



**THE ATTORNEY GENERAL  
OF TEXAS**

July 13, 1987

**JIM MATTOX  
ATTORNEY GENERAL**

Mr. James R. Raup  
McGinnis, Lochridge & Kilgore  
1300 Capitol Center  
919 Congress Avenue  
Austin, Texas 78701

Open Records Decision No. 470

Re: Availability under the Open  
Records Act, article 6252-17a,  
V.T.C.S., of information regarding  
the job performance of the princi-  
pal of Crockett High School

Dear Mr. Raup:

The Austin Independent School District received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information regarding the job performance of the principal of Crockett High School. As attorney for the district, you submitted copies of the information in question to this office for review pursuant to section 7 of the act. The district created a review committee to conduct an investigation of conflicts between the principal and staff. During this investigation, the committee interviewed numerous witnesses, including the principal, and received numerous documents from the witnesses. The committee prepared a summary of the witnesses' testimony and a final report of findings and recommendations for the superintendent of the school district. Additionally, the district's Department of Internal Audit conducted an audit of various Crockett High School funds. The district received a request under the Open Records Act for (1) the committee's report, (2) summaries of the witnesses' testimony, (3) all documents received by the committee, and (4) audits of Crockett High School funds and of the funds of certain other secondary schools within the Austin Independent School District.

You emphasize in several letters submitted in connection with your request that the district is committed to compliance with the Open Records Act and wishes to release all information that may be released under the act. The district's primary concern is with avoiding threatened litigation for the release of information that may implicate the privacy interests of the principal or of any other persons involved in the controversy. You received a "release from liability" from the principal's attorney regarding the release of the audits, audit working papers, and any testimony related to the use of high school funds. Consequently, you narrowed your request for a decision from this office to exclude consideration of the fourth category of information, and the portions of the other three categories that relate to the use of high school funds. You are

concerned, however, about the effect of this "release" under the Open Records Act.

Under the Open Records Act, all information held as described in section 3(a) by a governmental body must be released unless the information falls within one of the act's specific exceptions to disclosure. You suggest that sections 3(a)(1), 3(a)(11), and 3(a)(14) may apply to certain parts of the records in question. As indicated, your primary concern is with information that may not be disclosed legally under the act.

In this regard, section 3(a)(1) differs in several respects from the other exceptions set forth in the act. Section 3(a)(1) protects "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Section 10(a) of the act states: "Information deemed confidential under the terms of this Act shall not be distributed." Section 10(e) makes violation of this section a misdemeanor and official misconduct. In contrast, section 3(c) provides: "The custodian of the records may in any instance within his discretion make public any information contained within Section 3, Subsection (a)6, 9, 11, and 15." See also sec. 14(a). Although other exceptions in section 3 protect information that may be deemed confidential, see secs. 3(a)(2), 3(a)(3), 3(a)(7), 3(a)(10), 3(a)(14), 3(a)(17), 3(a)(18), section 3(a)(1) is the primary confidentiality provision. All of the information protected by other sections with some confidentiality aspect is also protected by section 3(a)(1). Because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor, the attorney general will raise section 3(a)(1) on behalf of governmental bodies. The attorney general will not ordinarily raise other exceptions that might apply but that the governmental body has failed to claim. See Open Records Decision Nos. 455 (1987); 325 (1982). Accordingly, the district may release, in its discretion, information protected by section 3(a)(11). It may not release information protected by sections 3(a)(1) and 3(a)(14).

You received a release from liability for the release of the audits, audit working papers, and any other information related to the use of high school funds. You express concern about the effect of such a release under the Open Records Act. Neither the decisions of this office nor reported court cases have addressed whether a release of liability for the public disclosure of information deemed confidential under the Open Records Act is effective either to prevent prosecution under section 10(e) of the act or to operate as an affirmative defense to prosecution. A review of the audits, the audit working papers, and other fund-related information, however, reveals that this question is moot in the instant request because the audits and associated documents contain no information that may be deemed confidential under section 3(a)(1). See generally Open Records Decision No. 230 (1979). Although the audits do contain information that may be protected by section 3(a)(11), the district can waive this

section. Consequently, this opinion does not address the effect of a "release" of liability under the Open Records Act or the availability of the audits under section 3(a)(11) of the act.

