



The Attorney General of Texas

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Mr. Robert E. Luna
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Open Records Decision No. 435

Re: Whether section 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., permits the Lewisville Independent School District to withhold three internal memoranda

Dear Mr. Luna:

You have asked whether section 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., permits the Lewisville Independent School District to withhold three internal memoranda. To answer this question, we must resolve some threshold issues.

Our decision in this matter was not sought until several weeks after the district had rejected a written request for these memoranda. Even then, it was requested only after we had intervened on behalf of the requestor. Section 7(a) of the act provides:

If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

See Open Records Decision No. 319 (1982) (where decision not requested within ten days, information may be withheld only if "compelling" reasons for doing so are shown). You contend that the district was not obligated to seek our decision because these memoranda contain advice, opinion and recommendation, which are within section 3(a)(11). Stated differently, your argument is that no decision request was necessary because it had been "previous[ly] determin[ed]" that the

memoranda "[fall] within one of the exceptions" to the act. We disagree.

Section 7(a) can be fairly read as eliminating the need for a decision request only when the precise information at issue has been determined to be excepted from required disclosure. In City of Houston v. Houston Chronicle Publishing Company, 673 S.W.2d 316, 318 (Tex. App. - Houston [1st Dist.] 1984, no writ), for example, the court said that no decision from the attorney general was appropriate because the information at issue -- the police blotter and show-up sheets of the city police department -- had been held to be available to the public in Houston Chronicle Publishing Company v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976), and in Open Records Decision Nos. 127 (1976) and 333 (1982). In the court's words:

As we read section 7, it provides that the City may request a decision from the Attorney General only if (1) the City considers the information to be within one of the statutory exceptions to disclosure, and (2) there has been no previous determination as to the status of the information. The City was not entitled to withhold the requested information pending an Attorney General opinion in this case because the information requested had already been determined to be public [in Houston Chronicle and in Open Records Decision Nos. 127 and 333]. (Emphasis in original).

673 S.W.2d at 318-19. The upshot of these statements plainly is that our decision must be sought whenever the applicability of a particular exception to particular information has not already been determined. In this instance, although prior decisions have discussed the standard to be applied in section 3(a)(11) cases, see, e.g., Open Records Decision No. 331 (1982) ("advice, opinion and recommendation" may be withheld from inter- or intra-agency memoranda), the applicability of this standard to the content of these three memoranda has never been resolved.

We believe that this construction of section 7(a) is logically compelled. To allow a governmental body conclusively to determine how standards developed for open records decisions to apply to particular documents would enable it to function in two inconsistent legal roles -- those of advocate and judge. In its role as advocate, the entity could assert the applicability of a standard; then, in its role as judge, the entity could decide the validity of its claim. Its conclusion, moreover, would not be subject to review by this office, because unless a governmental body seeks our decision we will very

likely never hear of the matter. This is so even though the Open Records Act clearly contemplates that the attorney general shall independently and objectively review determinations by governmental bodies that particular exceptions apply to requested information.

In fact, this situation has occurred several times. We have received many letters from the public seeking our assistance in obtaining information denied them by governmental bodies on the basis of standards discussed in prior decisions. After obtaining the relevant details, we have often discovered that the governmental body incorrectly applied these standards. Had the requestor never brought the matter to our attention, we would never have been able to perform the independent-review function contemplated by the act. The requestor's only recourse would have been to seek a writ of mandamus under section 8 of the act.

We therefore conclude that, when either a court or this office has not already determined that standards for applying a particular exception in the Open Records Act embrace particular information, a governmental body seeking to withhold that information under that exception must request our decision as to whether it may do so. In this instance, the school district should have sought our decision concerning the applicability of section 3(a)(11). In our opinion, however, because no judicial decision or opinion of this office has heretofore clarified section 7(a), your claim that the district did not think it was obliged to seek our decision was made in good faith. In light of this, it would be inequitable to conclude that the district may now withhold these memoranda only if it can show "compelling" reasons for doing so. See Open Records Decision No. 319 (1982). Future requests brought under these circumstances will be resolved by applying the "compelling reason" standard; we shall resolve this request, however, by applying the usual section 3(a)(11) standard.

Section 3(a)(11) authorizes governmental bodies to withhold "advice, opinion and recommendation" in inter- or intra-agency memoranda. Open Records Decision No. 331 (1982). We have examined the three memoranda, and we conclude that, although portions may reasonably be characterized as advice, opinion and recommendation, quite a bit of the information does not fit in this category. Much is entirely factual in nature, consisting of statements concerning actions taken, decisions made, and instructions given about the matter at hand. We have marked the portions of the memoranda which constitute "advice, opinion and recommendation" and may therefore be withheld. The remainder of the memoranda must be released.

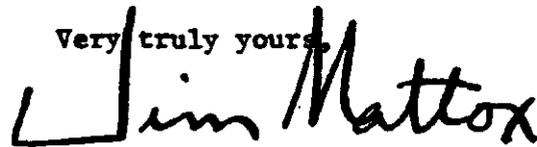
One final point needs attention. The person who requested these memoranda from the district contends that the information therein was

shared with her, her husband and another concerned parent at a particular meeting. You assert, however, that:

The school superintendent has not divulged the information in question to anyone, and he does not know of anyone who has divulged the said information. In her letter to you, [the requestor] alleges that the information was shared [as noted above]. If such information were divulged to them at that time, it was not authorized by the school district.

This office cannot resolve disputed questions of fact. We therefore cannot decide whether this information has been disclosed, but must assume that it has not been. If it has been publicly disclosed as alleged, the district may not now withhold it under section 3(a)(11). See Open Records Decision No. 400 (1983).

Very truly yours,



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