



The Attorney General of Texas

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The Honorable Dolph Briscoe
Governor of the State of Texas
Capitol Building
Austin, Texas 78711

Open Records Decision No.212

Re: Whether letters of the
governor recommending individuals
for appointment are public
under the Open Records Act

Dear Governor Briscoe:

Pursuant to section 7 of article 6252-17a, V.T.C.S., the Open Records Act, you request our decision whether letters recommending individuals for appointment by the Governor are excepted from required public disclosure. You have received a written request for access "to your files of letters recommending individuals for appointment by the governor to state boards and commissions." The request expressly excludes derogatory comments on the character or qualifications of potential appointees.

There is no question that the office of Governor is a "governmental body" defined by the Act and covered by its provisions. Section 2(1)(A) of the Act incorporates within that term any "office within the executive . . . branch of the state government . . . which is under the direction of one or more elected or appointed members." We have previously held the Act applicable to your office. Open Records Decision Nos. 177 (1977), 140 (1976) and 116 (1975). See Attorney General Opinion H-118 (1973).

You contend that letters of recommendation are excepted from required public disclosure by section 3(a)(1), 3(a)(2), and/or 3(a)(9) of the Act. Section 3(a)(1) excepts information deemed confidential by law, including judicial decisions recognizing the right of privacy; section 3(a)(2) excepts information in personnel files "the disclosure of which would constitute clearly unwarranted invasion of personal privacy"; section 3(a)(9) excepts

private correspondence and communications of an
elected office holder relating to matters the disclosure
of which would constitute an invasion of privacy.

The request is very broad, and not limited to particular files or letters. You have provided a few sample excerpts of letters from your appointment files. Some expressly request confidentiality. Others contain frank and

candid remarks about potential nominees, and sometimes draw comparisons among persons while recommending one. While letters with derogatory comments are not within the scope of the request, the samples demonstrate that at least some letters are not easily categorized as being only favorable. Without a more specific request for particular information and without that information before us for inspection, our decision must be limited to the question of whether the fact that one person has recommended another, or himself, for appointment is per se excepted from disclosure by one of the claimed exceptions. We do not decide whether the content of a particular letter is excepted.

On several occasions we have held that, while the content of a communication might be confidential and thus not subject to disclosure under the terms of the Act, the fact of a communication itself was not shielded from disclosure. Thus in Attorney General Opinion No. H-223 (1974) we held that the mere fact that a taxpayer had requested a reconsideration of his tax status was public even though the information concerning his status was made confidential by statute and excepted under section 3(a)(1). In Open Records Decision No. 88 (1975) we held that the fact of whether or not a person has filed an accident report is public information although the content of the report was made confidential by statute. Similarly, in Open Records Decision No. 102 (1975), we said that while the contents of an evaluation made of a teacher might be excepted under section 3(a)(2), it did not extend to the fact of his decision as to whether or not to submit to the evaluation. In Open Records Decision No. 40 (1974), we held that the section 3(a)(9) exception did not apply to a list of long-distance calls made by legislators and charged to the state, since "such a list is simply not a communication," and the fact of the communication was thus disclosed. In Open Records Decision No. 188 (1978), we held that a list of applicants for appointment as municipal court judge was not excepted from required disclosure even if such information constituted information in personnel files.

Thus we conclude that, to whatever extent the contents of a communication might be excepted from public disclosure, at least the fact that you have received letters making recommendations for appointment is not necessarily excepted.

The common element of the exceptions claimed is the right of privacy. The Texas Supreme Court has held that the section 3(a)(1) exception applies to information made confidential by a constitutional right of privacy, and by the common law tort right of privacy. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). The constitutional right of privacy protects fundamental rights, and thus far has only been extended to intimate personal relationships and activities, freedoms of the individual to make fundamental choices involving himself, his family, and his relationships with others. Id. at 679. The constitutional right has been recognized in cases involving marriage, procreation, contraception, family relationships, and the right of free association. Id. at 679-681.

The only apparent constitutional right of privacy which arguably could be infringed by disclosure of the fact of a recommendation is that of the right of free association. The question is whether the citizen's right to express his views by recommending a person for appointment by the governor is within this right and protected from public disclosure. The United States Supreme Court has said that compelled public disclosure can seriously infringe on privacy of association and belief guaranteed by the First Amendment. Buckley v. Valeo, 424 U.S. 1, 64 (1976). However, in that case, the Court upheld reporting and disclosure provisions of the Federal Election Campaign Act of 1971. The Court said that the governmental interests involved were sufficiently important to outweigh the possibility of infringement of First Amendment rights. The governmental interests served by the reporting and disclosure requirements were (1) providing the electorate with information with which to evaluate candidates, (2) deterring corruption or the appearance of corruption, and (3) making it possible to detect violations of law. The Texas Open Records Act is based on very similar purposes, which we believe "directly serve substantial governmental interests." See Id. at 68.

