



**THE ATTORNEY GENERAL
OF TEXAS**

July 21, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Stephen G. Williams
City Attorney
P. O. Box 779
Galveston, Texas 77553

Open Records Decision No. 473

Re: Whether information relating to computer assisted employee performance evaluation of city council appointees is subject to the Open Records Act

Dear Mr. Williams:

You received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for copies of performance appraisals of certain employees appointed by the Galveston City Council. You submitted copies of the documents in question to this office for review pursuant to section 7 of the act. The appraisals in question cover the city attorney, the city manager, the city secretary, the municipal court judge, and the city tax assessor/collector. The appraisals consist of several categories of information: (1) a statement of the basic philosophy and objectives of the performance appraisal along with a description of how the appraisal works; (2) one-page job descriptions of each appointed position; (3) performance appraisal manuals for each appointed position in question, consisting of a series of questions geared toward each job description with a priority weight attached to each question and a choice of five numerical responses (#1 representing "unsatisfactory" and #5 representing "outstanding"); (4) performance evaluation worksheets that include the name and position of the appointee evaluated, the name of the evaluator, and the numerical responses to the questions described above as category 3; and (5) computer printouts with the name of the appointee evaluated, numerical "score" for each question, and interpretations of the numerical scores. The city council members obtained the appraisal system under contract with a private firm and each council member individually performed the evaluations.

Information submitted in connection with this request reveals that the city received this request sometime between September 9th and 26th, 1986. The city responded to the request on September 26th, informing the requestor that the city believed the appraisals are excepted from required disclosure under the Open Records Act and that the city intended to request the attorney general's decision on the issue. The city did not, however, request the decision of this office until February 10, 1987.

Section 7(a) of the Open Records 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. (Emphasis added).

The attorney general interprets section 7(a) to mean that if a decision is not requested within 10 days, the information is presumed to be public. Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to overcome this presumption. Id. A less compelling interest will overcome the presumption when third-party privacy interests are at issue. Id. The sections protecting governmental interests, such as sections 3(a)(3) and 3(a)(11), are qualitatively different from the sections protecting information deemed confidential under the Open Records Act. Under the act, confidential information cannot be released. See art. 6252-17a, §§10(a), 10(e). In contrast, most of the information excepted by sections protecting governmental interests may be released to the public at the discretion of the governmental body, so long as the information is not selectively disclosed. See art. 6252-17a, §3(c), 14(a); see also Open Records Decision No. 463 (1987). Moreover, the protection of the sections protecting governmental interests can be waived when a governmental body fails to claim them. See Open Records Decision Nos. 455 (1987); 325 (1982). For these reasons, a compelling reason for withholding information protected by these sections is more difficult to establish than a compelling reason to withhold confidential information.

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 assert that sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(9), and 3(a)(11) protect this information from required public disclosure. In light of the fact that the city did not request a decision within the statutory deadline, this decision addresses only your argument with regard to sections 3(a)(1), 3(a)(2), and 3(a)(9).

Section 3(a)(1) protects

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

A primary purpose of this section is to protect privacy interests. Section 3(a)(1) incorporates constitutional privacy, common-law privacy, and statutory confidentiality. Only common-law privacy is relevant to your request. You do not indicate that the private firm that designed the evaluation system asserts any proprietary interest in the system.

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. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Consequently, this decision addresses exceptions 3(a)(1) and 3(a)(2) together.

Sections 3(a)(1) and 3(a)(2) incorporate the common-law privacy test articulated by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). Under sections 3(a)(1) and 3(a)(2), information may be withheld on common-law privacy grounds only if (1) the information contains highly intimate and embarrassing facts about a person's personal 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. Open Records Decision No. 464 (1987). Consequently, even if employee evaluations contain highly subjective evaluations, they may not ordinarily be withheld under sections 3(a)(1) and 3(a)(2). See id. The fact that a public employee receives a less than perfect -- or even a very bad -- evaluation is not the type of information protected by common-law privacy; it is not a highly intimate or embarrassing fact about the employee's personal affairs. Moreover, the public has a legitimate interest in the job performance of public employees. See, e.g., Open Records Decision No. 441 (1986).

Section 3(a)(9) protects

private correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy. (Emphasis added).

By its terms, this exception does not apply to the information in question. Section 3(a)(9) was intended to protect the privacy rights only of elected office-holders. Open Records Decision No. 332 (1982). Although elected city council members performed these evaluations, the evaluations do not implicate privacy interests of the city council members.

Consequently, because the release of these appraisals does not implicate confidentiality interests and because the city has failed to show a compelling reason why the appraisals should be withheld, the appraisals must be released.

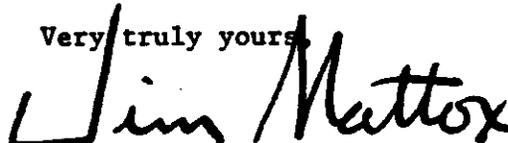
S U M M A R Y

The city of Galveston received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., on or around September 26, 1986. The city did not request the decision of this office until February 10, 1987. Under section 7(a) of the Open Records Act, if a governmental body fails to request, within 10 days, the decision of the attorney general with regard to a request for information under the Open Records Act, the information is presumed public. The governmental body must show a compelling interest to overcome the presumption.

Although a less compelling interest will overcome the presumption when privacy or confidentiality interests are at issue, the appraisals at issue do not contain confidential information. Performance appraisals made by city council members that evaluate certain employees appointed by the city council may not be withheld from public disclosure under sections 3(a)(1) or 3(a)(2) of the Open Records Act, unless they contain highly intimate or embarrassing facts about the employee's personal affairs and they are of no legitimate interest to the public. The appraisals at issue here do not meet this test. Nor does section 3(a)(9) apply to these evaluations.

Consequently, because the release of these appraisals does not implicate confidentiality interests and because the city failed to show a compelling reason why the appraisals should be withheld, the appraisals must be released.

Very truly yours,



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