



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 26, 1990

Mr. Charles E. Griffith, III Open Records Decision No. 574
Deputy City Attorney
City of Austin
708 Colorado
P.O. Box 1088
Austin, Texas 78767-8828

Re: Whether information re-
lating to funding a housing
project is excepted from dis-
closure under the Open Records
Act, article 6252-17a,
V.T.C.S. (RQ-2140)

Dear Mr. Griffith:

You request a determination from this office as to whether portions of materials requested from the city attorney under the Open Records Act, article 6252-17a, V.T.C.S., fall within various specified exceptions to the act. The information requested relates to the city's agreement with Carnales, Inc. and East Austin Chicano Economic Development Corporation (EACEDC) for funding of the Nueva Vida housing development and related litigation.

You submit that certain categories of documents covered by the request fall within exceptions to the Open Records Act, specifically sections 3(a)(1) and 3(a)(7) as they incorporate the attorney-client privilege, and section 3(a)(11) concerning intra-agency memoranda. You have classified the documents at issue into four categories, Exhibit B ("intra-agency memoranda"), Exhibit C ("legal opinion memoranda"), Exhibit D ("internal law department legal memoranda"), and Exhibit E ("handwritten notes related to litigation and research"). You also inform us that the requestor seeks "all summaries of executive sessions relating to City funding and litigation." You advise us that no summaries of executive sessions are made, and claim that section 2A(c) of the Open Meetings Act provides that certified agendas of such sessions are available only through court order in an action brought under the act.

Exhibit B consists of inter-agency and intra-agency memoranda. You claim that section 3(a)(11) exempts this material from disclosure. Section 3(a)(11) excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or

recommendation intended for use in the entity's policymaking/deliberative process. Open Records Decision No. 462 (1987). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.). Facts and written observations of facts do not constitute advice, opinion, or recommendation, and cannot be withheld under this section if they are severable from properly excluded material. Open Records Decision Nos. 462 (1987); 213 (1978). The documents you submit primarily contain advice, recommendation, and opinion, but also contain severable factual material. We have marked such factual portions, and these must be released; the remainder of the Exhibit B material may be withheld.

The documents in Exhibit C and D consist of (1) communications between city attorneys and city staff and (2) communications between city attorneys. You claim exception for all of these as legal opinion memoranda protected by attorney-client privilege as incorporated in sections 3(a)(1) and 3(a)(7) of the act, and as section 3(a)(11) inter-agency memoranda. As noted above, section 3(a)(11) only protects advice, opinion, and recommendations, and thus any protection under this section will overlap with protection under the two other sections cited (see discussion below). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Although this office has frequently cited this section to except from disclosure information within the attorney-client privilege, the privilege is more specifically covered under section 3(a)(7). This section protects

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure.

The Texas State Bar Disciplinary Rules of Professional Conduct proscribe the attorney from disclosing "confidential" information of a client or former client. Rule 1.05(a)(1). The rule's definition of confidential information includes both material within the attorney-client privilege of Rule 503 of the Texas Rules of Evidence and

"unprivileged client information." The rule defines unprivileged client information as "all information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client." Id. Rule 1.05(a).

We note that the attorney-client privilege may prevent the disclosure of communications between the client or its representatives and the attorney, or communications among lawyers serving the same client, such as you submit in your Exhibits C and D. Texas Rules of Civil Evidence 503(b). Although some courts have restricted the coverage of the attorney's communications to the client to those which reveal the client's confidences, the more general practice is to apply the privilege to attorney communications of legal advice and opinion as well. See Open Records Decision No. 462 at 10 (citing Dewitt and Rearick, Inc. v. Ferguson, 699 S.W.2d 692, 693 (Tex. App. - El Paso 1985, no writ)). Of course, client communications to the attorney regarding the subject matter of the representation are privileged. The rule's protection of unprivileged material extends the prohibition on disclosure to information about the client acquired by the attorney from third parties as well. Goode & Sharlot, Privileges, 20 Houston L. Rev. 273, 286 (1983).

This office has dealt with confidentiality in the attorney-client relationship on numerous occasions. See, e.g., Open Records Decision Nos. 462 (1987); 429 (1985); 210 (1978). As for privileged material under the confidentiality rule, it is important to note that the privilege does not attach to every communication between the parties within its scope. See Open Record Decision Nos. 462; 429 (containing a discussion of the attorney-client privilege). When communications from attorney to client do not reveal the client's communications to the attorney, prior decisions of this office have held that section 3(a)(7) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. See, e.g., Open Records Decision No. 462 (citing North American Mortgage Investors v. First Wisconsin Nat'l Bank of Milwaukee, 69 F.R.D. 9, 11 (E.D. Wis. (1975))). Basically factual communications from attorney to client, or between attorneys representing the client, are not protected. See Open Records Decision Nos. 556 (1990); 462 (1987).