You maintain your request with regard to (1) the committee's report, (2) summaries of the witnesses' testimony, and (3) all documents received from witnesses by the committee. As indicated, you suggest that sections 3(a)(1), 3(a)(11), and 3(a)(14) apply to some of this information.

#### Section 3(a)(14) protects

student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, that student's parent, legal guardian, or spouse or a person conducting a child abuse investigation required by Section 34.05, Family Code.

See also art. 6252-17a, §14(e) (incorporating the protection of the federal Family Educational Rights and Privacy Act of 1974). Some of the information contained in the summaries of the witnesses' testimony and in documents submitted by the witnesses identifies specific incidents involving named students and is protected by section 3(a)(14). See Open Records Decision Nos. 447 (1986); 205 (1978). The information protected by section 3(a)(14) has been marked in the documents submitted for review.

Section 3(a)(1) protects "information deemed confidential by law," including statutory confidentiality, common-law privacy, and constitutional privacy. The only statute that could be implicated here relates to student records. See art. 6252-17a, §§3(a)(14), 14(e). The information protected as student records under the act has been marked as indicated under the preceding discussion of section 3(a)(14).

Section 3(a)(1) also protects "information made confidential" by common-law privacy and constitutional privacy. Texas courts recognize four categories of common-law privacy: (1) appropriation (commercial exploitation of the property value of one's name or likeness), (2) intrusion (invasion of one's physical solitude or seclusion), (3) public disclosure of private facts, and (4) false light in the public eye (a theory analogous to defamation). The last two of these are the only two ordinarily implicated under the Open Records Act. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The Texas Supreme Court set forth the primary test for "the public disclosure of private facts" privacy protection applicable under section 3(a)(1). Id. Information may be withheld under this test

only if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. See 540 S.W.2d at 683-85.

Your concern is that the information in question contains allegations against the principal that trigger these privacy interests. All three types of information at issue here -- (1) the final report, (2) the witnesses' statements, and (3) documents submitted by witnesses -- contain highly subjective opinions, both "good" and "bad," about the principal. Even if these records contain highly subjective comments that are embarrassing to the principal, they are not protected by section 3(a)(1) unless the comments contain intimate or embarrassing facts about a person's private affairs. A public employee's job performance does not generally constitute private affairs. See Open Records Decision No. 464 (1987). Moreover, even if these records contain highly intimate facts about the principal's private affairs, section 3(a)(1) does not apply unless the records are also of no legitimate interest to the public. Id. As indicated, common-law privacy requires satisfaction of both parts of the test. Id. The public has a legitimate interest in the job qualifications and performance of public employees. See Open Records Decision No. 464 (1987); see also Open Records Decision No. 441 (1986) (names of school district personnel who have not passed the TECAT examination may not be withheld).

You also suggest that some of the witnesses who testified would be "surprised and dismayed" to find that their statements may not be deemed confidential. Section 3(a)(1) has been applied to protect an "informer's privilege." See, e.g., Open Records Decision Nos. 355 (1982); 279 (1981). The purpose for this "privilege" is to encourage persons to report possible criminal misconduct by assuring that their identity will not be disclosed, and therefore, that retaliation will be prevented. Open Records Decision No. 279. In the instant case, the records reveal on their face that witnesses knew that their identities would not be protected, that everything they said would be "on the record." Although it is not clear whether this meant "on the public record," the witnesses knew that their statements would be available to the person from whom they might fear retaliation.

On the other hand, there are a few statements made by witnesses in these records that reveal information that is protected by common-law privacy. For example, the fact that an employee broke out in hives as a result of severe emotional job-related stress is a highly intimate fact the public release of which would probably be objectionable to a reasonable person. It is also of no legitimate public concern. Although the fact that a public employee is sick is public, see Open Records Decision No. 336 (1982), specific information about illnesses is excepted from disclosure under section 3(a)(1). See Open Records Decision No. 262 (1980). The portions of the records

you submitted that contain information that may be withheld on this basis under section 3(a)(1) are marked accordingly.

