



The Attorney General of Texas

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Affirmative Action Employer

Ms. Alice Brown
Interim Superintendent
Round Rock Independent School
District
1311 Round Rock Avenue
Round Rock, Texas 78664

Open Records Decision No. 425

Re: Whether the names of applicants for Round Rock ISD superintendency are open records under section 7(a), article 6252-17a, V.T.C.S.

Dear Ms. Brown:

The Round Rock Independent School District [hereinafter "the district"] is seeking a new superintendent. It has engaged Harold Webb Associates of Evanston, Illinois [hereinafter "Webb"] to advertise for applicants, accept and screen applications, conduct interviews, and make recommendations to the school board. The editor of a local newspaper has asked the district to release the names, residences, and current occupations of applicants for this position, as well as the names of semifinalists and finalists. You have asked whether sections 3(a)(1) and 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., authorize the district to deny this request.

The threshold question is whether the requested information is within the Open Records Act. In his brief, the attorney for the district stated:

At the time the first request [for information] was made, [the district] had collected, assembled, or maintained no documents, writings, letters, memoranda or other written, printed, typed, copied or developed materials containing the names of applicants for superintendent. Such information was available only from the consulting firm in Evanston, Illinois.

Subsequent to receipt of the request by the board president, the consulting firm sent two documents to each individual school board member -- a List of the Applicants and a report on the Candidates Recommended for Interview. These individuals are the 'semifinalists.' These documents were sent to each board member at the board member's home address.

The report of Candidates Recommended has been discussed by the board in executive sessions. . . . Copies of this report remain, however, in the personal possession of each school board member. As of this date, there still are no documents, writings, letters, memoranda, or other written, printed, typed, copied or developed materials in the offices of the [district] containing the information requested.

The attorney argued that the requested information does not constitute "public records" under the act because it is not maintained by the district in its administrative offices and is not under the control of the district's custodian of public records.

Section 3(a) of the Open Records Act provides that "public information" means "[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business." "Public records" means "the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information." Sec. 2(2).

Information relating to the selection of a school superintendent is "official business" of the district. Under section 2(1)(D) of the act, moreover, "governmental body" expressly includes "the board of trustees of every school district." When this information was received by the trustees in their official capacity, it clearly became "information collected . . . by [a] governmental bod[y] . . . in connection with the transaction of official business" within the express terms of section 3(a) of the act. See Open Records Decision No. 332 (1982). It is now "information . . . maintained by [a] governmental bod[y]" within the meaning of that section.

To conclude that this information is not "public information" would wreak havoc on the act. If a governmental body could withhold information which clearly relates to "official business" on the ground that the information is maintained by the individual members of that body rather than in the body's administrative offices, it could easily and with impunity circumvent disclosure requirements. The legislature could not possibly have intended to allow governmental entities to escape from the act's disclosure requirements in this manner. Nor do we believe that the question of whether information is "public" can turn on whether it is physically controlled by the custodian of information of a governmental body. If that were so, governmental bodies could avoid the act simply by taking information out of the hands of the custodian and placing it elsewhere. We also note that the act's definition of "public information" does not refer to "custodians of information." Thus, whether a custodian has actual control of information can have no bearing on whether that information

is "public." In this instance, therefore, the information is "public" unless excepted under section 3(a).

We turn now to the issue of whether this information is within either section 3(a)(1) or section 3(a)(11). In his brief, the attorney advanced the following section 3(a)(1) argument:

A brochure prepared by the consulting firm was sent/made available to each applicant. The brochure stated, in part:

All application material received will be acknowledged and treated confidentially,

. . . .

Consultant Harold Webb reports that many applicants specifically relied on his promise of confidentiality and made application on the specific condition that their names not be disclosed. It was the specific understanding of these people that they would be permitted to withdraw from the process if for any reason disclosure was required.

. . . .

