



The Attorney General of Texas

July 18, 1978

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Mr. Gordon Cockerham, Superintendent
Lancaster Independent School District
P. O. Box 400
Lancaster, Texas 75146

Open Records Decision No. 200

Re: Whether school district employee is entitled to certain information relating to his employment including communications between district and its attorney.

Dear Mr. Cockerham:

You have requested our decision under section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act. A school district employee has requested all information in his personnel file or otherwise held by you which touches upon the quality of his performance. You have provided him access to his personnel file, but contend that certain other information which pertains to his employment relationship is excepted from required disclosure under section 3(a)(1) as information deemed confidential by law by virtue of the attorney-client privilege, and under section 3(a)(3) which excepts certain information relating to pending or contemplated litigation. The information submitted for our decision is a letter from you to the attorney for the district asking for legal advice, and your attorney's response. There is also a memorandum from you to the Board which reports on a meeting you had with the employee, makes related recommendations, and includes a quantitative report on the employee's work over a period of time.

The employee's right to information is not limited to that which he can obtain as a member of the general public. The proviso of section 3(a)(2) gives him a special right of access as follows:

all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under the Act.

We have broadly construed this proviso as making available to an employee all information relating to his employment relationship. Open Records Decision Nos. 133 (1976); 115 (1975); 31 (1974).

We believe that the communications between the district and its attorney are clearly excepted from required public disclosure by section 3(a)(1) as information made confidential by law, specifically, the attorney-client privilege. Article 38.10 of the Code of Criminal Procedure provides in pertinent part:

[A]n attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship.

This statute has been described as a statutory declaration of the common law rule of evidence and applies to both criminal and civil cases. Cochran v. Cochran, 333 S.W.2d 635, 641 (Tex. Civ. App. — Houston 1960, writ ref'd n.r.e.); Williams v. Williams, 108 S.W.2d 297, 299 (Tex. Civ. App. — Amarillo 1937, no writ). See Ballard v. Ballard, 296 S.W.2d 811, 816 (Tex. Civ. App. — Galveston 1956, no writ); 1 C. McCormick & R. Ray, Texas Law of Evidence § 481 p. 400 (Texas Practice 2d ed. 1956). The privilege applies to written communications from the client to the attorney, Missouri, K. & T. Ry. Co. of Texas v. Williams, 96 S.W. 1087, 1089 (Tex. Civ. App. 1906, no writ), and from the attorney to the client, Harrell v. Atlantic Refining Co., 339 S.W.2d 548, 554 (Tex. Civ. App. — Waco 1960, writ ref'd n.r.e.) (attorney's title opinion a privileged communication). See 1 C. McCormick & R. Ray, Texas Law of Evidence § 486 p. 408 (Texas Practice 2d ed. 1956).

We do not believe that the governmental employee's special right of access to information in his personnel file extends to information protected by the attorney-client privilege, even if the subject of the correspondence relates to the employment relationship. The "policy underlying the privilege of confidence in communications between attorney and client is to secure the client's subjective freedom of communication." Ballard v. Ballard, *supra*, at 816. The policy of the privilege would be defeated if the employee could obtain these communications. He would not be able to obtain these communications through discovery in the contemplated litigation, and we do not believe that the section 3(a)(2) proviso was intended to change this. It is our decision that the correspondence between the district and its attorney is excepted from disclosure to the employee under section 3(a)(1).

The next issue is whether the memorandum from you to the board is excepted from required disclosure to the employee under section 3(a)(3) as information relating to litigation in which the district may be a party. Your attorney has advised us that he believes there is a reasonable anticipation of litigation in regard to this specific matter, and he has determined that the memorandum should not be made public. We note that communications by a client to third persons are not covered by the attorney-client privilege. American Motorists Ins. Co. v. Williams, 395 S.W.2d 392 (Tex. Civ. App. — Ft. Worth 1965, writ ref'd n.r.e.).

We do not believe that the 3(a)(3) exception is applicable to this memorandum even though there may be a reasonable anticipation of litigation. We do not believe that this exception permits you to deny to the employee his clear right under section 3(a)(2) to inspect memoranda such as this. See Open Records Decision Nos. 148 (1976); 90 (1975); 55 (1974) (employee has right to inspect memoranda making evaluations and recommendations concerning his employment relationship.)

We have previously held that information specifically made public by statute is not excepted from disclosure by section 3(a)(3) of the Act. Open Records Decision Nos. 161 (1977); 146 (1976); 43 (1974). An employee's right to all information in his personnel file given by the proviso of section 3(a)(2) is a significant interest, and while it does not necessarily prevail where it conflicts with significant governmental interests, the opposing interests must be balanced. See Open Records Decision Nos. 172 (1977) (section 3(a)(1) informer's privilege held to prevail over employee's section 3(a)(2) right as to information in investigative file); 133 (1976); 105, 71 (1975) (recognizing that section 3(a)(8) law enforcement records exception may apply to information concerning employee which was gathered for purpose of investigating and detecting crime).

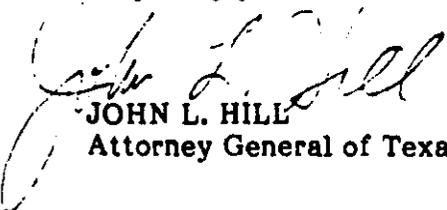
This memorandum does not relate directly to pending or contemplated litigation, but to the facts and circumstances out of which the litigation might arise. It was not prepared in contemplation of possible litigation. Our Rules of Civil Procedure protect from discovery certain information

made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which the same has arisen.

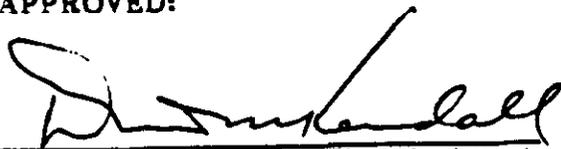
Tex. R. Civ. P. 167. See Tex. R. Civ. P. 186a. In the context of a 3(a)(2) claim by an employee, we regard the work product concept expressed in these Rules as helpful in determining the scope of the section 3(a)(3) exception. See Hickman v. Taylor, 329 U.S. 495, 510-511 (1947).

It is our decision that the memorandum is not excepted from disclosure under section 3(a)(3), and that the employee is entitled to inspect it under the proviso to section 3(a)(2).

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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