



**THE ATTORNEY GENERAL
OF TEXAS**

December 3, 1987

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ATTORNEY GENERAL**

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Open Records Decision No. 485

Re: Whether oral or written information delivered to a governmental body during a properly conducted executive session under section 2(g) of the Open Meetings Act, article 6252-17, V.T.C.S., is confidential under section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1288)

Dear Mr. Gary:

As attorney for the Board of Regents of the Corpus Christi Junior College District [hereinafter "Board"], you have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires the Board to release an investigative report prepared by a private detective. You have provided the following facts:

1. Some time prior to April 17, 1987, certain complaints and information came to the attention of the [Board], which caused the Board to initiate the investigation mentioned in [the requestor's] letter dated April 17, 1987.

2. Some time prior to May 8, 1987, during a closed session, the Board received a report from Mr. Wade [a private detective hired by the Board] concerning [Del Mar College President] Dr. Biggerstaff. Mr. Wade had prepared a written report, but, upon my advice, an oral report was made and the written report was not delivered to the Board. Mr. Wade delivered the written report to me for delivery to Mr. Frels [a

private attorney] if further investigation indicated that it was appropriate to proceed with an action to consider the termination of the contractual status of Dr. Erwin L. Biggerstaff, Jr., as President of Del Mar College.

3. Subsequently, the Board authorized an additional investigation of District accounts to be performed by Gowland, Kincaid, David & Co., CPAs, which was concluded on or about June 3, 1987. A written report of the audit was delivered to and reviewed by the Board and Dr. Biggerstaff. Dr. Biggerstaff had no objection to its publication, so it was made public.

4. On or about June 17, 1987, the Board took the action reflected in the letter to Dr. Biggerstaff dated June 22, 1987, being Document No. 5 attached.

5. Subsequently, the Board scheduled a hearing for September 15, 1987, for consideration of the proposed termination of the contract of Dr. Biggerstaff. Dr. Cortes was authorized to employ Kelly Frels of Houston, Texas, to prepare and present the case against Dr. Biggerstaff in the event a settlement could not be negotiated between the Board and Dr. Biggerstaff prior to July 23, 1987, the date that Pat Morris, attorney for Dr. Biggerstaff, was to leave the country on vacation.

6. A settlement between the Board and Dr. Biggerstaff was negotiated and consummated on or about July 29, 1987, a copy of which is attached hereto as Document No. 6. This document was approved by Board action during an open meeting; therefore, it was clearly public.

7. Since the contractual dispute was settled, the scheduled hearing before the Board was cancelled and no documentation will be presented to the Board relating to

this matter at either an open or closed session.

8. From the very beginning, Dr. Biggerstaff, and his attorney, insisted that this entire proceeding be conducted in closed session, so there is no indication that if the hearing of September 15 had been held, that it would have been open to the public.

You contend that the investigative report prepared by Mr. Wade is not subject to required disclosure because

[f]or reasons which should be apparent from the foregoing narrative, [it] was never delivered to the Board, was never delivered to Mr. Frels, was never delivered to Dr. Biggerstaff and, since there will be no hearing, will never be delivered to the Board.

In a subsequent letter to this office, you expanded this argument:

3. In Open Records Decision No. 159 [1977], dealing with the question of whether a private investigator's report to a city council concerning a candidate for the position of chief of police is public under the ORA, the Attorney General ruled as follows:

We have previously indicated that the Open Records Act and the Open Meetings Act, article 6252-17, V.T.C.S., 'have similar purpose and should be construed in harmony.' Open Records Decision No. 68 (1975) at 1; Attorney General Opinion H-484 (1974). The Open Meetings Act permits a governmental body to exclude the public from discussions 'involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal' of an employee. V.T.C.S. art. 6252-17 §2(g).

Although the opinion relied upon the exception for personnel records in §3(a)(2)

of the ORA when considered with §2(g) of the OMA, it appears to me that the same result could have been reached by the Attorney General in harmonizing §3(a)(1) of the ORA with §2(g) of the OMA.

4. Senate Bill 168 recently enacted by the Texas Legislature, amending the OMA.

The addition by the Legislature of §2A to the OMA seems pertinent to the resolution of the current matter. In §2A the Legislature recognized that prior to S.B. 168, governmental bodies were not required to keep any record of what transpired during their closed meetings. The Legislature provided that a record of the closed portion of the meetings must be kept, but that the record of such closed session could be made available for public inspection and copying only upon court order in an action brought under the Act. . . .

. . . .

It is our position that all information, whether oral or written, delivered to a governmental body properly acting under Section 2(g) of the OMA is 'information deemed confidential by law' under Section 3(a)(1) of the ORA. This position is clearly consistent with the provisions of the OMA, the ORA and Open Records Decision No. 159 of the Attorney General. (Emphasis in original.)