Our concern focuses on the fact that 93 of the applicants in this case come from outside of the state of Texas, and cannot be fairly charged with knowledge of Texas law. Moreover, the Illinois consultant working on the search was not aware of the previous interpretation of the . . . Open Records Act by the Attorney General in connection with this issue. In good faith, therefore, the consultant specifically promised confidentiality to the applicants in his brochure.

The question is simply this: Do previous interpretations of the Open Records Act by the Attorney General outweigh the reasonable expectations of confidentiality enjoyed by those who submitted applications for the job relying on the promise of confidentiality? Also, would a state privacy or state constitutional provision guaranteeing the right of privacy prohibit the disclosure of the name of an applicant enjoying the protection of the laws of such state? In other words, if an applicant resides in a state which guarantees him as a citizen of that state a right of privacy, either through constitutional or

statutory mandate, does that individual continue to enjoy that right of privacy in applying for a job in the state of Texas?

This argument contains several flaws. First, it is clear from the express terms of the Open Records Act itself that governmental bodies may not enter into agreements to keep information confidential, but may withhold only that information which is clearly within a section 3(a) exception. Sec. 3(a). A long line of open records decisions confirms this. See, e.g., Open Records Decision Nos. 283 (1981); 207 (1978); 133 (1976); 101, 55A (1975). The reason is obvious: to allow governmental bodies simply to decide to keep information confidential would be to allow them to emasculate the Open Records Act. A recent court of appeals decision, moreover, specifically holds that the names of applicants for an employment position with a governmental body are subject to disclosure under the act. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Thus, the law in this area has been settled for several years. In light of this, neither the district nor its agent, Webb, could validly promise to keep this information confidential. As for the argument that hinges on whether the applicants reside in states that have created some "right of privacy," it must be remembered that these applicants have voluntarily applied for a position with a governmental entity in Texas. Each applicant may be said, therefore, to have voluntarily subjected himself to Texas laws regulating the disclosure of information possessed by governmental bodies in this state. Even if a particular applicant enjoys some right of privacy in his state of residence that would prevent his name from being disclosed by a governmental body in that state -- and no evidence whatsoever has been introduced to show that this is true -- it can hardly be seriously argued that his state of residence has the power to control the use to be made by Texas governmental bodies of information in their possession.

For these reasons we reject your section 3(a)(1) argument. We now turn to your section 3(a)(11) claim.

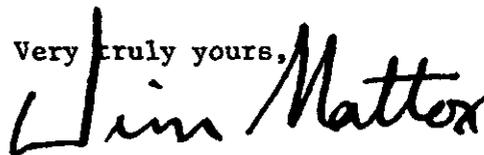
The board of trustees of the district possesses two lists of names. One contains the names of all applicants; the other contains the names of those applicants recommended as semifinalists. The latter may be withheld under section 3(a)(11), as the names of semifinalists constitute the "recommendation" of Webb, the district's consultant. See Open Records Decision Nos. 335 (1982); 293 (1981) (section 3(a)(11) applicable where information prepared by outside consultant); 273 (1981) (names of persons recommended by a search committee as finalists for position of university president are excepted under section 3(a)(11)). The attorney for the district, however, asserts that the list of applicants may also be withheld, arguing that

[s]ince the names of the top candidates themselves represent the advice and opinion of the school district's consultant, it is our belief that the memo is exempt from disclosure in its entirety.

We disagree. In his brief, the attorney for the district stated that one of the two lists sent to the board members was "a list of the applicants," which we interpret as indicating who has applied for this position. A list containing the names of all applicants for the position of superintendent does not reflect the consultant's "opinion" that these people applied for the position, or contain his "advice" or "recommendation" concerning these applicants. See, e.g., Open Records Decision No. 335 (1982) (section 3(a)(11) excepts advice, opinion, and recommendation). Instead, it reflects a simple fact: these individuals applied for the position in question. Section 3(a)(11) therefore does not apply to this list.

In summary, the district must release the names of applicants for the position of district superintendent. It may withhold, under section 3(a)(11), the names of semifinalists and finalists for that position as recommended by its consultant.

Very truly yours,



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