



**THE ATTORNEY GENERAL  
OF TEXAS**

February 14, 1990

**MINI MATTOX  
ATTORNEY GENERAL**

Mr. James B. Bond  
Deputy Chancellor

Legal and External Affairs Re: Applicability of section  
Texas A & M University System 3(a)(23) of the Texas Open  
College Station, TX 77843 Records Act, article 6252-17a,  
V.T.C.S., as added by Senate  
Bill 404 of the 71st Texas  
Legislature to information  
regarding candidates for pre-  
sident of a university  
(RQ-1775)

Dear Mr. Bond:

The Texas A & M University System received an open records request for all documents relating to candidates for the position of president of Prairie View A & M University, including applications and nominations. The requestor seeks the names, ages, and resumes of all persons being considered for the position. The university seeks to withhold the information from required public disclosure under section 3(a)(23) of the Open Records Act, V.T.C.S. article 6252-17a.

Section 3(a)(23) excepts from required public disclosure

the names of applicants for the position of chief executive officer of institutions of higher education, except that the governing body of the institution of higher education must give public notice of the name or names of the finalists being considered for the position at least 21 days prior to the meeting at which final action or vote is to be taken on the employment of the individual.

V.T.C.S. art. 6252-17a, § 3(a)(23).

Prior to the addition of section 3(a)(23) by the 71st Legislature, S.B. 404, Acts 1989, 71st Leg., ch. 110, at 466, the names of persons under consideration for the post of university president were not excepted from public

disclosure under the Open Records Act. In Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.), the court applied the test for common law privacy set out in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), and concluded that neither sections 3(a)(1) nor 3(a)(2) of the Open Records Act protected the names of candidates for the post of university president, nor the fact that individuals were being considered for such a position. The Hubert court determined that such information does not constitute embarrassing facts about a person that if publicized would be highly objectionable to a reasonable person. The court also found that section 3(a)(2) of the act did not prohibit the release of the information because information is protected under section 3(a)(2) only if its release would constitute a clearly unwarranted invasion of privacy, which the court found was not the case with the names of candidates. Id. at 550. Open Records Decision Nos. 345 (1982) and 110 (1975) had held that section 3(a)(2) did not apply to applicants for public employment. In Open Records Decision No. 439 (1986), the attorney general held that a list of recommended finalists was not protected from disclosure as advice, opinion, or recommendation on policy matters under section 3(a)(11). See also Open Records Decision Nos. 273, 264 (1981); 257 (1980).

Section 3(a)(23) protects from disclosure "the names of applicants." The scope of this section's protection requires some analysis, since it has been suggested that the exception to disclosure applies only to the names of individuals who on their own initiative submit applications for a position as university president, and that other information, including resumes and professional qualifications, are not excepted; it has also been suggested that even the names of persons nominated by third persons would not be excepted.

In interpreting a statute, the dominant consideration is to ascertain and give effect to legislative intent. See Knight v. International Harvester Credit Corp., 627 S.W.2d 382 (Tex. 1982); Jessen Assoc. v. Bullock, 531 S.W.2d 593 (Tex. 1975). To do so, it is necessary to consider the old law, the evil, and the remedy. State v. Bothe, 231 S.W.2d 453 (Tex. Civ. App. - San Antonio 1950, no writ); see also Gov't Code § 312.005.

Section 3(a)(23) was passed as part of an amendment to Senate Bill 404, which as introduced related to exempting the college transcripts of teachers from the Open Records

Act. The amendment adding section 3(a)(23) was adopted without substantive discussion or debate. Subsequent to passage of Senate Bill 404, however, the House of Representatives considered House Bill 1654, which amended the Education Code by adding section 51.913 relating to public records generated by university executive search committees. H.B. 1654, Acts 1989, 71st Leg., ch. 1252, at 5054-55.

As originally introduced, House Bill 1654 rendered confidential for purposes of the Open Records Act the records of an executive search committee of an institution of higher education. The stated purpose of House Bill 1654, according to the bill analysis, was "[t]o eliminate the chilling effect created by the premature disclosure of university CEO candidates' names under the Open Records Act and the unwarranted invasion of privacy of the named candidates." Bill Analysis, H.B. 1654, 71st Leg. (1989). As enacted, however, the language about confidentiality and exemption from the Open Records Act was dropped. Discussion about this deletion in the House and Senate floor debates on House Bill 1654, makes it clear that language protecting the records of executive search committees of institutions of higher education from disclosure under the Open Records Act was considered unnecessary because section 3(a)(23), as passed in Senate Bill 404, already protected such information.