We disagree. For the following reasons, we conclude that the investigative report is within the scope of the Open Records Act and that it may not be withheld simply because its contents were considered in an executive session of the Board.

We first consider your argument that section 2A of the Open Meetings Act requires us to conclude that this report need not be publicly disclosed. Among other things, this section requires governmental bodies either to keep a certified agenda or to make a tape recording of the "proceedings" in their executive sessions. It also sets forth the conditions under which the public is

entitled to have access to these agendas or recordings. This section is inapplicable in this instance, however, because it became effective on August 31, 1987, whereas the meeting at which the contents of this report were discussed took place on May 8, 1987. The availability of this report, therefore, is not affected by section 2A.

The threshold question in this case is whether this report is within the ambit of the Open Records Act. As noted, you observed that although the report was delivered to you, it was never given to the Board or to Dr. Biggerstaff; instead, its contents were disclosed orally to the Board.

Section 2(2) of the Open Records Act defines "public records" as

the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information.

"Public information" is defined in section 3(a) as

[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business . . . with the following exceptions only[.]

Open Records Decision No. 462 (1987) dealt with a situation similar to this one. The University of Houston had engaged a private law firm to investigate its athletic program. During this investigation the firm prepared and assembled various notes and documents, and the local news media requested access to them. The university argued that these documents were not within the act because only an oral report based on them was given to the university regents; the documents themselves remained at all times in the physical custody of the law firm.

The decision identified three factors to be considered in determining whether information held by a consultant to a governmental body is subject to the act:

(1) the information collected by the consultant must relate to the [governmental body's] official business; (2) the consultant must have acted as an agent of

the [governmental body] in collecting the information; and (3) the [governmental body] must have or be entitled to have access to the information. See also Open Records Decision No. 439 (1986).

It concluded:

[T]he chancellor [has] a right of access to information discovered and records developed during the investigation. He has a right to receive a report of the firm's fact findings, and to request and receive interim reports. At the conclusion of the investigation, the chancellor and his designated agent have a right to review any materials accumulated during the investigation. Finally, in his letter of May 7, 1986, the chancellor states that '[t]he notes you take of the conversations are adequate for us.' This indicates that the law firm acted as the university's agent in assembling and maintaining information garnered during the investigation. Ownership of materials accumulated during the investigation remains in the law firm, but the university has considerable power to review those materials. The university's power to require access to the materials prepared by the firm indicates that the firm acted as the university's agent, not as an independent contractor, in developing and holding the investigative records.

We believe that the chancellor's right to examine these records causes them to be subject to the Open Records Act. The law firm prepared them on behalf of the university in connection with the transaction of official business. Although the records may be in the law firm's physical custody they are constructively in the chancellor's custody; for this reason they are, we conclude, within section 3(a) of the act.

Each of the requirements identified in this decision is satisfied here. The information in the detective's report clearly relates to official college business. Applying the foregoing criteria, we conclude that the

detective acted as an agent of the Board in assembling this information and in preparing the report. Finally, the fact that the contents of the report were disclosed orally to the Board means that the Board had access to the information. The report, therefore, is within the scope of the act. To conclude otherwise, we add, would afford governmental bodies a ready means of circumventing the intent of the act. See V.T.C.S. art. 6252-17a, §1 (statement of purpose).

The next issue is whether the act authorizes the Board to withhold this report. Aside from section 3(a)(1), you have invoked no exception in support of your argument that the report may be withheld. We shall therefore confine our discussion to this exception. See Open Records Decision No. 444 (1986) (except for section 3(a)(1), attorney general will not raise exceptions on behalf of governmental bodies).

As you observed, Open Records Decision No. 159 (1977) dealt with an analogous situation. A city had employed a private investigator to make a confidential investigation and to prepare a report concerning a police officer whom the city council was considering for promotion. The council discussed the report in executive session, and thereafter maintained it as confidential. The media sought access to the report, and this office held as follows:

The report consists of extensive interviews with a large number of persons regarding the police officer's moral character and fitness, the methods used in his work, and rumors of illegal or improper conduct on his part. Although remarks which do not directly relate to the individual police officer are interspersed throughout the report, it appears that the report as a whole ought to be excepted from public disclosure under section 3(a)(2) of the Open Records Act, which excepts

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .

We have previously indicated that the Open Records Act and the Open Meetings Act,

article 6252-17, V.T.C.S., 'have similar purpose and should be construed in harmony.' Open Records Decision No. 68 (1975) at 1; Attorney General Opinion H-484 (1974). The Open Meetings Act permits a governmental body to exclude the public from discussions 'involving the appointment, employment, evaluation, reassignment, duties, discipline or dismissal' of an employee. V.T.C.S. art. 6252-17, §2(g). In considering the subject report in executive session, the City Council of Midland was exercising this prerogative in dealing with personnel matters over which it is granted specific authority. The City Council is empowered by the City Charter 'to supervise and control' the police department 'to appoint and remove' all officers and employees thereof. Article 3, section 24 and article 4, section 14, Charter of the City of Midland.

