



**THE ATTORNEY GENERAL
OF TEXAS**

June 3, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Natividad "Nat" Lopez
Chairman
Board of Regents
Pan American University
1201 West University Drive
Edinburg, Texas 78539

Open Records Decision No. 464

Re: Whether evaluations of administrators of Pan American University are subject to required disclosure under the Open Records Act

Dear Mr. Lopez:

On behalf of Pan American University, you ask whether anonymous evaluations of certain university administrators are subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. The evaluations in question were made by university faculty members and consist of two types of questions. The first category of questions consists of 49 declarative statements to which the evaluator responds by choosing one of 6 letters: A (Strongly Agree), B (Agree), C (Undecided), D (Disagree), E (Strongly Disagree), or F (Insufficient Information). The second type of question requires the evaluator to respond with narrative statements to the following: "What are the primary strengths of this administrator?" and "What primary skills should this administrator develop to become a more effective administrator?" You indicate that the university is considering releasing to the public a statistical compilation of the responses to the 49 declarative statements. Your primary concern, however, is with a request from faculty members for copies of the narrative responses. Because your request letter equates release of this information to faculty members with release of the information to the public, the correctness of this assumption must also be addressed.

Under the Open Records Act, information is open unless it falls within one of the act's specific exceptions to disclosure. You assert that sections 3(a)(2) and 3(a)(11) protect these evaluations from disclosure. Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ." This section protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 441 (1986).

Under the Industrial Foundation case, information may be withheld on common-law privacy grounds only if it is highly intimate and embarrassing and is of no legitimate concern to the public. 540 S.W.2d at 685; cf. Open Records Decision No. 455 (1987). The disclosure of even highly subjective evaluations does not ordinarily constitute an invasion of privacy under section 3(a)(2). See Attorney General Opinion JM-36 (1983); Open Records Decision No. 167 (1977); see also Open Records Decision No. 34 (1974). Even if the narrative statements contain highly subjective comments that are intimate and embarrassing to the administrator under evaluation, they are not protected by section 3(a)(2) unless they are also of no legitimate interest to the public. The public certainly has an interest in the manner in which administrators at public universities perform their official duties. In Open Records Decision No. 224 (1979), this office indicated that individualized, handwritten student comments evaluating faculty members are excepted under section 3(a)(2). This decision mischaracterizes the purpose for section 3(a)(2) and the test applicable under section 3(a)(2) and is therefore expressly overruled. See Hubert v. Hart-Hanks, supra; Attorney General Opinion JM-36 (1983). Consequently, none of the responses in the evaluations you submitted may be withheld from disclosure under section 3(a)(2).

Section 3(a)(11) presents a closer case. Section 3(a)(11) protects from required public 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." This language appears to except information which would be available through discovery in litigation. As will be seen in the following discussion, however, the exception has the opposite effect -- it protects information which is protected from discovery. Section 3(a)(11) was patterned after a similar exemption, subsection (b)(5), of the federal Freedom of Information Act, 5 U.S.C. section 552. Attorney General Opinion H-436 (1974); Open Records Decision No. 251 (1980). Cases decided under the federal exemption are therefore instructive in determining the scope of section 3(a)(11). Attorney General Opinion H-436. The federal exemption extends protection to information that would be privileged from discovery in litigation. Federal Trade Commission v. Grolier, Inc., 462 U.S. 19 (1983). Thus, despite the use of the confusing phrase "other than," section 3(a)(11) was intended to protect information of the type that is privileged from discovery in litigation. See Attorney General Opinion H-436.

Although the federal "discovery" exemption encompasses the attorney-client privilege and the attorney work-product doctrine, the primary focus of exemption 5 is on the "deliberative process" or "executive" privilege. See National Labor Relations Board v. Sears, Roebuck and Co., 421 U.S. 132 (1975). Exemption 5 of the federal act was designed to protect from required public disclosure advice and opinion on policy matters in order to encourage open and frank discussion in the deliberative process of administrative agencies. As indicated in the legislative analysis to exemption 5:

[I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of the Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). These statements also reflect the purpose for exception 3(a)(11) of the Texas act. See Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436; Open Records Decision Nos. 429 (1985); 209 (1978).

