



**THE ATTORNEY GENERAL
OF TEXAS**

July 8, 1987

**JIM MATTOX
ATTORNEY GENERAL**

THIS OPINION
OVERRULES OPINION

NO. ORO-454

IN PART

Mr. Paul Bibler, Jr.
Senior Assistant City Attorney
P. O. Box 1562
Houston, Texas 77251

Open Records Decision No. 468

Re: Whether personnel information compiled prior to the effective date of the Open Records Act, article 6252-17a, V.T.C.S., is subject to disclosure under that statute

Dear Mr. Bibler:

The city of Houston personnel department has received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for all files concerning an individual's service as a city of Houston police officer from 1945 to 1964. The individual is now a Harris County constable.

You have made portions of the records available to the requestor. You wish to withhold evaluations of the employee's performance and information regarding allegations of misconduct by the police officer.

You argue that the employee evaluations are excepted from public disclosure by section 3(a)(11) of the Open Records Act, which applies to

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 provision allows you to withhold from public disclosure the advice, opinion, and recommendations that play a role in the deliberative process. Advice, opinion, and recommendations recorded in a performance evaluation of an employee are protected from public disclosure if they are used in the deliberative process. Open Records Decision Nos. 464 (1987); 450 (1986); 354 (1982); 168 (1977).

The evaluations were recorded on two forms, one designated "Report of Employee Performance Rating" and one designated "Service Rating." The Reports of Employee Performance Rating list five factors or elements to be evaluated, such as "Quality of Work," and "Safety

Mindedness." The employee's immediate supervisor is to evaluate each factor by checking one of five boxes signifying ratings from outstanding to unsatisfactory. Suggestions for the employee's improvement may be included. The supervising officer must give a basis for each "Unsatisfactory" or "Outstanding" rating. The rating is reviewed by a higher superior officer, and approved by the department head who assigns a brief verbal rating and totals up points assigned to individual evaluation items to give an overall numerical score used by the civil service commission in promotion decisions. See generally V.T.C.S. art. 1269m. The reports show the dates that they were furnished to the civil service and to the employee.

The reports show on their face that they were used in the deliberative process. They are evaluations of the employee by his superiors, made for the civil service commission to use in promotion decisions.

Except for the signatures of the evaluators and the dates of the evaluations, information on the reports consists almost entirely of opinion and recommendation. A few factual statements are made to support a rating of "outstanding" or "unsatisfactory." Factual statements are not protected by section 3(a)(11). However, a reading of these factual statements reveals whether they support scores of "outstanding" or "unsatisfactory." These factual statements cannot be separated from the opinion, advice, and recommendation in the reports; accordingly, the information about the former peace officer found in these reports may be withheld in its entirety.

The second form, the Service Rating, was used in 1945 through 1947. It lists 20 categories, for example, "Attitude towards his job" and "Judgment." The employee and the evaluator checked one of five rankings, ranging from superior to unsatisfactory, for each category. There is a place for the evaluator's handwritten remarks, and a list of six items, such as "Has unusual intelligence," and "Should be transferred" which the evaluator was to check if applicable to the employee. The evaluator gave an overall rating. The police chief reviewed the form and indicated whether the person who did the evaluation was "very liberal," "slightly liberal," "exactly right," or "conservative." The form is addressed to the civil service.

The "service rating" is protected from public disclosure by section 3(a)(11) of the Open Records Act, for the same reasons already applied to the "Report of Employee Performance Rating."

It is suggested that these evaluations would be open to the public if the individual evaluated in them had been allowed to inspect them. This suggestion is based on the following provision of the Open Records Act:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

V.T.C.S. art. 6252-17a, §14(a).

This policy that records are open to the general public is consistent with the philosophy of the Open Records Act. See V.T.C.S. art. 6252-17a, §1. Prior to June 14, 1973, the effective date of the Open Records Act, governmental bodies had considerable discretion to determine who could see their records. Open Records Decision No. 55A (1975); see also Palacios v. Corbett, 172 S.W. 777 (Tex. Civ. App. - San Antonio 1915, writ ref'd w.o.m.) (common law right to inspect county financial records to discover a misapplication of funds); Attorney General Opinion V-681 (1948) (common law right to inspect records is a qualified right, enforceable by writ of mandamus). Section 14(a) of the Open Records Act states a duty to which governmental bodies have been subject since June 14, 1973. We question whether the voluntary disclosure of information to an individual in 1963 or 1953 would make that record forever after available to the general public. A different issue would arise if a governmental body had regarded employee evaluations as "open to the public" on the effective date of the Open Records Act. See V.T.C.S. art. 6252-17a, §6(15); Houston Chronicle Publishing Co. 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).

