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Mr. John Wright
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Open Records Decision No. 439

Re: Whether section 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., embraces the names and backgrounds of candidates for governmental employment who are recommended by a search firm and the names of finalists for the employment position

Dear Mr. Wright:

A reporter has asked the board of trustees of the Grand Prairie Independent School District to release

[a]ll names, resumes, background information, and other pertinent information concerning the 15 individuals your search firm . . . identified for your consideration as superintendent of the . . . district. Further, we would like those four individuals identified who were named for interviews by the school board this week.

As attorneys for the school district, you have asked whether section 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S., embraces this information. That section excepts from disclosure

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.

In your request letter, you argued that

[t]he firm hired to conduct the search presented intra-agency memoranda 'recommending' possible candidates for the position of superintendent to the school board members and thus the contents of such memoranda are not discoverable by the public. . . . [The firm] utilized its opinion in recommending potential job candidates and did not merely act as a conduit for collection of job applications.

For the following reasons, we conclude that the board must release the requested information.

This office has held that the public is entitled to the names of and resume information about persons who apply directly to a governmental body to obtain employment. Open Records Decision Nos. 264 (1981); 257 (1980). We have also held that if a governmental entity engages a search committee to solicit and screen job applicants, the entity must disclose the names of all candidates reviewed by that committee. Open Records Decision No. 273 (1981), aff'd., in Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). On the other hand, we have said that governmental entities may withhold the names of finalists for an employment position. Id. We have never considered whether section 3(a)(11) applies when a search firm hired by a governmental body reviews a pool of job applicants and recommends that the entity consider only some of those applicants.

You have based your argument for withholding the information at issue here on decisions of this office holding that section 3(a)(11) excepts "recommendation" contained in intra-agency memoranda. See, e.g., Open Records Decision No. 331 (1982). We concede that this information qualifies as "recommendation." We conclude, however, that this does not resolve the section 3(a)(11) issue. In our judgment, the proper way to approach this issue is not to apply the term "recommendation" mechanically, but rather is to focus on the policies underlying both section 3(a)(11) and the Open Records Act as a whole. Our examination of these policies leads us to conclude that the act requires the disclosure of both the names and resume information about the candidates recommended by the search firm and the names of the finalists selected for interviews with the board.

Both a state court of appeals and this office have said that the purpose of section 3(a)(11) is

to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.

Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.), citing Open Records Decision No. 222 (1979). These decisions have implicitly recognized that, like that of its federal counterpart, 5 U.S.C. §552(b)(5), the premise underlying section 3(a)(11) is that

the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible.

Mead Data Central, Inc. v. U.S. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977). See Open Records Decision No. 251 (1980) (holding that section 3(a)(11) was designed to parallel federal exception). These authorities, however, do not stand for the proposition that anything that can be labelled "recommendation" may automatically be withheld from the public. On the contrary, as the court said in Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975), to be exempt from disclosure under the federal act

the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made.

And as the Vaughn court also noted, to interpret the term "deliberative process" expansively would be to

swallow up a substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of personnel policies in any given agency . . . the only final action which would be subject to public disclosure would be the action taken by the surveyed agency in the implementation of the recommendations of the commission.

Id. at 1145.

In our opinion, careful consideration of the policies discussed and the distinctions drawn by the Mead and Vaughn courts in applying the federal counterpart of section 3(a)(11) compels the conclusion that the arguments for withholding the information at issue here are weak. Agency officials clearly must be able to discuss the resume information regarding job applicants with some assurance of confidentiality if their discussions are to be "frank and open" and thus productive. But we fail to see how public disclosure of the names and backgrounds of the candidates being considered, as opposed to discussions of those candidates' attributes, would inhibit the free flow of discussion -- the essential "give-and-take" -- within the agency. The legitimate governmental interest is in protecting agency deliberations concerning job applicants, not the applicants' identities and backgrounds.

If the arguments for withholding this information are hardly compelling, those favoring its release are strong. As the court in the Hubert case, supra, observed,

the public is legitimately concerned with the names and qualifications of candidates for the presidencies of state universities. [Citation omitted]. The taxpayers of this state finance one of the larger systems of higher education in the country. That highly qualified and conscientious administrators are selected and entrusted to conduct the affairs of these institutions is a matter of legitimate public interest. . . . (Emphasis added).

652 S.W.2d at 551. The same can be said of candidates for the position of public school superintendent. And as the Hubert court also noted,

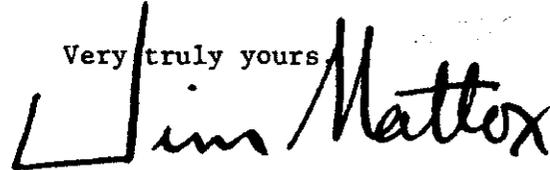
[sections] 1 and 14(d) of the Open Records Act command that the provisions of the Act are to be liberally construed to favor disclosure of public records. The practical effect of a statutory directive for liberal construction of an act is that close judgment calls are to be resolved in favor of the stated purpose of the legislation. . . . [A] liberal construction of the Open Records Act seems to compel disclosure of information, even when disclosure might cause inconvenience or embarrassment for some persons. (Emphasis added).

Id. at 551-52.

Our prior decisions have recognized that no section 3(a)(11) interest is infringed by the requirement that an agency disclose the names and resume information about individuals who apply directly to it for employment. See, e.g., Open Records Decision Nos. 264 (1981); 257 (1980). We do not see how any legitimate section 3(a)(11) interest suddenly arises when a governmental body receives a list of recommended candidates from a search firm rather than through direct applications. In neither instance will the release of the names and resume information about the individuals being considered impair the agency's ability to engage in "frank and open discussion . . . in connection with its decision-making processes." Austin v. City of San Antonio, supra, at 394. And to carry the analysis a step further, we do not see how the disclosure of the names of finalists for a governmental position would prevent the "give-and-take" that is so essential a part of the deliberative process leading to important agency decisions. Irrespective of the stage of the hiring process, to reveal the identities and backgrounds of individuals being considered for public employment is not to reveal anything about the agency's views concerning their possible merits as public employees.

When the policy arguments for and against disclosure of the names and resume information about both job applicants and finalists are balanced, we believe the conclusion readily follows that whatever minimal inhibiting effect on agency discussions might result from the disclosure of this information is vastly outweighed by the public interest in having access to it. The admonition in the Open Records Act that the act is to be liberally construed and the Hubert court's statement that close judgment calls are to be resolved in favor of openness are additional factors favoring disclosure of this information. We therefore conclude that section 3(a)(11) of the Open Records Act does not embrace the names and resume information about job applicants recommended to governmental bodies by search firms, nor does it apply to finalists considered for governmental employment. To the extent that Open Records Decision Nos. 425 (1985) and 273 (1981) hold that the names of finalists may be withheld, they are overruled.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, sweeping initial "J".

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