Application of section 3(a)(11) by this office to particular information resulted in the formulation of several "tests." For example, section 3(a)(11) excepts only advice, opinion, and recommendation. Attorney General Opinion JM-36 (1983). Section 3(a)(11) protection is not as broad as discovery protection. For example, facts and written observations of facts and events cannot be withheld under section 3(a)(11). Open Records Decision Nos. 450 (1986); 308 (1982). The fact that information does not constitute "fact," however, does not mean that it falls automatically within section 3(a)(11). See Open Records Decision Nos. 429 (1985); 213 (1978). In Open Records Decision No. 213, this office noted:

It is frequently not possible to draw a reasonable distinction between 'fact' and 'opinion,' since every fact is necessarily viewed through the medium of a human observer, and every opinion presumably reflects the speaker's view of the truth. . . . [A] more appropriate and viable distinction is that between evaluation and recommendation, for it is the latter that is more directly related to the decisional process. (Emphasis added).

A distinction between "evaluation" and "recommendation" alone, however, too easily results in a semantic maze. A more viable approach focuses on whether the advice, opinion, or recommendation actually plays a role in the decisional process. For example, in Open Records Decision No. 429, this office indicated that information protected by section 3(a)(11) must be prepared by a person or entity with an official reason or duty to provide the information in question. See also Open Records Decision Nos. 283, 273 (1981). This test assures that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 3(a)(11). This approach is in line with federal decisions under the analogous federal exemption. See, e.g., Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975); Ryan v. Department of Justice,

617 F.2d 781 (D.C. Cir. 1980); Wu v. National Endowment for the Humanities, 460 F.2d 1030 (5th Cir.), cert. denied, 410 U.S. 926 (1972); Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977). Consequently, whether specific information falls within section 3(a)(11) depends on the circumstances surrounding the creation or collection of the information.

The evaluations of university administrators in question here were prepared by university faculty members pursuant to a university policy requiring periodic evaluations of university administrators. In Open Records Decision No. 273, this office indicated that the recommendations of a search advisory committee appointed by the chairman of a state university's board of regents regarding the position of president of the university fell within section 3(a)(11). But see Open Records Decision No. 439 (1986) (section 3(a)(11) does not embrace the names of finalists competing for an employment position). In Open Records Decision No. 239 (1980), this office determined that a college president's recommendations to the board of regents regarding faculty tenure are excepted from disclosure by section 3(a)(11). In Attorney General Opinion JM-36 (1983), this office indicated that section 3(a)(11) protects individualized student evaluations of faculty members. Consequently, evaluations of university administrators, made by university faculty members pursuant to a university policy calling for such evaluations, meet the threshold test for protection under section 3(a)(11).

As indicated, the anonymous evaluations at issue here may be divided into two categories: declarative statements with a letter answer and narrative statements. You indicate that the university is considering releasing to the public a statistical compilation of the responses to the declarative statements. In Open Records Decision No. 209 (1978), this office considered an evaluation consisting of a series of questions asking employees to indicate whether they agreed, disagreed, or had no opinion about statements reflecting job attitudes. The decision determined that a final compilation of the results of this survey could not be withheld under section 3(a)(11). See also Open Records Decision Nos. 206, 197 (1978). The conclusion in Open Records Decision No. 209 rested on the fact that the compiled results of the survey were not a part of the decisional process. Consequently, if Pan American University has compiled a survey of the responses to the declarative statements on the evaluation in question, it must release that compilation. On the other hand, if the university has not in fact created the survey, it need not do so. The Open Records Act does not require a governmental body to create new information. Attorney General Opinion JM-672 (1987); Open Records Decision No. 452 (1986).