A governmental body may also withhold information under section 3(a)(1) on the basis of "false light" privacy. "False light" privacy applies when the information is scurrilous, when release of the information would be highly offensive to a reasonable person, when the public interest in disclosure is minimal, and when the governmental body has serious doubts about the truth of the information. See Open Records Decision No. 438 (1986). These records contain some unpleasant allegations with words such as "harassment" and name-calling such as "liar." Most of the testimony and supporting documents, however, simply recount the witnesses' observations of specific events, how these events affected the witnesses and other persons, and the witnesses' personal opinions about the events and about the principal. Some of the statements may suggest that the principal violated certain state and school district policies and requirements. Most of the witnesses, however, simply stated their subjective opinions and evaluations of the principal's job performance and personality. It is doubtful whether any of these records contain "scurrilous" information. See Open Records Decision No. 438 (1986). Moreover, even if this information were deemed "scurrilous" such that its release would be highly offensive to a reasonable person, it is of more than minimal interest to the public. See *id.* The public has a legitimate interest in knowing about serious job-related conflicts between a high school principal and her faculty and staff.

Additionally, to place someone in a "false light," the information about that person must be false. The number of similar complaints militates against the falsity of the information. The final report of the committee does not indicate that the school district believes these complaints are "false." Moreover, most of the testimony is admittedly opinion about the principal's personality and management style; opinion is not subject to a label of "true" or "false." The real objection here is not with what the Open Records Act requires or allows to be disclosed but with what the media does with the information: "bad" things are news, "good" things are not. The records at issue here contain both "good" and "bad" evaluations. The fact that the media may present only one side of a story, thereby creating a false impression, does not, however, mean that a governmental body commits a tort based upon "false light" privacy. In releasing these records, the school district would not be disclosing "information that might place persons in a false light . . . in reckless disregard of its truth." See Open Records Decision Nos. 438 (1986); 372 (1983).

The Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, *supra*, recognized that section 3(a)(1) protects constitutional privacy as well as common-law privacy theories. Like common-law privacy, the constitutional privacy protected by section 3(a)(1) has several different aspects. The

Industrial Foundation court indicated that constitutional privacy protects information within the "zones of privacy" described by the United States Supreme Court in Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and the rearing and education of children. None of these "zones" are applicable to the statements about the principal. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in avoiding disclosure of personal matters. The first interest applies to the traditional "zones of privacy." The second interest, in non-disclosure or confidentiality, is somewhat broader. Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). In other words, information need not necessarily fall into one of the "zones of privacy" to be protected by constitutional privacy principles. The constitutional privacy test balances the personal, intimate nature of the information with the public interest in disclosure. Open Records Decision No. 455 (1987). As indicated under the discussion of common-law privacy, only small portions of these records contain highly personal information. Consequently, constitutional privacy does not allow withholding any information in addition to the information already marked.

You also suggest that section 3(a)(11) protects at least the committee report. Section 3(a)(11) protects "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." Section 3(a)(11) protects information of the type that is privileged from discovery in litigation. Attorney General Opinion H-436 (1974). The exception was designed to protect advice and opinion on policy matters in order to encourage open and frank discussion in the deliberative process of governmental bodies. 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. 464 (1987); 429 (1985); 209 (1978).

Several factors must be considered under section 3(a)(11). For example, section 3(a)(11) excepts only advice, opinion, and recommendation -- not facts or written observations of fact. See Open Records Decision No. 450 (1986). Advice, opinion, and recommendation may 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. Open Records Decision No. 464. Additionally, in Open Records Decision No. 429, this office indicated that such information, when submitted from outside sources, is protected by section 3(a)(11) only when it is prepared by a person or entity with an official reason or duty to provide the information in question. The ultimate test to which these factors are directed is whether the advice, opinion, or recommendation was designed or intended to play a role in the decision-making process. See Open Records Decision No. 464. Accordingly, the circumstances surrounding the creation or collection

of specific information determine whether the information falls within section 3(a)(11).

