



The Attorney General of Texas

May 2, 1984

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Mr. Richard D. Latham
Securities Commissioner
State Securities Board
1800 San Jacinto
Austin, Texas 78711

Open Records Decision No. 412

Re: Whether a letter from an assistant attorney general to a client agency is excepted from disclosure under the Open Records Act

Dear Mr. Latham:

On January 30, 1984, an assistant attorney general responded to your request for advice concerning the requirements for rulemaking hearings under section 5(c) of article 6252-13a, V.T.C.S. The response consisted of a letter and supplemental memoranda. In a letter dated February 8, a requestor asked you for a copy of "the Attorney General's opinion, to which you made reference to [sic] at the 2/3/84 Board Meeting, which opinion equated public hearings with rulemaking proceedings." You contend that sections 3(a)(1) and 3(a)(7) of article 6252-17a, V.T.C.S., the Open Records Act, authorize you to withhold the requested letter and memoranda, on the ground that they are within the attorney-client privilege. You also rely upon section 3(a)(11).

At the outset, we must clarify what is at issue in this instance. We understand that the letter which precipitated the assistant attorney general's response did not request a formal opinion pursuant to article 4399, V.T.C.S. As a matter of practice, requests for opinions made under that article are routinely noticed in the Texas Register and answered in formal, published Attorney General Opinions. A person who requests and obtains a formal opinion under article 4399 may not invoke the attorney-client privilege to protect its contents, since he must be presumed to be aware that his request will be noticed in the Texas Register and that the answer will be published. With this knowledge he must be presumed to have voluntarily waived any right to attempt to assert the privilege.

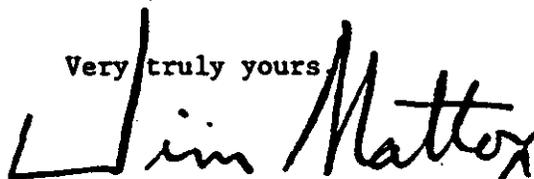
Your request stands on a different footing. Rather than a request for a formal Attorney General Opinion under article 4399, the request sought informal legal advice from the assistant attorney general who represents your agency. See V.T.C.S. art. 581-3 (attorney general to represent Securities Board in certain matters). We believe

that a state agency, as a client of the attorney general, article IV, section 22 of the Texas Constitution, has the right to invoke the attorney-client privilege to protect the contents of legal correspondence that it receives from the assistant attorney general who represents it. Since such correspondence is not sought under article 4399, the requestor cannot be said to have waived its right to attempt to assert the attorney-client privilege to protect it.

We therefore conclude that the attorney-client privilege may be invoked in this instance. In light of this conclusion, we need not address your claim under section 3(a)(11).

Having concluded that the attorney-client privilege may be invoked in this instance, we now consider the extent to which it applies. Both your letter and the letter sent to you by the person seeking this information indicate that at least some of the information contained in the assistant attorney general's response was made public in board meetings. We do not believe the attorney-client privilege may be invoked to protect from disclosure information which has already been voluntarily disclosed at a public meeting. Since we do not have all relevant details before us, we cannot determine the extent to which you have waived your right to assert the privilege in this instance. We therefore simply advise generally that any information contained in the requested letter and supplementary memoranda which has already been disclosed to the public, either in public board meetings or in some other manner, may not be withheld under the attorney-client privilege. Similarly, this information may not be withheld under section 3(a)(11), since voluntary disclosure of information removes that information from the ambit of this section as well.

Very truly yours



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