Moreover, section 14(a) applies only to a governmental body "voluntarily making part or all of its records available to the public." An employee of an agency whose job requires or permits certain access to records has not been granted access to those records as a member of the public. It is well established that information not required to be disclosed to the public under the Open Records Act may be transferred between state agencies without destroying its confidential character. Attorney General Opinion Nos. H-683 (1975); H-242 (1974). Public information remains public when transferred from the originating agency to the State Archives. Attorney General Opinion H-917 (1976). See also Open Records Decision No. 272 (1981). Similarly, an agency's employees have access to certain agency records in their role as employees, and not as members of the public. A governmental body may have a policy of showing employees their evaluations without thereby "voluntarily making . . . records available to the public. . . ." V.T.C.S. art. 6252-17a, §14(a). Members of the public need not state any reason for their access to public records. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 674 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The governing body of an agency must, in

contrast, have reasons for allowing an employee to see particular agency records, including his own evaluations. If an agency has a reasonable policy or practice of letting its employees see their evaluations, it will not thereby make them available to "any person" pursuant to section 14(a) of the Open Records Act. Open Records Decision No. 464 (1987).

There is evidence that the employee in question saw some of his evaluations, but they are not for that reason removed from the protection of section 3(a)(11). Although an employee has no special right of access to his evaluations, Open Records Decision Nos. 332, 330 (1982), the agency may permit him to examine them in his role as employee without making them available to the general public. See Open Records Decision No. 464. Open Records Decision No. 454 (1986), concluded that a police department "involuntarily" released an investigative report to the officer under investigation. This decision implies that the department released the report "to the public" when it allowed its employee to see them. We did not follow this implication of Open Records Decision No. 454 in Open Records Decision No. 464 and we will not follow it in future constructions of section 14(a) of the Open Records Act. Open Records Decision No. 454 is overruled to the extent its construction of section 14(a) differs from the construction relied upon in this opinion.

The documents you have submitted include reports of internal investigations of three allegations of police misconduct. The investigations took place in 1949, 1950, and 1952. The 1949 investigation resulted in a three-day suspension, the 1950 investigation was eventually closed as unfounded, and the file does not disclose any disposition of the 1952 investigation. You argue that the 1950 and 1952 investigations should be withheld pursuant to the doctrine of false light privacy. You suggest that some documents are excepted from public disclosure by section 3(a)(11). You also argue that statements taken and disciplinary letters issued on an understanding of confidentiality prior to the adoption of article 6252-17a, V.T.C.S., should be excepted from public disclosure in accordance with Open Records Decision No. 284 (1981). We will address this argument first.

Open Records Decision No. 284 dealt with letters of reference about a high school administrator which were written in 1963 and furnished the school district pursuant to a promise of confidentiality. The decision stated as follows:

1. You have not raised any argument under section 3(a)(8), and consequently, we do not consider any issue thereunder.

This office has held that evaluations obtained in exchange for agreements of confidentiality made prior to June 14, 1973, the effective date of the Open Records Act, may be honored in order to avoid the constitutional prohibition against impairment of the obligation of contracts. Open Records Decision Nos. 64, 55A (1975). Accordingly, those letters may be withheld from disclosure.

Open Records Decision No. 284 (1981). Open Records Decision Nos. 55A and 64 concerned letters of recommendation and evaluations made pursuant to a written promise of confidentiality prior to the effective date of the Open Records Act.

The Texas Supreme Court has determined that the Open Records Act is intended to apply to all records kept by governmental bodies, whether acquired before or after the effective date. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In discussing an administrative rule which attempts to make workmen's compensation claims confidential, the court said that

we do not believe that information should be excepted from disclosure merely because the individual furnishing such information did so with the expectation that access to the information would be restricted. The Legislature has not, by determining that the government information formerly kept confidential should be disclosed, impaired any vested right of a claimant to the confidentiality of the information. (Footnote omitted).

540 S.W.2d at 677. In a footnote to the quoted passage, the Supreme Court expressly reserved its opinion on the correctness of Open Records Decision No. 55A and distinguished it from the case before it, because the Industrial Accident Board made no express contract of confidentiality to induce claimants to provide information. Id. n. 15.

Applying the standard stated by the Supreme Court to your request, statements taken and letters issued pursuant to an express promise of confidentiality before June 14, 1973, may be excepted from public disclosure pursuant to Open Records Decision No. 55A. However, statements given and letters written with only an expectation of confidentiality are not excepted from public disclosure.

