



**THE ATTORNEY GENERAL
OF TEXAS**

February 20, 1990

JIM MATTOX
ATTORNEY GENERAL

Mr. John T. Hoeft
General Counsel
Dallas Area Rapid Transit
601 Pacific Avenue
Dallas, Texas 75202

Open Records Decision No. 542

Re: Whether subsection (c) of section 7 of the Texas Open Records Act, article 6252-17a, V.T.C.S., applies when a governmental body has not requested an open records decision pursuant to subsection (a) of section 7 of the act (RQ-1840)

Dear Mr. Hoeft:

In a letter dated September 25, 1989, Mr. Otis C. Tolbert, Director of Minority Affairs for Dallas Area Rapid Transit (DART), requested an attorney general opinion regarding a request from Mr. Chris Kelley of the Dallas Morning News for the release (pursuant to the Open Records Act, V.T.C.S. art. 6252-17a) of a "copy of Otis Tolbert's employment application to DART, including any and all supporting documents related to his education, training or qualifications for the Director of Minority Affairs position." Mr. Tolbert's letter to this office explained why he believed the information in question should be withheld.

In your letter of September 29, 1989, you advised this office that "Mr. Tolbert is acting entirely in a personal capacity and that his request is not an official request of Dallas Area Rapid Transit." Your letter went on to state that you consider the information in question releasable, but you wish to know whether this office interprets section 7(c) of the Open Records Act as giving a third party individual who is the subject of the documents requested the right to request an attorney general opinion as to the releasability of the information in question.

We notified you by our letter of October 18, 1989, that we would be preparing an opinion regarding this matter. We are regarding your letter of September 29, 1989, as a

request for an opinion pursuant to section 7 of the Open Records Act.

We will deal first with the interpretation of section 7(c). Section 7(c) was added to the act by the 71st Legislature, Acts 1989, 71st Leg., ch. 1248, § 14, at 5027, and became effective on September 1, 1989. This provision has not been, to our knowledge, judicially interpreted. No previous opinions of this office have dealt with this provision.

Section 7(b) of the Open Records Act provides in part:

If the governmental body wishes to withhold information, it must submit written comments setting forth the reasons why the information should be withheld. Any member of the public may submit written comments setting forth the reasons why the information should or should not be released. The attorney general shall issue a written opinion based upon the determination made on the request.

Section 7(c) of the Open Records Act provides:

In cases in which a third party's privacy or property interests may be implicated, including but not limited to Subdivisions (1), (4), (10), and (14) of Subsection (a) of Section 3 of this Act, the governmental body may decline to release the information in order to request an attorney general opinion. A person whose interests may be implicated or any other person may submit in writing to the attorney general the person's reasons for withholding or releasing the information. In such cases, the governmental body may, but is not required to, submit its reasons why the information should or should not be withheld.

Pursuant to section 7(b), when a governmental body requests an attorney general opinion, the governmental body bears the burden of stating which exceptions apply to the information and why. Section 7(c) serves to relieve the governmental body of this duty in circumstances where (1) a third party's privacy or property interests may be implicated, (2) the governmental body has requested an attorney general opinion, and (3) such third party or any

other party has submitted reasons for withholding or releasing the information.

Nothing in section 7(c) provides a mechanism for a third party to relieve a governmental body of its duty to seek an attorney general opinion regarding information it believes is excepted from public disclosure. However section 7(c) does provide that, in the circumstances it describes, the governmental body may rely upon another party to raise applicable exceptions. Please note, that among the circumstances necessary to trigger the applicability of section 7(c) is the submission by another party of reasons for withholding or releasing the information. Where another party has not submitted such reasons, the governmental body must assume the burden of raising exceptions it wishes this office to consider.

Therefore, this office is of the opinion that only governmental bodies may seek attorney general opinions under section 7 of the Open Records Act. Any person may submit written comments as to why information in question should be released or withheld. In the circumstances described in section 7(c), the submission of such comments relieves the governmental body of its duty to raise exceptions it believes are applicable to the information in question. Section 7(c) does not provide third parties with standing to request attorney general opinions under section 7 of the Open Records Act.

We will now discuss the concerns Mr. Tolbert raises. First, Mr. Tolbert states:

I am an employee of the above political subdivision who has given a deposition relating to litigation of a civil nature to which the above political subdivision is a party and further that the deposition goes to the heart of the requested information, and would seriously jeopardize the pending negotiations or settlement of the litigation.

No explanation is provided of the nature of the litigation or why the information in question is relevant to the litigation. In any case, the litigation exception to the Open Records Act, section 3(a)(3), excepts "information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a

party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection."

Since the litigation exception is not one which implicates the rights of a third party, since the litigation exception is waivable by the governmental body, and since the governmental body has not raised this exception, we are of the opinion that it is waived.

Second, Mr. Tolbert advises:

The second exception on which I am requesting your opinion goes to a constitutional issue involving the request for information on a discriminatory basis. This request for information was addressed specifically to a singled-out person of a minority and protected group (black) while not requesting the same information from a non-minority (white person). In my opinion, this action is arbitrary and capricious; hence discriminatory, and therefore unconstitutional.

Section 5 of the Open Records Act prohibits the inquiry by the governmental body into the motives of the person applying for inspection or copying of records, and requires the governmental body to treat each request uniformly. V.T.C.S. art. 6252-17a, § 5(b), (c). Mr. Kelley's motives are, thus, not relevant to an analysis under the terms of the Open Records Act. As Mr. Kelley is clearly not a state actor, it is not apparent how any claim of discrimination is applicable as a matter of constitutional law.

Third, Mr. Tolbert raises section 3B of the Open Records Act, and suggests:

The third exception on which I am requesting your opinion is contained in [section 3B]. . . . A person under this section may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

We understand Mr. Tolbert to be expressing the belief that DART may not release his resume for reasons other than those for which it was originally obtained.

Section 3B deals with the special right of access that a person has to information about himself that is protected from public disclosure solely by laws designed to protect that person's privacy interests. The restriction noted by Mr. Tolbert applies to recipients of information under this section and not to the governmental body. Therefore, this provision is not applicable here.

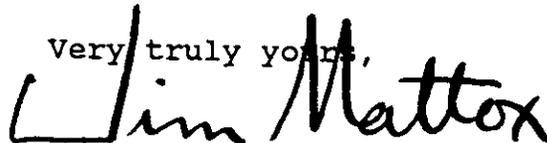
Finally, we have reviewed the information with respect to the privacy exception found in section 3(a)(1) and find it not to be applicable here. Information regarding the qualifications of a public employee is certainly of legitimate concern to the public. Nothing in Mr. Tolbert's resume is highly intimate or embarrassing nor will its release restrict his freedom in a sphere recognized to be within a zone of constitutionally protected privacy. We note that the privacy exception found in section 3(a)(1) is comprehensive of that found in section 3(a)(2). Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977); Hubert v. Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

The information in question must be released immediately.

S U M M A R Y

Only governmental bodies may request attorney general opinions under section 7 of the Open Records Act. Section 7(c) permits a governmental body to rely on another party to raise and explain the applicability of exceptions to the Open Records Act where (1) a third party's privacy or property interests may be implicated, (2) the governmental body has requested an attorney general opinion, and (3) such third party or any other party has submitted reasons for withholding or releasing the information.

Very truly yours,



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

MARY KELLER
First Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RENEA HICKS
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by John Steiner
Assistant Attorney General