, and G.² Exhibit B is a draft letter

¹You contend that "none of the attached exhibits are subject to disclosure pursuant to the second part (b) of the request, in that the request did not adequately specify the documents to be obtained." While the Open Records Act applies only to information in existence and does not require a governmental body to prepare new information, Open Records Decision No. 572 (1990), a governmental body is obligated to make a good faith effort to relate a request to information which it holds, Open Records Decision No. 561 (1990) at 8. When a governmental body is presented with an unclear request for information, it should advise the requestor of the types of information available so that he may clarify his request. *Id.* at 9.

²You advise us that Exhibits C, C-1, C-2, C-3, and D do not fall within the scope of the request because "no specific past or present employees are mentioned, and no specific incidents of alleged wrongdoing were given." Nonetheless, in the event that they do fall within the scope of the request, you seek a determination regarding their availability under the Open Records Act. We do not comment on your contention that these drafts are not responsive, but we remind you that it is the city's duty to make a

from a commissioner of the Housing Authority of the City of Waco (the "housing authority") to an attorney. Exhibit C contains a cover note to the mayor from the commissioner and three unsigned letters from the commissioner to the district attorney (Exhibit C-1), a United States congressional representative (Exhibit C-2), and the Federal Bureau of Investigation (Exhibit C-3), all of which are copied to the mayor. Exhibit D is an unsigned letter from the commissioner to the United States Department of Housing and Urban Development ("HUD") which is copied to the mayor. Exhibit E is a cover letter from the commissioner to the mayor and a draft memo from the commissioner. Exhibit F is an unsigned letter from the commissioner to the executive director of the housing authority which is copied to the mayor. Finally, Exhibit G is a letter from the commissioner to the director of HUD's Public Housing Management Division which is copied to the mayor.

You claim that Exhibits C, C-1, C-2, C-3, D, and F are not public records subject to the Open Records Act. You assert that Exhibits B, E, F, and G are excepted from public disclosure under section 3(a)(1). You also claim that all of the exhibits are excepted from public disclosure under section 3(a)(3). You also assert that Exhibits B, E and F are protected by section 3(a)(11) and that information "relating to witnesses and other sources of investigatory information" is protected under section 3(a)(8). Finally, you assert that Exhibit B is excepted from disclosure by the attorney client privilege.

First, we address your contention that Exhibits C, C-1, C-2, C-3, D, and F are not public records, but rather documents maintained by the mayor "solely in his capacity as a private citizen." As noted above, Exhibit C contains a cover note to the mayor from the commissioner and three unsigned letters from the commissioner to the district attorney, a United States congressional representative, and the Federal Bureau of Investigation. Exhibit D is an unsigned letter from the commissioner to HUD. Exhibit F is a letter from a commissioner to the executive director of the housing authority. The documents relate to housing authority matters, such as a commissioner's efforts to report allegations of wrongdoing and complaints about the scheduling of commissioners' meetings. All of the letters are on housing authority letterhead and are copied to "Mr. Bob Sheehy, Mayor."

You contend that these are not public records because the mayor has no authority over the matters discussed in the letters. We disagree. The Open Records Act applies to "[a]ll information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business." V.T.C.S. art. 6252-17a, § 3(a). We believe it is immaterial under the Open Records Act whether an official who holds records regarding official business has direct authority over the matters contained therein. Clearly, the mayor was provided with a copy of this letter in his official capacity "in connection with

(footnote cont'd.)

good faith determination whether information is responsive to a request for information and to relate a request to information which it holds. See generally Open Records Decision No. 561 (1990).

the transaction of official business." Accordingly, Exhibits C, C-1, C-2, C-3, D, and F are public records.³

We first address your claim that Exhibit B is excepted from required public disclosure by the attorney-client privilege as incorporated by section 3(a)(1) into the Open Records Act. 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.)

The protection of section 3(a)(7) is limited to information that reveals client confidences to an attorney or that reveals an attorney's legal advice. Open Records Decision No. 574 (1990). Exhibit B is a draft of a memorandum from a commissioner of the housing authority to the housing authority's legal counsel. The document clearly reveals client confidences to the housing authority's legal counsel.⁴ We conclude, therefore, that Exhibit B may be withheld in its entirety under section 3(a)(7) of the Open Records Act.⁵

With respect to section 3(a)(1), you assert that Exhibits E, F, and G "contain allegations which, based upon the lack of action by the McLennan County grand jury, have not been substantiated" and would therefore be "misleading, libelous, and possibly slanderous to the persons named." You claim that these exhibits are excepted from required public disclosure by section 3(a)(1) of the Open Records Act in conjunction with the doctrine of common law privacy. Information may be withheld from required public disclosure under common law privacy if it meets the criteria articulated by the Texas Supreme Court in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540

³We also note that even if these documents were not public records in the hands of the mayor, they are certainly public records of the housing authority and therefore public records of the city. See *infra* n.4.