The question is then the extent to which disclosure might burden individual rights. In order for associational privacy rights to be upheld against substantial governmental interests, there must be a factual showing of significant infringement on First Amendment rights, such as harassment and reprisal. Compare NAACP v. Alabama, 357 U.S. 449, 462 (1958) (uncontroverted showing of economic reprisal, physical coercion, other manifestations of public hostility) with Laird v. Tatum, 408 U.S. 1, 13-14 (1972) (allegations of subjective "chill" not adequate, must show specific present objective harm or threat of specific future harm).

We do not believe that the potential for specific physical or economic harm such as that which has been found to exist by virtue of association with highly controversial minority groups can be presumed to exist in the case of a citizen who writes to the governor to recommend another for appointment to an office. Absent a factual showing of specific present or potential harm, there is no legal authority which would support a holding that disclosure of the fact that an individual has recommended another for appointment by the governor is protected by a constitutional right of privacy of association or belief.

It is contended that disclosure of information concerning appointments would invade the governor's constitutional right of privacy. The Supreme Court considered the right of disclosural privacy in records of a chief executive in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Court's decision indicates that the constitutional privacy rights of public officials, including the President, are of very limited scope. The Court said that such rights may extend to "matters of personal life unrelated to any acts done by them in their public capacity." Id. at 457 (emphasis added). While the case did not deal with the question of public disclosure of the information involved, it does indicate the narrow scope of an official's constitutional right of privacy. We have found no legal authority that a chief executive has a constitutional right of privacy in the

fact that he received a recommendation for appointment of a person from a particular individual.

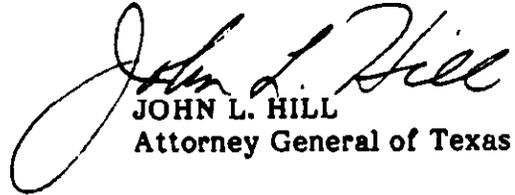
Thus, we conclude that no constitutional right of privacy has been recognized which would prohibit disclosure of the fact that a person recommended another or himself to the governor for appointment.

The common-law tort right of privacy exists only if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, supra, at 685. We do not believe the fact that a person has recommended another or himself for appointment by the governor meets the test of disclosing "highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person." The content of a particular letter might disclose highly intimate or embarrassing facts, but we do not think that the fact of a favorable recommendation can be considered per se an invasion of the privacy of either the person recommended or the person making the recommendation.

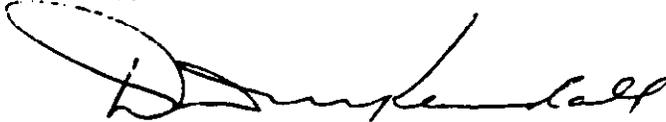
The most closely analogous case we have found on this question is Philadelphia Newspapers, Inc. v. United States Dept. of Justice, 405 F. Supp. 8 (E.D. Pa. 1975). The issue was whether the identities of persons who wrote letters recommending that a former public official be paroled were exempt from disclosure under the Freedom of Information Act exemptions which protect personal privacy. 5 U.S.C.A. § 552 (b)(6), (7)(C). The court held that such disclosure would not be a clearly unwarranted invasion of privacy of the persons writing such letters of recommendation. We consider the decision in this case highly persuasive.

It is our decision that information concerning the fact of a recommendation for an appointment being made is not per se excepted from required public disclosure under section 3(a)(1), 3(a)(2), or 3(a)(9). In particular instances, where a factual showing of significant potential infringement of First Amendment rights of association and belief can be made, such recommendations might be excepted by a constitutional right of privacy. Information in particular letters would not be excepted under a common law right of privacy unless they contain highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and the information is not of legitimate concern to the public. If you believe that a particular letter falls within an exception, the information should be submitted to the Attorney General in accordance with section 7 of the Act, for an in camera inspection and determination of whether and to what extent the information may be withheld.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:



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C. ROBERT HEATH, Chairman
Opinion Committee

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