As a legislative response to the Hubert case and to prior attorney general decisions, therefore, the rationale underlying section 3(a)(23) is two-fold. First, the exception is intended to protect a governmental body's ability to obtain the greatest number of applications of qualified persons for high-level academic posts. Second, it facilitates this goal by protecting from premature public disclosure and scrutiny those individuals who desire to be considered for such a position, but who are deterred from submitting themselves to the selection process because of fear of harm to their professional reputations if not selected or to their current positions through the public disclosure of the fact that they are seeking another position. Hubert at 554.

It has been suggested that section 3(a)(23) excepts only the names of persons under consideration for high-level academic posts. However, the discernible legislative intent underlying section 3(a)(23) is not merely to protect the names of persons from public disclosure, but to protect the identities of persons in order to protect a university's interest in obtaining a meaningful pool of qualified

applicants by allowing persons to submit themselves to scrutiny without the "chilling" or inhibiting effect of any fear of adverse publicity. The privacy interest of a person seeking the post of university president would be offered no greater protection if only the person's name but not other identifying information were protected. Nor would a university's interest in obtaining a pool of applicants uninhibited by potentially premature public revelation of their interest in employment be furthered. In order to effectuate the purposes of section 3(a)(23), then, "names" should be understood as synonymous with "identities."

A name is by common usage often commonly considered the substantial equivalent of identity. Presley v. Wilson, 125 S.W.2d 654 (Tex. Civ. App. - Dallas 1939, writ dismiss'd, judgment corrected). Names are merely descriptive of persons for identification, but it is the identity which is the essential thing. Interpreting names and identities synonymously comports with prior attorney general opinions addressing the privacy of names of individuals in certain protected categories of persons and holding that protection from disclosure extends not only to the names of individuals but also to any information tending to identify the individual. See, e.g., Attorney General Opinion JM-36 (1983); Open Records Decision Nos. 477 (1987), 165 (1977) (relating to the identities of students); 339 (1982) (victims of sexual abuse or rape); 515 (1988) (informers covered by the informer's privilege). Examples of information identifying individuals might include, but is not limited to, resumes, professional qualifications, membership in professional organizations, dates of birth, current positions, publications, letters of recommendation, or any other information that can be uniquely associated with a particular applicant.

As for the suggestion that the information about individuals nominated to the position should be treated differently, we have examined the legislative history and background to section 3(a)(23) and found nothing pertinent in regard to possible distinctions to be made between "applicants" and "nominees," or among "applicants," "nominees," and "candidates," or related issues. There is no evidence in the legislative history that any distinction between applicants and nominees was considered. From the standpoint of the rationale behind the section 3(a)(23) exception such a distinction is irrelevant, since all persons considered for the position share the same privacy interest and the relationship of this privacy interest to the university's interest in obtaining a large candidate pool is the same for all individuals.

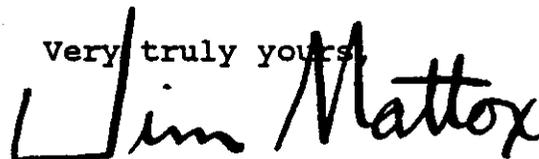
The Hubert court used the word "candidate" to encompass the two classes of persons, applicants and nominees, and treated both kinds of applicants alike for purposes of the Open Records Act. The terms "applicants," "candidates," and "nominees" are commonly used interchangeably. An understanding of the word "applicant" as a broad class including all candidates or persons under consideration effectuates the legislative intent. The underlying rationale of the exception is not served by rigid, formalistic, and false distinctions, nor does the commonly accepted meaning of the word applicant require it, and therefore we reject it. Since no meaningful distinction between the two classes of persons justifies different treatment under section 3(a)(23), we think the exception protects the identities of all persons being considered for the position of university president, whether they apply on their own initiative or they are nominated.

We conclude, therefore, that section 3(a)(23) protects the identities of all individuals being considered by a university for the position of chief executive officer of an institution of higher education. We have reviewed the documents you submitted and have determined that they are excepted from required public disclosure under section 3(a)(23). Pursuant to the statute, public notice of the names of all finalists must be given at least 21 days before the meeting at which final action or vote is taken in selecting the individual.

S U M M A R Y

Section 3(a)(23) of the Open Records Act, article 6252-17a, V.T.C.S., protects from required public disclosure the identities of all candidates being considered for the position of university president. Public notice of the names of all finalists must be given at least 21 days before the meeting at which final action or vote is taken in selecting the individual.

Very truly yours,



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