



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 4, 1989

Mr. Roel Smith
Superintendent
Donna Independent
School District
116 North 10th
Donna, Texas 78537

Open Records Decision No. 530

Re: Whether section 3(a)(17) of the Open Records Act protects public employees' home addresses and telephone numbers when the employees have not designated the information confidential within the time allowed by section 3A of the act (RQ-1638)

Dear Mr. Smith:

The Donna Independent School District received an open records request from a teachers' organization for a list of the district's employees' names, assignments, and home addresses and telephone numbers. You suggest that section 3(a)(17) of the Texas Open Records Act, article 6252-17a, V.T.C.S., protects the employees' home addresses and telephone numbers. Apparently, you question only the availability of home addresses and telephone numbers. If you have not done so, you must release names and work assignments immediately. See V.T.C.S. art. 6252-17a, § 6(2); see also Attorney General Opinion JM-672 (1987) (governmental body must raise exceptions). You express concern about the manner in which employees may obtain the protection of section 3(a)(17). Section 3(a)(17) does not automatically protect public employees' home addresses and telephone numbers unless the employee at issue is a peace officer. See Open Records Decision No. 488 (1988). This decision addresses the applicability of section 3(a)(17) to non-law enforcement public employees.¹

1. As of September 1, 1989, sections 3(a)(17) and 3A of article 6252-17a, V.T.C.S., refer to officials and employees and to former officials and employees. The
(Footnote Continued)

Section 3(a)(17) protects from required public disclosure:

the home addresses and home telephone numbers of each official and employee and each former official and employee of a governmental body except as otherwise provided by Section 3A of this Act, and of peace officers as defined by Article 2.12, Code of Criminal Procedure, 1965, as amended, or by Section 51.212, Texas Education Code. (Emphasis added.)

V.T.C.S. art. 6252-17a, § 3(a)(17) (as amended by Acts 1989, 71st Leg., ch. 327, § 1, at 1290, effective Sept. 1, 1989). As the underlined language indicates, section 3A expressly limits the applicability of section 3(a)(17).

Section 3A provides:

(a) Each employee or official of a governmental body and each former employee or official of a governmental body, shall choose whether or not to allow public access to the information in the custody of the governmental body relating to the person's home address and home telephone number. Each official and employee and each former official and employee shall state that person's choice to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which the employee begins the employment with the governmental body, the official is elected or appointed, or the former employee or official ends service with governmental body. If the official's or employee's or the former official's or employee's choice is to not allow public access to the information, the information is protected as provided by Section 3 of this Act. If an employee or

(Footnote Continued)

request at issue in this decision concerns only current employees. See Open Records Decision Nos. 488 (1988) (employees retired prior to adoption of 3A); 455 (1987) (former employees who exercised 3A right during service).

official or a former employee or official fails to report within the period established by this section, the information is subject to public access.

(b) If, during the course of the employment or the term of the office, or if, after leaving service with the governmental body the person wishes to close or open public access to the information, that individual may request in writing that the main personnel officer of the governmental body close or open access, as the case may be, to the information. (Emphasis added.)

Id. § 3A (as amended by Acts 1989, 71st Leg., ch. 327, § 2, at 1292, effective Sept. 1, 1989).

Subsection (a) of section 3A specifies that each person affected "shall" indicate in writing within 14 days of beginning employment, or in the case of former officials and employees within 14 days of ending service, whether the person's home address and telephone number are to be public information. The term "shall" ordinarily denotes a mandatory responsibility or condition. Attorney General Opinion JM-496 (1986). When the term appears in a statute setting a time limit for the performance of a duty, however, the Texas courts construe the term as directory. Id. (and case cited therein). In the context of section 3, the mandatory/discretionary distinction is not on point. As used in section 3A, the term "shall" imposes a condition rather than a duty. It is not mandatory that a public employee take action; but if the employee does not, the employee's home address and telephone number will be subject to public access. The last sentence of subsection (a) states that if the employee does not report a choice within 14 days, the employee's home address and telephone number are "subject to public access." At first blush, this provision appears irrevocable: if an employee fails to act, the public availability of the employee's home address and phone number is fixed forever.