For similar reasons, the declarative statements with a letter response (questions 1 through 49) must also be released. Although these responses may reflect the subjective opinion of the evaluator, their release will not impair the deliberative process at the

university because the questions are anonymous. As indicated, the purpose of exception 3(a)(11) is to encourage open and frank discussion in the deliberative process. Information may therefore be withheld under section 3(a)(11) if release of the information would impair the government's ability to obtain the information in the future. See Wu v. National Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir.), cert. denied, 410 U.S. 926 (1972); see also Brockway v. United States Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975); Machin v. Zuckert, 316 F.2d 336 (D. C. Cir.), cert. denied, 375 U.S. 896 (1963). Release of anonymous standardized responses will not reveal the identity of the evaluator and, therefore, will not prevent evaluators from providing similar opinions in the future. Consequently, you must release the standardized responses to questions 1 through 49.

The narrative responses to questions 50 and 51 present a different question. Because release of these responses could identify the individuals making the evaluations and recommendations, these responses may be withheld under section 3(a)(11). Although the narrative responses are anonymous, releasing them could reveal the identity of the evaluators. For example, some of the evaluations are handwritten and some criticize attitudes which may apply only to some faculty members. Because the release of these evaluations could impair the university's ability to obtain the same degree of openness on evaluations in the future, they may be withheld under section 3(a)(11).

This does not mean, however, that the university may rely on exception 3(a)(11) in withholding the narrative evaluations from the faculty senate and faculty members. A government body cannot make "selective disclosure" under the Open Records Act; if information does not fall within a specific exception, it must be disclosed to any person who requests it. Open Records Decision No. 463 (1987); see art. 6252-17a, §14(a); Open Records Decision No. 192 (1978). If information protected by section 3(a)(11) is released to one member of the public, it must be released to all -- the exception is waived. Nevertheless, distributing evaluations made by university faculty members among university faculty members is not necessarily the equivalent of distributing the information to the public. Transferring information from one government agency to another does not destroy the protected character of the information so long as each agency is authorized to have the information. See Open Records Decision No. 272 (1981); Attorney General Opinion H-917 (1976). This rationale dictates the conclusion that information may be similarly transferred within a given entity without losing its protected status with respect to the general public.

The Faculty Senate of Pan American University submitted to this office a letter which asserts that the Faculty Senate is entitled to copies of the surveys in question. The letter cites various university policies in support of its contention. This question is

not, however, governed by the Open Records Act. The act does not grant special rights of access. See Open Records Decision Nos. 450 (1986); 288 (1981). Consequently, an open records decision rendered by this office pursuant to section 7 of article 6252-17a cannot address whether faculty members have a right to see the information in question. It is clear, however, that the act does not prohibit the university from releasing the narrative responses to questions 50 and 51 to faculty members if the faculty members are otherwise authorized to have the information.

S U M M A R Y

Section 3(a)(2) of the Texas Open Records Act, article 6252-17a, V.T.C.S., does not protect from public disclosure evaluations of public university administrators made by university faculty members unless the evaluations are highly intimate and embarrassing and are of no legitimate interest to the public. The public has an interest in the manner in which public university administrators perform their official duties.

Anonymous evaluations consisting of statements requiring a standardized response may not be withheld under section 3(a) (11) of the Open Records Act. Anonymous individualized narrative evaluations which could identify the evaluator, however, may be withheld under section 3(a)(11).

The transfer of evaluations of university administrators that are made by university faculty members to faculty members who are authorized to have the information does not waive the protected status of that information under the Open Records Act. The Open Records Act does not, however, govern any special rights of access which may apply to university faculty members.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

JACK HIGHTOWER
First Assistant Attorney General

MAKY KELLER
Executive Assistant Attorney General

Mr. Natividad "Nat" Lopez - Page 7

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by Jennifer Riggs
Assistant Attorney General