



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 10, 1989

To Whom it May Concern:

It has come to our attention that Open Records Decision No. 515 (1988) contains an error. On the first line of page 6 the cite "OR88-007" should be deleted. The informal decision overruled is the letter ruling of September 8, 1987, not informal decision OR88-007.

Yours very truly,

OPINION COMMITTEE

Opinion Committee

JSR/bc



**THE ATTORNEY GENERAL
OF TEXAS**

December 30, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Richard A. Peebles
Reid, Strickland and
Gillette
407 Citizens Bank Tower
P.O. Box 809
Baytown, Texas 77522-0809

Open Records Decision No. 515

Re: Whether the "informer's
privilege" aspect of section
3(a)(1) of the Texas Open Re-
cords Act, article 6252-17a,
V.T.C.S., applies when no
violation of the law is
alleged. (RQ-1448)

Dear Mr. Peebles:

The Lee College District of Baytown, Texas, received an open records request from a college employee for "everything in my personnel file." The district released to the employee a copy of all items in his personnel file except for certain memoranda and written statements of complaints regarding the employee's conduct with fellow workers, particularly with regard to his supervision of two specific employees. You asked this office whether subsections 3(a)(1) and (3) of the Open Records Act, article 6252-17a, V.T.C.S., except this information from required public disclosure. This office responded by issuing an informal open records ruling, OR88-007, which held 1) that you failed to show how the material met the tests for section 3(a)(3) protection and 2) that the informer's privilege aspect of section 3(a)(1) does not protect the statements and memoranda because they contained no report of a violation of a law.

You subsequently asked this office to reconsider that ruling, in light of a prior informal open records ruling from this office to the district, dated September 8, 1987, that held that the informer's privilege protected similar statements. After reexamining the purpose of the privilege, this office concludes that the September 8 letter ruling improperly extended the scope of the privilege and that OR88-007 correctly recognized that the informer's privilege does not apply to the memoranda and statements at issue here.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Section 3(a)(1) includes information protected by the informer's privilege. See Open Records Decision No. 434 (1986). The United States Supreme Court explained the rationale underlying this privilege in Roviaro v. United States, 353 U.S. 53, 59 (1957):

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law....The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Citations omitted, emphasis added.)

The Texas Rules of Criminal Evidence and Texas Rules of Civil Evidence, however, share a somewhat broader definition of a protected informer as "a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation." See Tex. R. Crim. Evid. 508; Tex. R. Civ. Evid. 508 (emphasis added). The language of these rules indicates that the informer's privilege protects not only the identities of those persons who actually report a known violation of the law, but also the identities of those who merely cooperate in law-enforcement investigations. The privilege also protects the statements of informers to the extent that the statements tend to reveal the informers' identities. See Open Records Decision No. 320 (1982).

Nor does the informer's privilege aspect of section 3(a)(1) pertain only to those individuals who make reports to the police or similar law-enforcement agencies. This office has held that the informer's privilege aspect of section 3(a)(1) also applies when the informer reports violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The

Attorney General has previously held that the privilege protects the identities of persons who:

- (1) made complaints regarding air pollution to the Texas Air Control Board, Open Records Decision No. 391 (1983);
- (2) made complaints regarding licensing violations of a particular nursing home to Texas Department of Human Resources, Open Records Decision No. 376 (1983);
- (3) reported zoning ordinance violations to city officials, Open Records Decision No. 279 (1981);
- (4) informed the Texas Board of Private Investigators and Private Security Agencies about an unlicensed person acting as a private investigator, Open Records Decision No. 183 (1978);
- (5) reported child-care violations to the Department of Public Welfare, Open Records Decision No. 176 (1977); and
- (6) reported a case of animal neglect to a city's animal control division. Open Records Decision No. 156 (1977).

On the other hand, this office has held that the privilege does not protect the identities of individuals who report activities falling outside the realm of criminal or quasi-criminal law enforcement. For example, Open Records Decision No. 218 (1978), determined that the privilege does not protect the identities of persons who complained to a county commissioner about the actions of a county employee. The opinion noted that no criminal conduct had been reported and that the "tone of each letter, when coupled with the consideration that each is addressed to a county commissioner rather than to the appropriate law enforcement official, indicates that the complainants expected administrative redress rather than criminal prosecution." Open Records Decision No. 218 (1978) at 2.

Similarly, Open Records Decision No. 191 (1978) held that the privilege does not protect the identities of two female employees who made allegations of sexual harassment in the workplace, naming fellow employees as the offenders. Although an act of sexual discrimination may subject an

individual to civil liability, the Attorney General held that the complaining employees' grievances and statements did not disclose the violation of any statute; consequently, the complainants' identities could not be withheld pursuant to the informer's privilege aspect of section 3(a)(1).

