



The Attorney General of Texas

August 20, 1982

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Major General Willie L. Scott
TexARNG, The Adjutant General
P. O. Box 5218
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Open Records Decision No. 320

Re: Whether certain documents held by the Adjutant General's Department are public under the Open Records Act

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Dear General Scott:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., as to whether information obtained in two investigations of employee conduct conducted by the Adjutant General's office is available to the public. You suggest that portions of the material are excepted from disclosure under sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(8) and 3(a)(11) of the Act.

The first series of documents relates to a report, dated October 24, 1979, of an investigation into allegations and counter-allegations against various personnel of the Texas National Guard. You have marked the relevant portions of these documents as "enclosure 5c." Parties to the litigation relating to this investigation have already inspected these records pursuant to court order. As a result, section 3(a)(3) of the Open Records Act may no longer be applied to except the information from disclosure.

Neither is the information excepted under sections 3(a)(1) or 3(a)(2). Under section 3(a)(1), which excepts "information deemed confidential by law," we have recognized both constitutional and common law privacy. None of the information submitted, however, satisfies the requirements imposed for either kind of privacy. Open Records Decision No. 260 (1980). Section 3(a)(2), which requires a showing that disclosure of particular information about public employees would constitute "a clearly unwarranted invasion of personal privacy," is also inapplicable to the information submitted. Open Records Decision No. 260 (1980).

Although section 3(a)(8), which excepts law enforcement records, is applicable to the Texas National Guard, Open Records Decision No. 172 (1977), the availability of the exception is greatly restricted when a file has been administratively closed. Open Records Decision No. 216 (1978). You have not suggested that access to the information

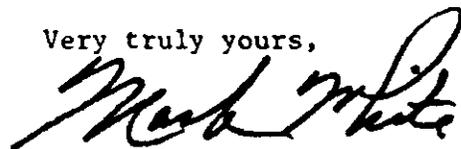
will "unduly interfere with law enforcement and crime prevention," and we conclude therefore that the information at issue here is not excepted from disclosure under section 3(a)(8). Open Records Decision No. 252 (1980). We note, however, that you have also raised the informer's privilege as incorporated into section 3(a)(1) of the Open Records Act. We will discuss this privilege subsequently in this decision.

A large portion of the information marked in enclosure 5c is, however, excepted under section 3(a)(11) of the Act as an "interagency memorandum." That exception is applicable to the information submitted to the extent that it consists of "advice, opinion and recommendations." Open Records Decision Nos. 273 (1981); 239 (1980). Accordingly, we have marked those parts of the documents in enclosure 5c which may be withheld under section 3(a)(11).

The second series of documents consists of three marked portions of enclosure 5c and a report of an investigation, dated February 27, 1978, into irregularities related to reports submitted by an individual in the Texas National Guard. Portions of the report contain the advice, opinion and recommendations of the investigator, and, as noted above, are excepted from disclosure under section 3(a)(11). Part of the report, as well as the marked portions of enclosure 5c, is also excepted under section 3(a)(1) of the Act, as information deemed confidential by the informer's privilege. In Open Records Decision No. 172 (1977), this office held that a report of an investigation into the conduct of a former officer of the Texas National Guard was excepted from disclosure under section 3(a)(1), "as tending to reveal the identity of informants." The decision noted that, while the privilege normally applies only to the identity of an informant, and not to the contents of his communication, the content itself is privileged when it would tend to reveal the identity of the informant.

As in Open Records Decision No. 172, it appears that disclosure of the informers' statements would here tend to reveal their identity. Thus, in accordance with the reasoning of that decision, we believe that the entire report dated February 27, 1978, together with the three relevant portions of enclosure 5c, may be withheld from disclosure under section 3(a)(11), as advice, opinion and recommendations, or under section 3(a)(1), as information deemed confidential by the informer's privilege.

Very truly yours,



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