



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1993

Mr. Donald G. Vandiver
First Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR93-272

Dear Mr. Vandiver:

You have asked this office whether certain information is subject to required public disclosure under the Open Records Act (the "act"), article 6252-17a, V.T.C.S. Your request was assigned ID# 17400.

Each of the individual members of the City of Lubbock City Council (the "council") has received a request for his or her evaluation of the job performance of the city manager, city attorney, and city secretary. You indicate that the council has already released a copy of the "final written evaluation of each official," along with certain other background information. Each final evaluation contained, among other things, an anonymous listing of the numerical ratings assigned by each council member to a list of job performance factors for each position evaluated and an average rating for each factor. You argue, however, that the actual performance evaluation rating sheets completed by each council member regarding the performance of each of the three officials, including handwritten "comments," do not constitute "public information" within the meaning of section 3(a) of the Open Records Act and thus are not subject to the act. You further argue that even if this information is within the coverage of the act, it is excepted from public disclosure by sections 3(a)(1) and 3(a)(11).

We begin by addressing your contention that the requested information is not subject to the Open Records Act. Section 2(2) of the act defines "public records" as

the portion of all documents, writing, letters, memoranda, or other written, printed, typed, copied, or developed materials *which contains public information.* (Emphasis added.)

Section 3(a) of the act provides that

[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 is public information and available to the public during normal business hours of any governmental body, with the following exceptions only [followed by 23 specific exceptions].

You argue that the performance evaluation sheets, including handwritten comments, prepared by the individual council members are not "public records" within the coverage of the act because these documents are not "local government records" as defined by section 201.003(8)(B) of the Local Government Code. Alternatively, you argue that these documents are outside the scope of section 3(a) of the Open Records Act because they are "personal" to the individual council members, and the city has neither an "ownership interest" in these records nor a right of access to them.

First, we address your contention that section 201.003(8)(B) of the Local Government Code removes the information at issue here from the coverage of the Open Records Act. This section is contained within the Local Government Records Act, which the legislature enacted in 1989. The primary purpose of this act was to establish uniform, statewide records management standards for local government records. *See* Local Gov't Code § 201.002. Section 201.003(8) of the act defines a "local government record" as

any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium or other information recording medium, regardless of physical form or characteristic and *regardless of whether public access to it is open or restricted under the laws of the state*, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business. (Emphasis added.)

Local Gov't Code § 201.003(8). Subsection 201.003(8)(B) excludes from this general definition "notes, journals, diaries, and similar documents created by an officer or employee of the local government for the officer's or employee's personal convenience." You claim that the evaluation sheets are "notes" prepared by the individual council members for their "personal convenience" and that therefore these sheets do not constitute local government records. You further argue that as such, these documents are not subject to the Open Records Act.

It is clear that the Local Government Records Act and the Open Records Act each have a different scope and purpose. As noted above, the primary purpose of the Local Government Records Act is the establishment of uniform records management procedures for local government records, while the Open Records Act generally governs *access* to public information, as defined by that act, generated at all levels of government within the state. Furthermore, various provisions throughout the Local Government Records Act indicate that this act does not supersede the Open Records Act. For example, under section 201.003(8), set out above, the Local Government Records Act applies to all "local government records" regardless of whether a particular document is subject to the Open

Records Act. *See also* Local Gov't Code §§ 201.009(a) (local government records are subject to the Open Records Act); 202.002(b) (local government record subject to an open records request must be preserved until the request is resolved); 202.003(b); 203.050(a) (inspection of record by State Library and Archives Commission does not constitute release to public under Open Records Act); 204.004(c)(3).

Clearly, the Local Government Records Act defines "local government records" for purposes of that act's records management requirements only; the legislature did not intend for this definition to have any effect on the scope of the Open Records Act. Rather, as illustrated by the provisions of the Local Government Records Act cited above, the legislature emphasized that any records that are subject to the Local Government Records Act are *also* subject to the Open Records Act. Correspondingly, even if a record is outside the coverage of the Local Government Records Act because it does not fall within that act's definition of a local government record, it does not follow that such a record is not subject to the Open Records Act. We conclude, therefore, that the definition of a "local government record" set out in section 201.003(8) of the Local Government Records Act does not govern whether particular information constitutes "public information" under the Open Records Act.¹

Given this conclusion, we next address your claim that the performance evaluation sheets completed by the individual council members are not "public records" subject to the Open Records Act. Some early rulings issued by this office held that "personal notes of an individual employee in his sole possession and made solely for his own use" were not subject to the Open Records Act. Open Records Decision No. 77 (1975); *see also* Open Records Decision Nos. 145 (1976); 116 (1975). Later decisions have clarified the proper interpretation of section 3(a). These decisions have generally held that "notes" made by a governmental officer as part of his official duties are not "personal" to that individual; rather, such notes are public information subject to the act. *See, e.g.*, Attorney General Opinion No. JM-1143 (1990) at 2; Open Records Decision No. 225 (1979) at 3. This office has reached the same result in cases involving notes taken by officials as part of their duty to evaluate governmental employees. *See* Open Records Decisions Nos. 450 (1986); 327 (1982).