⁴The attorney-client privilege does not protect information that has been voluntarily disclosed to a third party. Open Records Decision No. 412 (1984). The housing authority is a division of the city. See Local Gov't Code § 392.011; *Aetna Cas. & Sur. Co. v. Glidden Co.*, 283 S.W.2d 440, 441 (Tex. Civ. App.—Eastland 1955) (housing authority a body corporate and politic and a division of city which existed with consent of city) *reversed on other grounds*, 291 S.W.2d 315 (Tex. 1956). The housing authority, therefore, did not waive the attorney-client privilege by making Exhibit B available to the mayor.

⁵Because we conclude that Exhibit B is excepted from public disclosure under 3(a)(7), we do not address whether it is excepted under sections 3(a)(1), 3(a)(3), 3(a)(11), and 3(a)(8) of the Open Records Act.

S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public.⁶ Having examined these exhibits, we conclude that they contain no information that is intimate or embarrassing. Moreover, the information is of legitimate concern to the public. *See* Open Record Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs); 438 (1986) at 4-5 (public has a legitimate interest in knowing the details of accusations against a city supervisor). Accordingly, Exhibits E, F, and G may not be withheld from required public disclosure under section 3(a)(1) of the Open Records Act.

You also claim that Exhibits C, C-1, C-2, C-3, D, E, F, and G are excepted from required public disclosure by section 3(a)(3) 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) at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. The mere contemplation of future litigation by a governmental body is not sufficient to invoke section 3(a)(3). Open Records Decision No. 557 (1990) at 6.

You have submitted newspaper articles which you claim demonstrate the pendency of investigations regarding racial discrimination, defamation charges, misconduct, fraud, grand jury tampering, and other criminal violations. You claim that these articles demonstrate a reasonable likelihood of litigation against the city. You also claim that "if Mayor Sheehy considers removal of a commissioner, a hearing is required under Local Government Code Section 392.041(e) and (f) and certain of these documents would be relevant as evidence." You also broadly assert that the "subject matter of the attached exhibits relates to one of the potential litigation issues." We cannot conclude that litigation may be reasonably anticipated on the basis of news articles absent additional evidence demonstrating the likelihood of litigation. Your suggestion that the mayor may initiate removal proceedings appears to be entirely speculative. Furthermore, you have not demonstrated that this information relates to the alleged pending litigation with any

⁶This office no longer recognizes "false light" privacy as a basis for excepting records from public disclosure under section 3(a)(1) of the Open Records Act. Open Records Decision No. 579 (1990).

specificity. Accordingly, we conclude that the exhibits 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 information contained in these exhibits is excepted from required public disclosure by section 3(a)(8) of the Open Records Act. Section 3(a)(8) excepts:

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Even if a matter is closed, the names of witnesses may be withheld under certain circumstances. Open Records Decision No. 397 (1983) at 2. The names of those persons and their statements may be withheld if it is determined from an examination of the facts of the particular case:

that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement authorities.

Open Records Decision No. 252 (1980) at 4; *see also* Open Records Decision No. 397. "When the 'law enforcement' exception is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of it would unduly interfere with law enforcement." Open Records Decision No. 287 (1981) at 2.

You vaguely claim that certain information relates to "witnesses and other sources of investigatory information" and that its release might "subject witnesses to possible intimidation or harassment" or "harm the prospects of future cooperation of witnesses" with law enforcement. You have not identified the "witnesses and other sources of investigatory information" you are concerned about. We have reviewed Exhibits C, C-1, C-2, C-3, D, E, F, and G and is not apparent to us that they contain or would reveal such information. Exhibit D, for example, refers generally to "witnesses" but does not specifically identify them. You have not demonstrated that the release of any particular information contained in these exhibits would interfere with law enforcement interests. Accordingly, these exhibits may not be withheld from public disclosure under section 3(a)(8) of the Open Records Act.

Finally, you claim that exhibits E and F constitute "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, are excepted from public disclosure. For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d

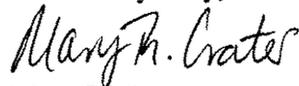
408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning exhibits E and F to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

In sum, we conclude that Exhibit B may be withheld. Exhibits C, C-1, C-2, C-3, D, and G must be released immediately, and Exhibits E and F must be released unless they are resubmitted to this office within fifteen days.

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 OR93-195.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/le

Ref.: ID# 18701

Enclosure: Open Records Decision No. 574 (1990)

cc: Mr. R. John Cullar
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(w/o enclosure)