



The Attorney General of Texas

April 20, 1979

MARK WHITE
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX 78711
2/475-2501

701 Commerce, Suite 200
Dallas, TX 75202
4/742-8944

324 Alberta Ave., Suite 180
El Paso, TX 79905
15/533-3484

1100 Main, Suite 610
Houston, TX 77002
713/228-0701

1006 Broadway, Suite 312
Cubbock, TX 79401
36/747-5238

313 N. Tenth, Suite F
McAllen, TX 78501
12/682-4547

1000 Main Plaza, Suite 400
San Antonio, TX 78205
12/225-4191

Equal Opportunity/
Affirmative Action Employer

Honorable Robert M. Collie, Jr.
City Attorney
P. O. Box 1562
Houston, Texas 77001

Open Records Decision No. 222

Re: Whether a report prepared for a city evaluating possible sites for a sludge disposal plant is public under Open Records Act.

Dear Mr. Collie:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act. You have received a request for a copy of a report of a private consulting firm's study of possible site locations for the Northwest Sludge Treatment Plant. You contend that the report is excepted from required public disclosure under exceptions 3(a)(3), 3(a)(4), 3(a)(5) and 3(a)(11) of the Act.

The requested report was prepared in November, 1975, to evaluate a number of possible sites for a sludge disposal plant which the city intends to construct in about 1983-1985. Subsequently, in 1977 the city purchased one of the sites evaluated. No further action has been taken on construction of the plant itself.

Section 3(a)(5) excepts from required public disclosure:

(5) information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor; . . .

The city contends that this exception continues to apply to the site investigation report because the city has made no formal announcement that it will proceed with the construction of the contemplated sludge disposal plant at this site, and that its options are still open as to whether or where the plant will ultimately be built. We do not believe that the applicability of section 3(a)(5) can be extended beyond the limited time it was intended to operate. This exception is clearly designed to protect a governmental body

in its planning and negotiating position in regard to particular transactions, and no longer. In Open Records Decision No. 5 (1973), this office said that this exception was intended to protect an appraisal study prepared for a governmental body in contemplation of the purchase of real or personal property, at least until the transaction was either completed or aborted. We said that that study could be withheld if it was still the basis for good faith negotiations regarding the purchase by the city of the particular property in question. See V.T.C.S. art. 6252-17 (public may be excluded from a meeting discussing property when it would have detrimental effect on negotiating position). In this instance, the transaction with which this study is concerned has been completed by the purchase of a site. We do not believe that the mere possibility that the city might conceivably change its plans is a basis for the continued applicability of this exception.

The city contends that the report is excepted under section 3(a)(4) which excepts:

(4) information which, if released, would give advantage to competitors or bidders; . . .

The city argues that it may in the indefinite future determine to purchase one of the other properties evaluated, and that could put the city at a disadvantage as a bidder for the property. This office has construed this exception narrowly, requiring a showing of a specific actual or potential harm in a particular competitive situation. See Open Records Decision Nos. 203, 184 (1978); 170 (1977); 124 (1976); 95, 75 (1975); 48, 46, 45 (1974). Section 3(a)(5) is expressly designed to protect the interest of a governmental body during planning or negotiations for the purchase of property. We believe it would be contrary to the legislature's intent expressed in section 3(a)(5) to permit section 3(a)(4) to be used to withhold information held by a governmental body after the specific transaction contemplated has been completed.

The city contends that the information is excepted from disclosure under section 3(a)(3) which excepts:

(3) information relating to litigation of a . . . civil nature . . . to which the state or political subdivision is, or may be, a party, . . . that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection; . . .

It is the city's position that since it is involved in litigation with the State of Texas and the Clear Creek Basin Authority involving the condition of the city's sewer facilities and plans for construction of sewer facilities, and since the report at issue relates to the city's sewer facilities, the section 3(a)(3) exception applies to permit the report to be withheld.

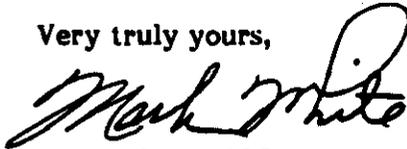
This report relates solely to the selection of a site for a particular sludge treatment plant, and the city has completed the particular transaction with which the report is concerned. We do not believe that this exception is applicable where there is no showing

of a direct relationship between the information sought and the pending or contemplated litigation. The relationship between this report and the litigation is too remote for application of the section 3(a)(3) exception in this instance.

The city contends that the report is excepted from required public disclosure under section 3(a)(11) which excepts certain intra-agency memoranda. This exception is designed to protect from disclosure advice and opinion on policy matters and to encourage open and frank discussion between subordinate and chief with regard to administrative action. Attorney General Opinion H-436 (1976); Open Records Decision Nos. 213, 211, 209, 197, 196, 192 (1978); 179, 168, 163 (1977); 149, 137, 128 (1976); 86, 81 (1975); 29, 20 (1974). The exception does not extend to factual information which is severable. Id.; see Environmental Protection Agency v. Mink, 410 U.S. 73 (1973). The vast bulk of this report is factual and evaluative. Most of it presents objective, verifiable factual data on the sites considered. The authorities cited above establish that factual information of this type is clearly not excepted under section 3(a)(11). In Open Records Decision No. 213 (1978), this office drew a distinction between evaluations and recommendations claimed to be excepted under section 3(a)(11), and said that the latter are more directly related to the decisional process intended to be protected by that exception. See Open Records Decision Nos. 171 (1977) (objective, factual, evaluative study of hospital beds is public); 160 (1977) (factual, evaluative audit report is public).

The report contains one page entitled "Recommendation." This is the type of information excepted from required public disclosure under section 3(a)(11). Page 17 entitled "Recommendation" may be withheld from required public disclosure under section 3(a)(11), but the balance of the report is public.

Very truly yours,



MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

TED L. HARTLEY
Executive Assistant Attorney General

Prepared by William G Reid
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

C. Robert Heath, Chairman
David B. Brooks

Honorable Robert M. Collie, Jr. - Page Four

Susan Garrison
Rick Gilpin
William G Reid
Bruce Youngblood