The whole committee report clearly falls within section 3(a)(11). It consists of the advice, opinion, and recommendation of the committee to the school district superintendent. Although parts of the report merely recount events, circumstances, and the witnesses' observations and opinions, the report does so in the context of an evaluation of these events, observations, and opinions -- i.e., how much weight they should be given. The report contains the committee's specific recommendations of possible actions to remedy the situation. Consequently, the report may be withheld under section 3(a)(11). As indicated, however, the district may release, in its discretion, information protected by section 3(a)(11). The Open Records Act does not prohibit the release of information protected only by section 3(a)(11).

The other two categories of information, the witnesses' testimony and documents submitted to the committee present more difficult questions. Much of the testimony consists of observations of events. In Open Records Decision No. 450 (1986), this office indicated that notes taken by an appraiser during the evaluation of teachers may be withheld to the extent that the notes contain advice, opinion, and recommendation but not to the extent that they contain merely objective observations of facts and events. The recounting of events in the records in question, however, is highly subjective. Moreover, factual observations are intertwined with the opinions of the witnesses. If public information is "inextricably intertwined" with information that may be withheld under the act, all of the information may be withheld. Open Records Decision Nos. 239 (1980); 174 (1977). Accordingly, the testimony of school district employees may, at the discretion of the district, be withheld under section 3(a)(11).

The testimony heard by the committee also includes the testimony of several persons, i.e., parents and former employees, who are not employees of the district. Because section 3(a)(11) was intended to protect the deliberative process of governmental bodies, it does not ordinarily apply to unsolicited evaluations submitted by persons unconnected to the governmental body. See Open Records Decision Nos. 283, 273 (1981). The fact that information originates outside of a governmental body does not, however, automatically mean that the information cannot be protected by section 3(a)(11). Section 3(a)(11) applies to advisory memoranda provided to a governmental body by an outside "consultant" with an official reason to advise the governmental body. Open Records Decision No. 429 (1985). "Outside" evaluations may fall within section 3(a)(11) when (1) the governmental body has the authority to conduct the evaluation, (2) the governmental body initiated the evaluation or recommendation, and (3) the governmental body had a purpose for seeking the information from the source in question. The committee was designed specifically to seek information from persons familiar with the alleged conflict at Crockett High

School or familiar with the principal in question from other schools. Although testifying before the committee was entirely voluntary, it was not unsolicited. The district expressly requested all persons with relevant information to come forward. The district needed the information held by persons familiar with the principal's management style. Consequently, the witnesses' testimony may, at the discretion of the district, be withheld under section 3(a)(11).

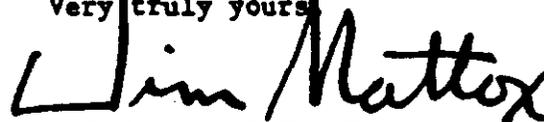
The final category of information consists of documents submitted by the witnesses during the course of the committee's investigation. Some of the documents are simply written statements of the testimony the witnesses planned to give. These documents may, at the discretion of the district, be withheld to the extent that the witnesses' testimony may be withheld. As indicated under the discussion of sections 3(a)(1) and 3(a)(14), some of the documents contain small amounts of private information. These documents are marked accordingly and must be withheld. The remaining documents must be released.

#### S U M M A R Y

The Austin Independent School District received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information related to a review committee's investigation of the job performance of the principal of Crockett High School. The district may withhold, in its discretion, (1) the committee's report, (2) summaries of the witnesses' testimony, and (3) supporting documents submitted by the witnesses to the committee under section 3(a)(11) of the act. The Open Records Act does not, however, prohibit the release of information protected only by section 3(a)(11).

The district may not release information deemed confidential under the Open Records Act. A very small amount of the information at issue is protected by either section 3(a)(1) or 3(a)(14). Copies of the documents are marked accordingly.

Very truly yours,



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