



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 2, 1994

Mr. W. Dickinson Yale, Jr.
Coats, Rose, Yale, Holm, Ryman & Lee
800 First City Tower
1001 Fannin
Houston, Texas 77002-6707

OR94-057

Dear Mr. Yale:

On behalf of the Sam Houston Race Park Authority (the "authority"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 24398.

The authority received an open records request for the following information:

1. A copy of the agenda of each meeting held since inception of [the authority].
2. A copy of all official Board of Directors minutes for each meeting.
3. A copy of the unofficial transcripts and/or tape of all meetings.
4. A copy of all notes taken by any board members.

¹The Seventy-third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

You do not object to releasing the information in categories 1, 2, and 3, to the extent that this information exists.² You contend, however, that the handwritten notes taken by individual members of the authority's board of directors do not constitute "public information" and therefore are not subject to the Open Records Act. In comments submitted to this office under section 552.304 (formerly section 7(b)), the Texas Association of School Boards suggests that the definition of "local government record" contained in the Local Government Records Act³ supports this conclusion. Alternatively, you claim that, if the board members' notes are subject to the Open Records Act, these notes are excepted from required public disclosure by section 552.109 (formerly section 3(a)(9)).

We conclude that the board members' notes do constitute public information subject to the Open Records Act. Section 552.021 defines public information as follows:

(a) Information is public information if, under a law or ordinance or *in connection with the transaction of official business*, it is collected, assembled or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it. [Emphasis added.]

In previous Open Records Decisions, this office has concluded that handwritten notes in the sole possession of a public officer or employee and made by the public officer or employee solely for his or her own personal use are not public information subject to the Open Records Act under this definition. See Open Records Decision Nos. 145 (1976) at 2; 116 (1975) at 2; 77 (1975) at 2. On the other hand, information used by a public official or employee in the performance of official duties is generally public information. See, e.g., Attorney General Opinion JM-1143 (1990) at 2. The notes you submitted for review were prepared by the board members in their official capacities and relate solely to the official business of the authority. Thus, they cannot be characterized as notes made solely for the personal use of the board member who made them and must be considered public information subject to the Open Records Act.

You argue that, because the authority treats notes taken by board members "as the private and personal notes of each individual Board member," the authority does not have a right of access to or ownership of these notes under section 552.021(a)(2), and the notes

²The Open Records Act does not require a governmental body to disclose information that does not exist. See Open Records Decision Nos. 362 (1983); 342 (1982).

³Local Gov't Code § 201.003(8).

therefore are not subject to the Open Records Act. We do not find this argument persuasive. Prior to its codification as section 552.021 of the Government Code, section 3(a) provided, in part, 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

The italicized language was added by the legislature in 1989, *see* Acts 1989, 71st Leg., ch. 1248, § 9, at 5023, and codified earlier decisions of this office concerning information prepared for a governmental body by a consultant or independent contractor. *See* Open Records Decision No. 558 (1990). This amendment recognized that where "a governmental body does not have a right of access to or ownership of information prepared for it by an *outside entity*, the information will not be subject to the Open Records Act." *Id.* at 2 (emphasis added). The information at issue here was assembled by members of the governmental body itself; section 552.021(a)(2) does not apply under these circumstances.⁴ As discussed above, the board members prepared their notes during meetings of the authority's board in connection with the transaction of the authority's official business. Consequently, the notes are subject to the Open Records Act under section 552.021(a)(1).

The definition of "local government records" contained in the Local Government Records Act does not change this result. Section 201.003(8)(B) of the Local Government Records Act specifically excludes from its definition of a local government record "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." The Open Records Act does not, however, contain a similar exclusion. Furthermore, 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, the legislature emphasized that any records that are subject to the Local Government Records Act are *also* subject to the Open Records Act. Correspondingly, records may be subject to the Open Records Act

⁴Although the codification of the Open Records Act was a nonsubstantive revision, the reorganization of section 3(a) into its present form in section 552.021 further clarifies that the act applies to public information in two alternative categories: (1) information generated within a governmental body itself; or (2) information prepared by an outside party for a governmental body where the governmental body owns or has a right of access to the information. Where information was generated within a governmental entity, that entity should be presumed to have access to the information regardless of which of its employees or members has actual possession of the information. *See* Open Records Decision No. 425 at 2-3.

even if they are not encompassed by the definition of a local government record in the Local Government Records Act. Therefore, the definition of a "local government record" set out in section 201.003(8) of the Local Government Records Act does not affect whether particular information constitutes "public information" under the Open Records Act.⁵

Under the Open Records Act, all public information is open unless it falls within one of the specific exceptions to required public disclosure. You contend that the notes taken by the individual board members are excepted from disclosure under section 552.109 (formerly section 3(a)(9)). Section 552.109 excepts from required public disclosure "[p]rivate correspondence and communications of *an elected office holder* relating to matters the disclosure of which would constitute an invasion of privacy." Gov't Code § 552.109 (emphasis added). By its terms, this section applies to the correspondence and communications of elected officials only. We understand that the members of the authority's board of directors were appointed by the Harris County Commissioners Court and, thus, that they are not elected officials covered by section 552.109.⁶

Moreover, the disclosure of information constitutes an invasion of privacy only if the information is highly intimate or embarrassing, *and* it is of no legitimate concern to the public. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have reviewed the copies of the notes taken by various board members that you submitted to us for review. These notes do not contain any information that is intimate or embarrassing. In addition, the notes relate to official business of the authority, and thus, the information they contain is of legitimate interest to the public.⁷ Accordingly, we conclude that the board members' notes are not excepted from disclosure by section 552.109 or any other exception under the Open Records Act and must be released in their entirety.

⁵Consequently, we do not reach the question of whether the notes at issue here are "local government records" subject to the Local Government Records Act.

⁶You suggest that the application of section 552.109 should not be limited to elected officials. As support for this proposition, you cite Open Records Decision No. 145 (1976), which dealt with handwritten notes prepared by a university president's secretary. That opinion, however, did not involve the application of section 3(a)(9), the predecessor to section 552.109. This office has never concluded that section 552.109 or its predecessor is applicable to any government official other than elected office holders.

⁷The notes also do not contain any information that would be protected from disclosure by a constitutional right of privacy. See Open Records Decision Nos. 478, 455 (1987); 212 (1978).

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 contact this office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

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Ref.: ID# 24389, ID# 24399, ID# 24400, ID# 24401
ID# 24402, ID# 24403, ID# 24404, ID# 24405,
ID# 24406, ID# 24407, ID# 24408, ID# 24409,
ID# 24410, ID# 24411, ID# 24412, ID# 17864,
ID# 17882, ID# 17917, ID# 17944, ID# 17979,
ID# 17988, ID# 18013, ID# 18058, ID# 18163,
ID# 18179, ID# 20755, ID# 20801, ID# 20906,
ID# 22976, ID# 24385

Enclosures: Submitted documents

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(w/o enclosures)