



**THE ATTORNEY GENERAL
OF TEXAS**

June 4, 1990

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Jim Hightower
Commissioner
Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

Open Records Decision No. 559

Re: Whether documents relating to the Texas-Federal Inspection Service are excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1935)

Dear Mr. Hightower:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

The information in question concerns an audit by the State Auditor of Texas of the Department of Agriculture and the Texas-Federal Inspection Service. The Texas-Federal Inspection Service is an entity created under a cooperative agreement between the United States Department of Agriculture and the Texas Department of Agriculture to carry out the Fresh Fruit and Vegetable Grading Program pursuant to the Agricultural Marketing Act of 1946 (7 U.S.C. 1621, et seq).

You claim that some of the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(7), 3(a)(11), or 3(a)(16), or by a combination of these sections. Pursuant to the Open Records Act, you have submitted the material you believe is excepted from public disclosure to this office for our inspection. You have organized this material into folders labeled A, B-1, B-2, B-3, and C through J.

As your most inclusive claim for exception from public disclosure is that with respect to section 3(a)(11), we will consider the applicability of section 3(a)(11) first.

Section 3(a)(11) excepts from public disclosure 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation

with the agency.' It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 470 (1987).

Open Records Decision No. 538 (1990).

You describe the material in folders A through E as draft documents. With respect to the information in folders A through B-3, you advise that the final version of these documents have already been released in the State Auditor's report.

It is clearly inimical to the purposes of the Open Records Act to suppose that an agency may close up documents merely by stamping the word "draft" upon them. However, where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. To the extent the content of the preliminary draft has appeared in the final version, it is already on the public record. The release of an edited version of the preliminary draft that includes only material incorporated into the final draft would not make more of the subject matter available to the public. It would, however, reveal something about the deliberative process by indicating where additions and deletions were made in the preliminary draft as it was reviewed. See National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1122 (9th Cir. 1988); Dudman Communications v. Department of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987); Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 85-86 (2d Cir. 1979). Thus, the draft itself, as well as comments made on the draft, underlining, deletions, and proofreading marks would qualify for exception under section 3(a)(11).

Underlying factual data upon which the document was based on purely factual matter, where severable, must be released. When such factual matter is contained in the

final version of the document, the release of the final version would satisfy this requirement. Open Records Decision No. 196 (1978) reached a contrary result, in addressing a preliminary draft of a report which had been made public in its final form. In that case, this office said that portions of a preliminary draft which were identical or nearly identical to information in the final report must be made available. But see Open Records Decision No. 120 (1975). Open Records Decision No. 196 did not consider whether the governmental body could comply with the request for information by providing one comprehensive document. As drafts of documents intended for eventual release form an integral part of the deliberative process which section 3(a)(11) is intended to protect, we believe this consideration is relevant to questions concerning preliminary drafts. As Open Records Decision No. 196 recognized, the content of information already released cannot be excepted by 3(a)(11). However, the drafter's recommendation of the form in which that information ought to be presented in the final report is within the scope of 3(a)(11). To the extent Open Records Decision No. 196 suggests the contrary, it is disapproved. We concluded that information in an earlier draft which has been released in the final document may be protected from disclosure by section 3(a)(11). We expressly do not conclude that severable factual information that appears in a preliminary draft but not in the final version may be excepted by section 3(a)(11).

A comparison of the draft documents to the report which has been released indicates the factual information in the documents in folders A through B-3 appears in the final draft. These documents may be withheld.

You do not explain the documents in folder C. However, they appear to be a schedule of charges made on a credit card and a list of the Department of Agriculture and Inspection Service meetings. As this information is entirely factual, it is not excepted from disclosure by section 3(a)(11). Since you claim no other exception for folder C, the information must be released.

You advise that the documents in folder D are drafts of letters that were not sent or not yet sent. As discussed above with respect to draft documents in general, drafts of proposed or actual correspondence are by definition the advice, opinion, or recommendation as to the form and content of the correspondence. Consideration of such drafts is clearly part of the internal give and take that must occur prior to the adoption of a public posture by an agency

as expressed in its correspondence. This internal deliberative process is what section 3(a)(11) is intended to protect. Nothing in this correspondence appears to be the sort of purely factual information or data that is appropriately severable for release. Therefore the information in container D may be withheld.

You advise that the documents in folder E are drafts of documents that have been released in another form. As indicated above, consideration of a claim of exception from public disclosure with respect to such drafts depends largely upon a comparison of the draft to the information actually released so that a determination can be made as to exactly what is being proposed to be withheld. In this case, with the exception of item 7 of the draft document titled "Facts about the Texas-Federal Inspection Service", the released versions of the documents include all the factual information contained in the drafts. With the exception of the indicated item, which is entirely factual and is not included in the final version, the information in folder E may be withheld.

