



# The Attorney General of Texas

May 31, 1978

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An Equal Opportunity  
Affirmative Action Employer

Honorable Kenneth H. Ashworth  
Commissioner  
Coordinating Board  
Texas College & University System  
P. O. Box 12788, Capitol Station  
Austin, Texas 78711

Open Records Decision No. 192

Re: Whether report made in connection with private degree-granting institution is public under Open Records Act.

Dear Mr. Ashworth:

Pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act, you ask whether a report of an evaluation made in connection with the certification of Ambassador College is excepted from required public disclosure as an intra-agency memorandum under section 3(a)(11) of the Act.

The Coordinating Board issues certificates of authority to private institutions of higher education to grant degrees upon a finding that the institution meets the standards established by the board. Education Code §§ 61.301 - .317. An evaluation team prepared a report of evaluation in connection with the application of Ambassador College for a certificate of authority. The team was made up of members of faculties of public and private institutions and a member of the board's staff. The team conducted an on-site visit to the college and made its report to the Consultant Certification Committee, a group made up of presidents of five accredited colleges and universities.

You have received a request for information concerning the granting of the certificate of authority to Ambassador College, and for any report generated in connection with the certification. You have submitted a copy of an evaluation report, and a memorandum from the chairman of the evaluation team making a recommendation concerning the issuance of the certificate of authority. The memorandum is simply a formal recommendation and transmittal of the evaluation report.

You contend that the evaluation report and the recommendation are excepted under section 3(a)(11), which excepts:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency . . . .

It is your position that the report and recommendation contain advice and opinion on policy matters, and that compelled public disclosure of such evaluations would significantly impair the Board's ability to obtain open and frank evaluations from consultant evaluators in the future.

Federal courts dealing with the exemption in the Federal Freedom of Information Act on which the Texas exception is patterned, 5 U.S.C. § 552(b)(5), have treated it as applicable to communications with outside consultants as well as employees within the agency. See Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976); Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975); Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). We do not believe that the fact that the information was prepared by consultants rather than employees of the agency is determinative of whether or not the exception applies.

We have said that the intra-agency memorandum exception was designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief concerning administrative action. Attorney General Opinion H-436 (1974). However, the exception does not extend to factual information which can be severed from the portion containing advice and opinion. Id.; See Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Soucie v. David, supra; Bristol-Meyers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969).

We have found two closely analogous cases from other jurisdictions and they reach opposite results. In Papadopoulos v. State Board of Higher Education, 494 P.2d 260 (Ore. App. 1972), a report made by outside consultants of their evaluation of a school within a state university was held to be a public record despite a promise of confidentiality to the consultants, and despite the claim that disclosure would make it difficult to obtain evaluations in the future. In Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973), memoranda prepared by consultants evaluating and making recommendations concerning an individual's application for a grant for scholarly research were held to be excepted from required public disclosure under the federal intra-agency memoranda exemption.

The court in Wu discussed the distinction between purely factual and scientific studies, which are open, and opinions and recommendations, which may

be withheld from public disclosure. The court recognized that the "purely factual" test is not an ironclad one, and looked to the primary purpose of the recommendations there, which was the expression of an opinion of outside experts to assist the agency in reaching a decision on the grant. Id. at 1033.

The evaluation report at issue here consists of the views of outside consultants as to whether the institution meets certain minimum standards set by the board which must be met in order to obtain a certificate of authority to grant degrees. The standards are not easily applied formulae concerning square feet of space per student or the number of volumes in the library. For example, one standard requires a finding:

- (4) That the institution has adequate space, equipment, instructional materials, and library facilities to provide education of good quality.

Application of such standards clearly calls for an expression of informed professional judgment more in the nature of an opinion rather than a scientific determination of fact. Such an evaluation is distinguishable from a financial audit report of the type dealt with in Open Records Decision Nos. 178 and 160 (1977). We believe that some of the expression of opinion of this sort might properly be withheld from required public disclosure under the section 3(a)(1) exception in order to encourage the free and open exchange of opinions and ideas during the deliberative process of an agency. However, we understand that these evaluation reports are routinely disclosed to the institution being evaluated. Section 14(a) of the Act provides:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

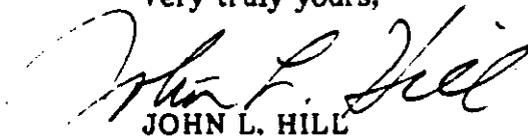
In Wu v. National Endowment for Humanities, supra, the person seeking the information was the individual whose grant application was the subject of the consultants' opinion and recommendation. The need to provide the outside experts some protection in making frank evaluations was particularly apparent there. See Wu v. Keeney, 384 F. Supp. 1161 (D. D.C. 1974). Here, the board does not seek to protect its internal deliberative process from those directly affected, but only from the public. Absent some express authority for making such a distinction, we do not believe the board may make such selective disclosure of its internal memoranda.

Ambassador College has, through its attorney, submitted its views on this matter and contends that disclosure of the report would constitute a violation of

the College's privacy. The right of privacy is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests. Oasis Nite Club, Inc. v. Diebold, Inc., 261 F. Supp. 173, 175 (D. Md. 1966); Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982, 985 (W.D. Mo. 1912); Maysville Transit Co. v. Ort, 177 S.W.2d 369, 370 (Ky. 1943). See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Rosemont Enterprises, Inc. v. Random House, Inc., 294 N.Y.S.2d 122 (N.Y. Sup. Ct. 1968); Association for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee, 236 N.Y.S.2d 216 (N.Y. Sup. Ct. 1962); Association for Preservation of Freedom of Choice, Inc. v. Nation Co., 228 N.Y.S.2d 628 (N.Y. Sup. Ct. 1962); Rosenwasser v. Ogoglia, 158 N.Y.S. 56 (N.Y. App. Div. 1916); Restatement (Second) of Torts § 652I, comment c, at 403 (1977); 62 Am Jur.2d, Privacy § 11 at 692-693 (1972). Cf. University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 256 N.Y.S.2d 301 (N.Y. App. Div. 1965) (denial of injunction against release of film using university name). The information in this report does not infringe upon any individual's privacy interest.

It is our decision that the information requested is public.

Very truly yours,



JOHN L. HILL  
Attorney General of Texas

APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman  
Opinion Committee

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