In your case, each council member was acting in an official capacity when he or she completed the performance evaluation sheets for each city official. The evaluation of city employees is clearly "in connection with the transaction of official business" within the meaning of section 3(a). In addition, you state that the ratings sheets "were compiled into the final evaluation documents which were presented to the officials being rated and to the [requestor]." Presumably, the rating sheets completed by the individual council members were made available to the council as a whole for this purpose. This office has previously

¹Consequently, we do not reach the question of whether the documents at issue here are "local government records" subject to the Local Government Records Act.

held that such shared information was not made solely for the use of the individual employee and so is public information subject to the act. *See* Open Records Decision Nos. 332 (1982); 120 (1976). It is our conclusion, therefore, that the performance evaluation sheets completed by the individual council members, including any handwritten comments made on those sheets, are public information subject to the Open Records Act.

Under the Open Records Act, all public information is open unless it falls within one of the act's specific exceptions to required public disclosure. You have argued that the performance evaluation sheets at issue here are excepted from disclosure by sections 3(a)(1) and 3(a)(11) of the act. Section 3(a)(1) excepts from disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Because the council met in executive session to evaluate the performance of the three city officials, you essentially contend that the evaluation sheets completed by the individual council members are made confidential by sections 2(g) and 2A of the Open Meetings Act, art. 6252-17, V.T.C.S. Section 2(g) provides that a governmental body may meet in closed session to consider the "appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee." Section 2A requires a governmental body meeting in closed session to prepare either a certified agenda or a tape recording of the proceedings; the certified agenda or tape may only be reviewed by a judge in a case involving an alleged violation of the Open Meetings Act. § 2A(a), (d), (e). This office has ruled that certified agendas and tapes of properly convened executive sessions are excepted from disclosure by section 3(a)(1) of the Open Records Act. *See* Open Records Decision Nos. 605 (1992); 495 (1988); *see also* Open Records Decision No. 330 (1982) (issued prior to the enactment of section 2A of the Open Meetings Act, finding minutes of properly held executive session excepted from disclosure by 3(a)(1)).

In your case, however, the records at issue are neither a certified agenda nor a tape recording of an executive session. Section 2A(c) of the Open Meetings Act does not make confidential *any* information or document simply because it was discussed or created in a properly held executive session. Open Records Decision Nos. 605; 485 (1987) at 9. Accordingly, the performance evaluation sheets completed by the individual council members may not be withheld from disclosure under section 3(a)(1) in conjunction with section 2A(c) of the Open Meetings Act.

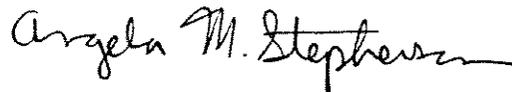
Next, you argue that release of the evaluation sheets will infringe upon the free speech rights of the individual council members. The Open Meetings Act does not require governmental officials to discuss what transpired during a properly held executive session nor does it prohibit them from doing so. *See* Attorney General Opinion No. JM-1071 (1989). Rather, section 2A(h) merely prohibits the disclosure of a certified agenda or a tape recording of an executive session. Likewise, the Open Records Act applies only to *public* information within the meaning of section 3(a) of the act. *See* Attorney General Opinion No. MW-563 (1982) at 5. Therefore, the disclosure of such public information, including written documents, does not implicate the constitutionally protected free speech rights of individual governmental officials.

Finally, you claim that the rating sheets and handwritten comments prepared by the individual council members constitute "inter-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 required 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, 413 (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." The court has since denied a motion for rehearing in this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. 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, however, you still desire to seek closure of the information pursuant to this section, you may submit additional detailed arguments as to the application of section 3(a)(11) in your case. You must submit any additional comments within 14 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. As discussed above, we conclude that no other exception to required public disclosure applies to the information at issue here. Therefore, if you do not timely submit further arguments concerning the application of section 3(a)(11), we will presume that you have released the information.

If you have any questions in regard to this ruling, please contact our office.

Yours very truly,



Angela M. Stepherson
Assistant Attorney General
Opinion Committee

AMS/MRC/le

Ref: ID# 17400, ID# 17421

Enclosures: submitted documents

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