



The Attorney General of Texas

February 26, 1982

MARK WHITE
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
12/475-2501
Telex 910/874-1387
Telecopier 512/475-0266

1607 Main St., Suite 1400
Dallas, TX. 75201-4709
14/742-8944

1824 Alberta Ave., Suite 180
El Paso, TX. 79905-2793
15/533-3484

20 Dallas Ave., Suite 202
Houston, TX. 77002-6986
713/650-0666

106 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1885
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

Mr. Woodrow W. Mize
Executive Director
Texas State Board of Registration
for Professional Engineers
P. O. Drawer 18329
Austin, Texas 78741

Open Records Decision No. 308

Re: Whether investigation of licensee made by Texas Board of Registration for Professional Engineers is available to the public

Dear Mr. Mize:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., as to whether an investigation of a licensee made by the Texas Board of Registration for Professional Engineers is available to that licensee.

In 1977, the board conducted an in-house investigation of the conduct of one of its licensees while he was employed by the Texas Water Quality Board. You do not contest public access to most of the report that resulted. You contend only that certain marked portions of the investigatory report are excepted from disclosure by sections 3(a)(1) and 3(a)(11) of the Open Records Act.

In your request, you suggest that parts of the report "reflect sources of complaint information not yet revealed and deemed confidential and protected under section 3(a)(1)." Although the informer's privilege might be applicable to information generated in administrative investigations, Open Records Decision No. 279 (1981), none of the passages you have marked provide a basis for identifying any private informant because the source of the informant is always identified as an "anonymous caller." Section 3(a)(1), however, also embraces the right of privacy.

We have frequently observed that the Texas Supreme Court, in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976) [hereinafter referred to as IAB], recognized two distinct kinds of privacy -- constitutional and common law. Open Records Decision Nos. 273, 264 (1981); 257 (1980). The material at issue here is clearly not protected by a constitutional right of privacy. See Open Records Decision No. 257 (1980). Neither do we believe that it satisfies the test for the type of common law privacy dealt with by the court in IAB, supra. The court declared

that, in order to be excepted from disclosure by a right of common law privacy, information must contain intimate and embarrassing facts, the publication of which would be offensive to a person of ordinary sensibilities, and, in addition, it must be of no legitimate concern to the public. Id. at 685. In our opinion, the information you have marked does not meet these requirements.

In IAB, however, the court had noted four categories of privacy recognized by Professor Prosser: (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about plaintiff; (3) publicity which places plaintiff in a false light in the public eye; and (4) appropriation, for defendant's advantage, of plaintiff's name or likeness. Id. at 682. See Prosser, Privacy, 48 U.Cal.L.Rev. 383 (1960). The "common law privacy" interest adopted by the supreme court in IAB was the second type of privacy under Prosser's classification. As to the third type of privacy, which protects an individual from being placed in a false light, Prosser said that "the interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." "False light" information differs from private information "in that one involves truth and the other lies, one private or secret facts and the other invention." Prosser, supra, at 400.

In our opinion, the supreme court would, in an appropriate instance, apply the "false light" privacy standard to information requested under the Open Records Act. We believe, therefore, that it is proper to determine whether the information at issue here is excepted from disclosure as information placing an individual in a false light. Unlike a court, we cannot ordinarily determine the truth or falsity of particular information, but where, as here, (1) the information is communicated to a public body by an anonymous source; (2) the agency makes a determination that the information is not in fact true; and (3) the public interest in disclosure is minimal, we will presume its falsity.

Applying these criteria to the information you have submitted, we conclude that the items marked "A," "D," and "K" may be withheld under false light privacy pursuant to section 3(a)(1) of the Open Records Act. Other passages marked are not protected by section 3(a)(1).

You also suggest that the marked items may be withheld under section 3(a)(1), as:

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.

This office has frequently stated that this section, which is patterned after a similar provision in the Federal Freedom of Information Act, title 5, section 552(b)(5) of the United States Code, is:

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 (1976); Open Records Decision Nos. 231, 222 (1979); 213, 211, 209, 197, 196, 192 (1978).

We have frequently said that section 3(a)(11) permits the withholding of advice, opinions and recommendations contained in inter-agency or intra-agency memoranda. Open Records Decision Nos. 273 (1981); 239 (1980). The information deemed disclosable by section 3(a)(11) has usually been referred to as "factual." Open Records Decision Nos. 251 (1980); 231, 222 (1979); 213, 211, 209, 197, 196, 192 (1978). Although purely factual material must ordinarily be disclosed under that section, it seems clear that the full panoply of material disclosable under section 3(a)(11) cannot be confined to the narrow category of "fact."

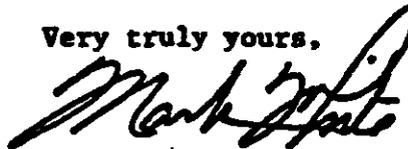
Like its federal counterpart, section 3(a)(11) has both an "executive privilege" aspect and a "discovery privilege" aspect. See Federal Open Market Committee of the Federal Reserve System v. Merrell, 443 U.S. 340 (1979). The policy underlying the section 3(a)(11) executive privilege is that public employees should be given significant latitude in conveying to fellow employees their subjective impressions regarding official business. An employee should be able, for example, to reveal to his supervisor his views about an agency decision, a personnel policy, or a fellow employee, without the chilling effect on those views which the certainty of public disclosure would impose. On the other hand, the purpose of the section 3(a)(11) executive privilege is not furthered by withholding from public disclosure basically background material which, although it may strongly influence the employee's advice to his supervisor, is not equivalent to that advice. Such background material, which will always impinge to a greater or lesser extent on the employee's views, even if only in a negative manner, may consist of facts as well as the opinions of persons outside the particular agency or another agency.

For purposes of the executive privilege aspect of section 3(a)(11), the only valid inquiry is whether particular information represents the advice, opinion or recommendations of persons entitled to claim the exception, i.e., employees or consultants of the agency or another public body within the scope of the Open Records Act. See Ryan v. Department of Justice, 617 F. 2d 781 (D.C. Cir. 1980); Open

Records Decision No. 192 (1978). If the information does consist of such advice, opinion and recommendations, it is excepted by section 3(a)(11). If it does not, it is not excepted as information to which the executive privilege applies. See County of Madison, New York v. U.S. Department of Justice, 641 F. 2d 1036 (1st Cir. 1981).

As to the marked portions of the report at issue here, only item "G" and a portion of item "I", which we have specified, may be withheld under section 3(a)(11) as "executive privilege" material. The remainder of the passages contain information which is disclosable under section 3(a)(11) unless they contain material that could not be obtained through discovery by a private party in litigation with the agency. See Open Records Decision No. 251 (1980). In the circumstances here, we are not convinced they do. Therefore, the remainder of the marked items should be disclosed.

Very truly yours,



MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant Attorney General

Prepared by Rick Gilpin and
Bruce Youngblood
Assistant Attorneys General

APPROVED:
OPINION COMMITTEE

Susan L. Garrison, Chairman
Jon Bible
Rick Gilpin
Patricia Hinojosa
Jim Moellinger
Bruce Youngblood