Folders G and H contain various correspondence between or among the Texas Department of Agriculture, the U.S.D.A., and the State Auditor with various attachments. The correspondence consists of inquiries or responses to inquiries. The attachments consist of copies of other correspondence or of purely factual information. None of this information is the sort of advice, opinion, or recommendation protected by section 3(a)(11).

Folder I contains a letter from the deputy commissioner of the Department of Agriculture to the director of the Inspection Service. This letter contains no advice, opinion, or recommendation. In addition, folder I contains several affidavits with respect to various practices or operations concerning the Inspection Service. These affidavits contain no advice, opinion, or recommendation. Hence, the information in folder I is not excepted from public disclosure by section 3(a)(11).

Folder J contains two memoranda, dated October 11, 1989, and November 10, 1989, respectively. Folder J also contains an unsigned document that recites facts concerning lunch and dinner meetings involving Department of Agriculture and Inspection Service staff. The November 10, 1989, memorandum recites the content of a telephone conversation between a staff member of the State Auditor and a staff member of the Department of Agriculture. Of the three documents in folder J, only the October 11, 1989,

memorandum which expresses the opinion of the drafter as to the answer of a question within the scope of the exemption found in section 3(a)(11).

With respect to the contents of folders C and G through J, you have also claimed exemption from required public disclosure under section 3(a)(16), the exemption for working papers of the State Auditor.

Documents that reveal (1) the timing, scope, or strategy of an audit, (2) discussion and opinion expressed by participants in an audit, or (3) law enforcement techniques may be withheld under section 3(a)(16). Open Records Decision No. 164 (1977). None of the material in folders C or G through J contain any discussion or opinion other than that already exempted from public disclosure by section 3(a)(11) as discussed above. No law enforcement techniques are revealed in the information in folders G through J. Our analysis of the applicability of section 3(a)(16) is therefore limited to whether any of the information in folders C or G through J is excepted from public disclosure as information which would reveal the timing, scope, or strategy of an audit.

Exempting information which reveals the timing, scope, or strategy of an audit serves public policy by preserving the secrecy of audit techniques and preventing client agencies from circumventing the State Auditor's work. Id. In the instant case, the audit is completed and the information in question is in the possession of the audited agency. Withholding information that might reveal audit timing, scope, or strategy with specific respect to the audit of the Department of Agriculture and the Inspection Service would not serve the purpose of the exemption. It is not apparent how any of the information in folders C or G through J reveal audit techniques of such a general or confidential nature that their release would provide agencies with the means to circumvent the State Auditor's work. We conclude that none of the requested information is exempted from public disclosure by section 3(a)(16).

Finally, you claim the information in folders B-1, B-2, D, and F, is excepted from public disclosure under sections 3(a)(1) and 3(a)(7) by the attorney-client privilege, and the Rules and Canons of Ethics of the State Bar of Texas. As we have concluded that the information in folder B-1, B-2, and D are excepted by section 3(a)(11), we will limit our analysis to folder F. The information in folder F consists of a chronology of events with respect to interactions of the Texas Department of Agriculture, the

Texas-Federal Inspection Service, the U.S.D.A., and the State Auditor. You advise that this information was prepared by the general counsel of the Department of Agriculture for the purpose of advising the commissioner. The information is presented factually, without comment or elaboration.

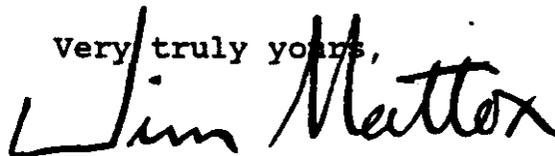
This office has consistently held that the attorney-client privilege aspects of sections 3(a)(1) and 3(a)(7) protect legal advice and opinion from public disclosure, but do not extend to factual information solely because it is reported by an attorney. Open Records Decision Nos. 462 (1987), 230 (1979), 80 (1975). We conclude that the information in folder F may not be withheld under the asserted exceptions.

S U M M A R Y

It is clearly inimical to the purposes of the Open Records Act to suppose that an agency may close up documents merely by stamping the word "draft" upon them. However, where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. In such an instance, the draft itself, as well as comments made on the draft, underlining, deletions, and proof-reading marks would qualify for exemption under section 3(a)(11). Purely factual matter, where severable, must be released. When such factual matter is contained in the final version of the document, the release of the final version would satisfy this requirement. Open Records Decision No. 196 (1978) is overruled to the extent inconsistent with this decision.

Where an audit is completed and the information in question is in the possession of the audited agency, withholding information that might reveal audit timing, scope, or strategy with specific respect to that audit would not serve the purpose of the exemption from public disclosure found in section 3(a)(16).

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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