



The Attorney General of Texas

May 5, 1983

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Affirmative Action Employer

Mr. Marlin W. Johnston
Commissioner
Texas Department of Human Resources
706 Banister Lane
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Open Records Decision No. 376

Re: Are memoranda prepared by
Department of Human Resources
concerning investigation of
nursing home available under
the Open Records Act

Dear Mr. Johnston:

On February 9, 1983, the Dallas Times Herald published an article in which the authors stated that the state of Texas is investigating a particular nursing home. This article contained quotations purportedly taken from documents in your possession. After the article was published, the attorney who represents the nursing home asked you for copies of the documents to which the authors referred. You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to grant this request.

You have sent us four interagency memoranda dated January 12, 1982, February 8, 1982, July 29, 1982, and September 9, 1982. We assume that the request for information embraces only these documents. You contend that sections 3(a)(1), 3(a)(7), and 3(a)(11) of the Open Records Act apply to two memoranda in their entirety and to parts of the other two memoranda. These sections except from required public disclosure:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

.....

(7) matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure; [and]

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(11) 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.

Before considering your claims, we must deal with a threshold matter. As noted, the newspaper article contained quotations purportedly taken from these memoranda; it seems, therefore, that these memoranda somehow found their way into the possession of the authors of the article. In your request letter, however, you state that the department has never voluntarily or officially released or sanctioned the release of any of these memoranda. We will assume for purposes of this decision that this is correct.

Although this office has held that a governmental body that voluntarily furnishes information to a newspaper may not later claim that that information may be withheld from others, Open Records Decision No. 162 (1977), it has never held that information which is not voluntarily released by a governmental body, but which nevertheless finds its way into the hands of a member of the general public, is henceforth automatically available to everyone. In our opinion, the Open Records Act does not preclude a governmental body from invoking one or more of the act's exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body. We therefore conclude that the fact that the Dallas Times Herald seems to be or to have been in possession of the four memoranda does not prohibit you from attempting to withhold the memoranda from others.

We first consider the February 8, 1982, memorandum. You seek to withhold only the third sentence of the second paragraph and the last paragraph. The sentence expresses the opinion of its author, while the last paragraph consists of a recommendation. These portions of the memorandum may therefore be withheld under section 3(a)(11), which excepts from required disclosure "advice, opinion and recommendation" contained in interagency or intragency memoranda. Open Records Decision Nos. 344, 335, 315 (1982).

We next consider the July 29, 1982, memorandum. You seek to withhold only the name of the individual whose complaint caused the initiation of this investigation. In our opinion, this name may be withheld under the "informer's privilege" aspect of section 3(a)(1). This office has previously held that the informer's privilege excepts from disclosure, inter alia, the identity of a person who reports a violation of a zoning ordinance, Open Records Decision No. 279 (1981), furnishes information regarding possible violation of air pollution laws, Open Records Decision No. 296 (1981), reports a possible violation of child care standards, Open Records Decision No. 176 (1977), and complain to a city's animal control division, Open Records

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Decision No. 156 (1977). These decisions compel the conclusion that the informer's privilege is applicable in this instance.

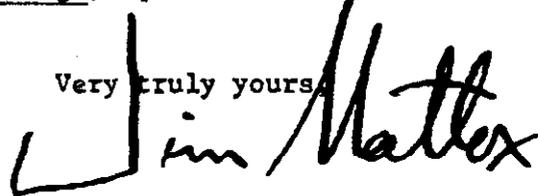
Finally, we consider the January 12, 1982, and September 9, 1982, memoranda. The former actually consists of two separate memoranda that were written by the same person and bear the same date. In our opinion, these memoranda are excepted from required disclosure under section 3(a)(11).

In Attorney General Opinion H-436 (1974), this office stated that section 3(a)(11) 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.

In this instance, a small portion of these memoranda does not constitute "advice, opinion and recommendation." Most portions of the memoranda do fit in this category, however, and we are of the opinion that enough of the memoranda is in this category to warrant the conclusion that the memoranda may be withheld in their entirety. As we read these memoranda, they are precisely the type that should be withheld in order "to encourage open and frank discussion between subordinate and chief concerning administrative action." Attorney General Opinion H-436 (1974). See, e.g., Open Records Decision Nos. 344, 335, 308 (1982).

Very truly yours,



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