The September 8, 1987, informal open records ruling from this office addressed statements of complaints similar to those at issue here and concluded that the informer's privilege aspect of section 3(a)(1) protected the statements from required disclosure. That ruling relied heavily on the decision in Evans v. Dep't of Transp. of the United States, 446 F.2d 821 (5th Cir. 1971) cert. denied, 405 U.S. 918 (1972). The court in Evans upheld the Federal Aviation Administration's refusal to release a letter that charged an airplane pilot with acts indicative of behavior disorder and mental abnormality because the letter contained information that revealed the writer's identity. The court observed that, if the information were released to the pilot:

few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation.

Evans, 446 F.2d at 824.

The rationale for the court's decision in Evans, however, does not apply here. The allegations about the pilot, which resulted in a formal administrative investigation and hearing, were brought before a federal administrative agency having the statutory duty to enforce regulations governing the airline industry. In Evans, the court held that the letters containing the allegations came under the protection of two federal statutes: first, 5 United States Code section 552(b)(7)(D), which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source," (emphasis added), and second, 49 United States Code section 1504, which grants the Board or Administrator of the agency discretion in releasing information contained in any report or document filed in relation to the enforcement of regulations governing the commercial airline industry. No similar statutes apply here, where the "informers" reported no violation of a criminal or civil statute or other law enforceable by the college district.

The September 8, 1987, letter ruling relies on Wigmore to assert that the informer's privilege applies not only to law enforcement officers, but also to the college district's personnel supervisors as "administrative officials having a duty of inspection . . . within their respective spheres." Reading Wigmore in context, however, sheds a better light on the scope of the privilege:

The privilege applies to communications to such officers only as have a responsibility or duty to investigate or to prevent public wrongs, and not to officials in general. This ordinarily signifies the police and officials of criminal justice generally. But it may also include administrative officials having a duty of inspection or of law enforcement in their particular spheres. The truth is that the principle is a large and flexible one. It applies wherever the situation is one where without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the appropriate official. (Emphasis added; emphasis in original deleted.)

Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961). There is no notation in Wigmore providing for the expansion of the privilege's protection to the type of information in question here.

Moreover, the basis for the informer's privilege is to protect informers from retaliation and thus encourage them to cooperate with law enforcement efforts. The statements at issue here consist of complaints about a public employee's behavior in supervising two specific employees and in generally failing to cooperate with fellow workers. Although the employees apparently seek some form of redress from their employer for their complaints, this is not the kind of information protected by the informer's privilege aspect of section 3(a)(1). See Open Records Decision Nos. 218, 191. These persons have not reported violations of law or suspected violations of the law to officials charged with enforcing specific laws. Section 14(d) of the Open Records Act requires that the "Act shall be liberally construed in favor of the granting of any request for information." The act's exceptions must be construed narrowly; this office is not at liberty to expand the act's exceptions. Open Records Decision No. 488 (1988). The informal open records ruling of September 8, 1987, therefore, is expressly overruled.

Finally, in your letter requesting reconsideration of decision OR88-007, you raise additional grounds for withholding the memoranda at issue. You claim that sections 3(a)(7) and 3(a)(11) apply to the memoranda. Governmental bodies bear the burden of showing which exceptions apply to specific information and why. Attorney General Opinion H-436 (1974); Open Records Decision No. 252 (1980). Section 7(a) of the act requires a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. In placing a time limit on the production of public information, the legislature recognized the value of timely production of public information. See also V.T.C.S. art. 6252-17a, § 4 (shall "promptly" produce public information), § 13 (may promulgate rules to ensure that "public records may be inspected efficiently, safely, and without delay"). To allow governmental bodies to raise additional arguments against disclosure, especially when requesting reconsideration of prior decisions, would allow them to delay releasing public information indefinitely.

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. City of Houston v. Houston Chronicle Pub. Co., 673 S.W.2d 316, 323 (Tex. App. - Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest in withholding the information to overcome this presumption. Open Records Decision No. 319. For this reason, a governmental body must show compelling reasons why this office should consider additional arguments, raised long after 10 days have elapsed, for withholding requested information. You have not shown compelling reasons why this office should consider sections 3(a)(11) and 3(a)(7), nor have you shown compelling reasons why the statements at issue here should not be released. Consequently, this decision does not address your arguments regarding sections 3(a)(11) and 3(a)(7).

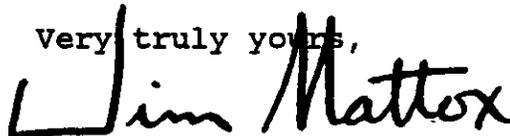
S U M M A R Y

The informer's privilege aspect of section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S., does not protect memoranda and written statements complaining of a public employee's work performance with fellow workers when those statements do not reveal crimes or the violation of specific

laws to the officials charged with enforcing those laws.

When a governmental body seeks reconsideration of a decision of the attorney general the governmental body cannot raise exceptions not raised in its initial request without showing compelling reasons for withholding the information and for raising additional exceptions.

Very truly yours,



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

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Jennifer S. Riggs
Assistant Attorney General