Despite the absolute language of the last sentence in subsection (a) of section 3A, however, section 3A does not fix irrevocably the public or non-public character of employees' home addresses and telephone numbers. Subsection (b) of section 3A provides that employees may, during the course of their employment or after ending service with the

governmental body, close or open access to their home addresses and telephone numbers. Although subsection (b) and the last sentence of subsection (a) appear to be in conflict, both must be given effect, if possible. The provisions can be harmonized by interpreting subsection (b) as a method allowing an employee to change, prospectively, the designation authorized in section 3A and a method allowing employees hired before the effective date of the provision to avail themselves of its protection. If subsection (a) were interpreted as an absolute, employees hired before the act's effective date could not take advantage of its protection; such employees could not act within 14 days of the day they began service with the governmental body. The significance of the last sentence of subsection (a) is simply that if an employee does not act, under either subsection (a) or (b) of section 3A, the information will be subject to public access. The last sentence of subsection (a) refers to "this section," meaning section 3A, not to "this subsection." For this reason, the 14 day "limit" imposed by subsection (a) of section 3A does not fix irrevocably the character of public employees' home addresses and telephone numbers.

You indicate that the district does not solicit employees' preferences regarding the public availability of their home addresses and telephone numbers. You ask whether you may do so now, in response to the open records request at issue here. Resolving your question depends on whether section 3A may operate retroactively to authorize the district to deny a pending request for information.

Neither subsection (a) nor subsection (b) prohibits the district from soliciting responses from its employees. A letter brief submitted by an attorney on behalf of the requestor suggests that the district may not solicit responses at all. Although subsections (a) and (b) of section 3A place the responsibility on public officers and employees, rather than on the governmental body, to assert their privileges under section 3A, neither subsection prohibits governmental bodies from advising public officials and employees about their privileges under section 3A. Additionally, the district clearly may solicit its employees' preferences with regard to the public availability of home addresses and telephone numbers to apply to future requests for information.

On the other hand, the issue you raise is whether the district may solicit a response from its employees in response to a pending open records request -- in other words, whether section 3A authorizes an officer or employee or former officer or employee of a governmental body to retroactively close information that was public when a particular open records request was made. We conclude that it does not; the character of requested information as public under sections 3A and 3(a)(17) is determined as of the time the request for information is made.

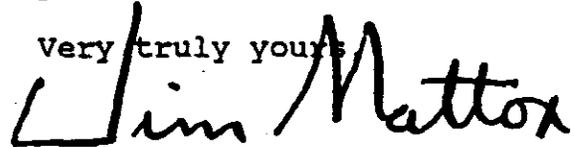
No legislative intent is apparent to allow employees to act such that subsection (b) of section 3A applies to change the character of information once an open records request has been made. Public records cannot be destroyed when they are subject to an open records request. Open Records Decision No. 505 (1988); Attorney General Opinion H-808 (1976). For similar reasons, the public character of records ordinarily cannot be changed after an open records request has been made. Although exceptions to the Open Records Act clearly apply to information in existence when the exception is first enacted, see Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), that is a different issue than the applicability of a provision to an active, pending request for information. The requestor's right of access to the information at issue must be interpreted as of the time it made its written request for information. Subsection (b) was intended only to allow an employee to change an existing designation and to allow employees hired before the effective date of the provision to take advantage of its protection. You do not indicate that the request at issue affects any new employees; accordingly, this decision does not address the situation arising with new employees or former employees acting within the 14 day period specified in subsection (a) of section 3A.

S U M M A R Y

Section 3(a)(17) of the Texas Open Records Act, article 6252-17a, V.T.C.S., does not automatically protect public officers' and employees' home addresses and telephone numbers from required public disclosure unless the employee is a peace officer. To obtain the protection of section 3(a)(17), non-peace officer employees and officers and former officers and employees must exercise

their privilege under either subsection (a) or (b) of section 3A of the Open Records Act. The exercise of the option to close public access to home addresses and telephone numbers does not apply to an open records request made before the option was exercised.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

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