Moreover, protection of unprivileged material under Rule 1.05 cannot be used to close up all communications and documentation concerning the client in a government attorney's case file. We note that the State Bar confidentiality rule in place at the time of the enactment of section

3(a)(7) was not as broad in its protection of unprivileged information as the current rule. Formerly, the rule covered privileged information and a client's "secrets," defined as

information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Supreme Court of Texas, Rules Governing the State Bar of Texas, art. XII, § 8, DR 4-101 (1973). Application of either the new or old language to open records determinations would create a major loophole in the act, given the broad range of materials flowing into the offices of government attorneys. Moreover, application of this coverage to open records cases could allow governmental entities to circumvent the act and close up a great deal of information by expediently transferring it to their attorneys. We do not believe that the legislature could have intended such a scenario.

The State Bar confidentiality rule does not in itself distinguish between the relationship between a client and a private or government attorney. However, critical distinctions between the two do exist. Often, the distinction between the government attorney and the "client" is quite blurred, as both are agents of the public as a whole. The preamble to the rules recognizes that the peculiar nature of government attorneys' relationships to their "clients" necessitates a different standard for their conduct in some areas. State Bar Rules art. 10, § 9, preamble No. 13 (government attorneys may represent several governmental agencies in intragovernmental legal circumstances where private lawyers could not; government lawyers may have "authority to represent the 'public interest'" in contrast to private lawyers.)

The distinction is crucial in the open records context. The confidentiality rule enjoins the private lawyer from releasing any client information garnered because of the professional relationship, and the public generally has no legitimate concern with or right to know such information. However, the government lawyer in the course of representation accumulates a great deal of information relating to the "client," virtually all of which is of great concern to the public, because the public is ultimately the "client." Moreover, in this case the confidentiality rule comes up against the basic statutory principle of the Open Records Act, that the public does have a right to know about the

conduct of its affairs, even when information might be embarrassing to governmental officials or entities, and even when the governmental agency would prefer such information to be withheld. Clearly, the legislature, by enacting section 3(a)(7), meant to protect the essence of the confidential relationship between attorney and client from the disclosure requirements of the Open Records Act; the question is whether it intended that protection to extend to all information about the entity found in the attorney's files.

To avoid an interpretation so inimical to the purposes of the Open Records Act, we hold that protection under section 3(a)(7) is limited to privileged material under Rule 1.05. We feel that this interpretation expresses the intention of the legislature in drafting the act and the section 3(a)(7) exception to it. The open records context directs us toward a narrow reading of the confidentiality rule to be consistent with the policies furthered by the Open Records Act, while honoring the principles protected by section 3(a)(7) and Rule 1.05. We believe that the purposes of the State Bar confidentiality rule -- to protect the unrestrained communication between attorney and client, and to protect the client from attorney misuse of client information -- are amply served by our interpretation of the rule in the open records context. See State Bar Disciplinary Rule of Professional Conduct 1.05, comments 1-5, 8. Release of non-privileged information gathered in the course of representation pursuant to an Open Records Act request does not seem to us to be attorney "misuse" of client information. Moreover, the fiduciary duty the attorney owes the client will be adequately upheld by the protection for privileged communications and by the application of section 3(a)(11).

We have examined the material submitted in Exhibits C and D, and find that the bulk of material does consist of protected information under section 3(a)(7). However, the exhibit also contains various documents that do not contain legal advice or opinion, or client confidences, such as a summary of a meeting sent from one attorney to an associate, containing no legal advice or opinion, or a basically factual recounting of events in a lawsuit sent between two city attorneys. See letters dated 4/19/87, 8/19/87, 2/22/88, 4/12/88, 4/15/88, and 2/29/88 (Exhibit D). Some of these documents also contain information that is clearly not confidential, either because it is a matter of public record (events at a hearing), or because it reports communications with a third party (conversations between attorney and opposing counsel). See, e.g., letter dated 1/26/88 (Exhibit

C). We have marked the documents or portions of documents that we have determined to be outside the act's exceptions, and these must be disclosed.