Selection of a police chief by a public body authorized to do so necessarily involves consideration of a number of highly sensitive matters, and we believe that the public body is permitted some discretion in obtaining as much information as it can from whatever sources are available, with the assurance that the report of its investigation will not be made public. See Open Records Decision Nos. 129 (1976); 106 (1975); 71 (1975). In our opinion, the exception for personnel records in section 3(a)(2) of the Open Records Act, when considered together with section 2(g) of the Open Meetings Act, provides ample justification for withholding the entire report from public disclosure.

Although the decision is not explicit on this point, its rationale necessarily is that the release of an investigative report considered in executive session would cause a "clearly unwarranted invasion of personal privacy" within section 3(a)(2). Regardless of how correct this conclusion may have been in 1977, it is based on a construction of section 3(a)(2) which is much broader than is now warranted. In Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court held that section 3(a)(2) is

triggered only if the release of information would cause an invasion of privacy tort within section 3(a)(1) of the act. This in turn depends on whether the information is highly intimate or embarrassing, a reasonable person would object to its release, and it is of no legitimate concern to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 683-85 (Tex. 1976). This standard for applying section 3(a)(2) clearly does not justify the conclusion that any report concerning a public employee which is discussed in an executive session necessarily may be withheld under section 3(a)(2). We overrule Open Records Decision No. 159 (1977) to the extent that it implies this conclusion.

The next issue is whether section 3(a)(1) of the Open Records Act affords a basis for withholding this report. Your argument is that if this section and section 2(g) of the Open Meetings Act are read together, an affirmative answer is required. We disagree. We do not challenge the proposition that the two acts must be construed in harmony -- indeed, we recently reaffirmed this notion in Open Records Decision No. 461 (1987) -- but we do not believe that your conclusion follows from it.

Section 3(a)(1) excepts from required disclosure information deemed confidential by constitutional or statutory law or by judicial decision. As there is no constitutional provision or judicial decision applicable here, this investigative report is within section 3(a)(1) only if it is made confidential by statute. Your argument is not that a statute explicitly embraces this report; rather, it is that the Open Records Act and the Open Meetings Act together except this report.

The implication of your argument is that any document, regardless of its contents and regardless of whether it would otherwise be available to the public, is perpetually "confidential" within section 3(a)(1) if it is ever considered in an executive session of the governmental body which prepared or maintains it. We cannot accept this conclusion. Section 14(d) of the Open Records Act provides that the act is to be liberally construed in favor of granting requests for information. Our courts, moreover, have held that close judgment calls are to be resolved in favor of public access to information. Hubert v. Harte-Hanks Texas Newspapers, Inc., *supra*, 652 S.W.2d at 552. An interpretation of the two statutes which would effectively place beyond the reach of the public any document discussed in an executive session of a

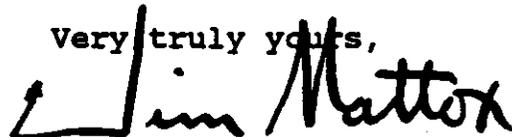
governmental body would hardly be in keeping with these statutory and judicial mandates.

We think that the proper approach is to consider each document on a case-by-case basis by inquiring whether any exception in the Open Records Act applies to it. See V.T.C.S. art. 6252-17a, §3(a) (providing that documents maintained by governmental bodies are available to the public "with the following exceptions only" (emphasis added)). In this instance, therefore, we hold that this investigative report is within the scope of the act, that it is not excepted from required disclosure simply by virtue of its having been considered in an executive session, and that all or part of it may be withheld only if a section 3(a) exception embraces it. You have not submitted the report for our review, as is required by section 7(a) of the act, so we cannot determine whether all or part of it may be withheld. Because we believe that you reasonably relied on Open Records Decision No. 159 (1977) for your conclusion that the report need not be disclosed, we are affording ten (10) days within which to submit the report for our review, together with any arguments regarding the applicability of section 3(a) exceptions to the report. If the material is not submitted within ten days, we will be obliged to presume that the material must be disclosed.

S U M M A R Y

The Open Records Act embraces an investigative report, the contents of which were disclosed orally to the Board of Regents of the Corpus Christi Junior College District. The report may not be withheld simply because it was considered in an executive session of the Board. The Board has ten (10) days within which to submit the report together with arguments for withholding it under section 3(a) of the Open Records Act.

Very truly yours,



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