The 1949 misconduct investigation is reported on pages 222 through 244 of the material you submitted. The final disposition of

the complaint, as reflected in the letter on page 222, is required to be disclosed. See Open Records Decision Nos. 329 (1982); 208 (1978). You believe that the communication from three police officers to the chief of police on pages 223 and 224 is excepted from public disclosure by section 3(a)(11). This document consists primarily of opinion, advice, and recommendation used in the deliberative process. The paragraphs of the document excepted from public disclosure by section 3(a)(11) are marked on the copies you sent.

The rest of the file on the 1949 investigation consists of affidavits by witnesses to the infraction. The only argument you raise as to these affidavits is that they were given under an understanding of confidentiality. Nothing in the materials themselves indicates that the police department made any express contract of confidentiality to induce witnesses to provide information. Your letter claims only that there was an understanding of confidentiality. The affidavits are not excepted from the Open Records Act by a vested contract right. You make no other argument that they are confidential. Accordingly, they are subject to public disclosure.

The 1950 investigation comprises pages 198 through 216. The name of the complainant is open to the public. Open Records Decision Nos. 329 (1982); 208 (1978). The investigation arose out of the complainant's arrest for refusing to show his identification when he was ticketed for jaywalking. The complainant's attorney wrote to the Civil Service Commission, relating the complainant's allegations of police misconduct and requesting an investigation. The police department began an investigation but was unable to locate the complainant at his home address or through his attorney. He apparently left the city without leaving a forwarding address. The investigation was eventually closed as unfounded.

You believe that this investigative report should be excepted from public disclosure by the "false light privacy" doctrine incorporated into sections 3(a)(1) and 3(a)(2) of the Open Records Act. This office has said that

a governmental body may withhold information on the basis of false light privacy, only if it finds, based upon the weight of evidence demonstrable to this office, that there is serious doubt about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal.

Open Records Decision No. 372 (1983), see also Open Records Decision No. 438 (1986). A portion of the attorney's letter to the Civil Service Commission may be withheld on the basis of false light

privacy. Other evidence in the file casts serious doubt on this information. Disclosure of the information would be highly offensive to a reasonable person and the public interest in disclosure is minimal. We have marked the material which is excepted from public disclosure by the doctrine of false light privacy. The rest of the information in the 1950 investigative file is open to the public.

Pages 174 through 182 relate to an investigation of an alleged incident of misconduct in 1952. You state that page 174 is excepted from public disclosure by section 3(a)(11) of the Open Records Act. This document is a letter written by a police officer involved in the investigation and sent to the police chief, evaluating the matter and recommending a disposition. Much of this letter is excepted from public disclosure by section 3(a)(11), and we have marked these portions accordingly.

The remaining pages in the 1952 report consist of statements from the complainant and other witnesses regarding the facts of the incident. You point out that the file does not state what decision, if any, the Chief of Police made about disposition of this matter. In view of the absence of a disposition, and in view of the age of this file which makes verification of the complaint exceedingly difficult, you argue that it is protected from public disclosure by the doctrine of false light privacy.

The information in the file does not cast doubt on the complainant's allegations. These records may not be withheld on the basis of false light privacy. You also suggest that there would be an unwarranted invasion of the subject officer's privacy under section 3(a)(2) of the Open Records Act if the witness statements were released. Section 3(a)(2) prohibits the release of information (1) which contains highly intimate or embarrassing facts, which, if publicized, would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). The facts in this file do not meet the first branch of the test for employee privacy under section 3(a)(2). The information does not contain highly intimate or embarrassing facts, the disclosure of which would be highly objectionable to a reasonable person. The investigation concerns a dispute which arose out of routine law enforcement work on a single car accident. The affidavits are not excepted from public disclosure by a right of privacy under section 3(a)(2). Accordingly, they must be released in their entirety.

S U M M A R Y

The Open Records Act applies to information compiled by governmental bodies before the June 14, 1973 effective date of the act. Statements

taken and letters written to a governmental body pursuant to an express contract of confidentiality made prior to the effective date of the act are excepted from public disclosure by constitutional protections accorded a vested contract right. When a governmental body allows an employee to see his evaluations pursuant to a reasonable policy or practice, it does not show them to a member of the public under section 14(a) of article 6252-17a. A governmental body may allow an employee to view his evaluations without thereby making them available to the public.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style.

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

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by Susan L. Garrison
Assistant Attorney General