Your Exhibit E consists of the handwritten notes of city attorneys relating to the city's litigation with EACEDC, litigation that is now over. You claim sections 3(a)(1), 3(a)(7), and 3(a)(11) exempt this material from disclosure, referencing your claims to the "work-product" privilege under Rule 166(b)(3) of the Texas Rules of Civil Procedure.

In Open Records Decision No. 304 (1982) this office ruled that an attorney's research materials and working papers were excepted from disclosure under section 3(a)(1) as information deemed confidential by law by reason of the protection of the work product privilege. In that case, the papers and research related to ongoing litigation, the governmental body claimed exception for the materials under section 3(a)(3) as well as section 3(a)(1), and the ruling noted that the section 3(a)(3) exception was designed to protect this sort of material from disclosure. However, more recently this office has stated that

(t)he work product doctrine . . . merely represents one aspect of section 3(a)(3) information relating to litigation. We have determined that none of the requested information has been shown to be "information related to litigation" within section 3(a)(3); therefore, none of it is protected as material prepared by an attorney in anticipation of litigation.

Open Records Decision No. 429 (1985). You have not claimed that this material is within section 3(a)(3), and indeed, could not do so, as there is no showing that litigation is pending or reasonably anticipated in your case. From what we can discern from these materials, any litigation that these notes relate to has been concluded. Open Records Decision No. 304 is explicitly overruled to the extent that it indicates that section 3(a)(1) incorporates the work product doctrine under the Texas Rules of Civil Procedure.

As for your claims under the attorney-client privilege, we note at the outset that notes in an attorney's client file may be covered under sections 3(a)(1) and 3(a)(7) if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys on the case.

See Goode & Sharlot, supra, at 284, n.43 ("Communications may be made or memorialized in documentary form.") (Emphasis added.)

We conclude that the notes furnished to us are excepted from disclosure to the extent that they document confidences of city representatives or the legal advice and opinions rendered to the city representatives or associated lawyers. However, the notes also contain many entries that are merely factual, such as a note that a meeting will take place or has taken place between individuals (entry dated 3/16/88); documentation of the filing or disposition of a motion or judgment (entry dated 1/20/88); and discussions with third parties (entry dated 3/24). Such information does not fall within the act's exceptions. For example, the fact of an attorney's meeting with a city representative must be disclosed, but the content of the meeting may be withheld if it reveals confidences of the representative or advice from the attorney. In general, the attorney's mere documentation of calls made, meetings attended, or memos sent is not protected under section 3(a)(7), if no notes revealing the attorney's legal advice or the client's confidences are included. Such documentation simply does not embody attorney-client communication. We have marked the first three pages of Exhibit E to indicate the type of material that may be withheld. As stated above, any coverage afforded by section 3(a)(11) would overlap in this instance with the coverage of the section 3(a)(7) exception, and so need not be discussed.

Finally, you are not obliged to comply with the request for "all summaries of executive sessions relating to City funding and litigation, as required by State law and Texas Attorney General opinions," if no such summaries exist. The act does not require a governmental body to prepare new information. Open Records Decision Nos. 462, 458 (1987). Furthermore, you are correct in stating that certified agendas of executive sessions are not available except by judicial order under the Open Meetings Act. V.T.C.S. art. 6252-17, § 2A(c).

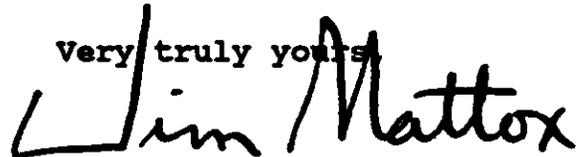
S U M M A R Y

Section 3(a)(7) protects communications within the attorney-client privilege from disclosure under the Open Records Act. The protection extends to factual information or requests for legal advice communicated by the client to the attorney, as well as to legal advice or opinion rendered by the attorney to

the client or to an associated attorney in furtherance of the rendition of legal services to the client. Notes made by an attorney in a case file are protected to the extent that they document client confidences or the attorney's legal advice or opinion communicated to the client; mere factual notations, or notations concerning information garnered from third parties, are not protected.

An attorney's work product is not protected as information deemed confidential by law under section 3(a)(1). Such information may be excepted from disclosure under section 3(a)(3), the "litigation exception," only if the section 3(a)(3) requirements are met. Open Records Decision No. 304 (1982) is overruled to the extent that it conflicts with this decision.

Very truly yours,



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