



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

January 25, 1989

Mr. William C. Bednar, Jr.
Eskew, Muir & Bednar
One Wahrenberger House
208 West Fourteenth Street
Austin, Texas - 78701

Dear Mr. Bednar:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 4927; this decision is OR89-39.

Section 7(a) of the Open Records Act, article 6252-17a, V.T.C.S., provides:

If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information. (Emphasis added.)

The Superintendent of the Salado Independent School District (SISD) received an open records request from Mr. H.A. Schenkel on July 13, 1988 for information pertaining to an invoice submitted to the district by its new attorney for his first month's services. Included in Mr. Schenkel's letter to the superintendent was a request for "a written transcript of each and every meeting, consultation [sic], phone call, investigation or inquiry which is reflected on the invoice." The transcripts that Mr. Schenkel was

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particularly interested in consisted of two volumes: Volume I was completed on July 15, 1988 and Volume II was completed on June 25, 1988.

The Superintendent, explaining that "I have not been privileged to this information," forwarded the request to the President of the SISD Board of Trustees. The President then consulted with the school's attorney, who advised him that the records request would not be honored because "this information is not public information."

Mr. Schenkel addressed subsequent written requests for this information to the board on August 3, 1988 and August 25, 1988. It was not until after Mr. Schenkel requested the assistance of this office that you requested a decision from the attorney general on November 8, 1988 as to whether you could properly withhold this information.

In your letter to this office dated October 26, 1988, you claimed that the school district never received any of Mr. Schenkel's requests. In our response of November 15, 1988, this office asked that you submit a sworn affidavit stating that such was the case. This office never received an affidavit. Consequently, this office holds that you failed to request a decision within the 10 days required by section 7(a) of the Open Records Act.

Section 7(a) of the act requires a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. In placing a time limit on the production of public information, the legislature recognized the value of timely production of public information. See also Art. 6252-17a, section 4 (shall "promptly" produce public information), section 13 (may promulgate rules to ensure that "public records may be inspected efficiently, safely, and without delay").

When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. City of Houston v. Houston Chronicle Publishing Co., 673 S.W.2d 316, 323 (Tex. App. - Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. Open Records Decision No. 319. We will examine your arguments to determine if you have shown a compelling interest for withholding the information.

You contend that subsections 3(a)(1), (3), and (11) of the act except the transcripts in question from required public disclosure. Because you failed to seek a decision from the attorney general in a timely manner, you have waived the protection of subsections 3(a)(3) and (11). Consequently, this letter ruling addresses only whether the requested transcripts contain information protected by section 3(a)(1). This ruling does not address whether the school board acted in compliance with the Texas Open Meetings Act, article 6252-17, V.T.C.S. with regard to the meetings from which the transcripts were taken.

We initially note that the district employees who testified at the meetings from which the transcripts were made were promised limited confidentiality. You are quoted in the transcripts as saying:

There was one other thing that I wanted to tell you and forgot, and that relates to any assurances to confidentiality of anything that you may say to the Board. I can only give you a limited assurance that your statements will remain confidential to the Board of Trustees. These statements will be provided to all the Trustees and it is not the present intention that the Committee, at least, share them any further, unless, at some point in the future, the Board of Trustees should decide upon a course of action that would trigger someone's procedural rights.

"Transcript of Proceedings Before the Salado Independent School District, Vol. I, p. 46.

Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract or agreement, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement to maintain confidentiality.

Section 3(a)(1) of the Open Records Act protects from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the right to privacy. Texas courts recognize four categories of common-law privacy, including public disclosure of private facts and false light in the public eye (a theory analogous to defamation).

A governmental body must withhold information under section 3(a)(1) on the basis of "false light" privacy only if it finds that release of the information would be highly offensive to a reasonable person, that public interest in disclosure is minimal, and that serious doubt exists about the truth of the information. Open Records Decision No. 438 (1986). The information contained in the transcripts pertains solely to the school district employees' satisfaction with the operation of the district's schools. In this regard it cannot be said that the public interest in the manner in which the schools operate is "minimal." To the contrary, the effectiveness of the educational system and the degree and manner in which its policies are carried out are of the utmost public concern. When these considerations are coupled with the fact that the employees' statements consist of sworn testimony, it is apparent that, with the exception of portion of the transcript that we have marked, the contents of the transcripts do not meet the necessary tests to be withheld pursuant to false light privacy.

The Texas Supreme Court in Industrial Foundation, supra set forth the primary test for "the public disclosure of private facts" under section 3(a)(1). Information may be withheld under section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See Industrial Foundation, 540 S.W.2d at 683-85. We have marked those portions of the transcripts coming within the protection of section 3(a)(1).

Subsections 3(a)(1) and (14) also require that you withhold:

student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, that student's parent, legal guardian, or spouse or a person

conducting a child abuse investigation
required by Section 34.05, Family Code.

Section 14(e) of the Open Records Act provides as
follows:

Nothing in this Act shall be construed to
require the release of information contained
in education records of any educational
agency or institution except in conformity
with the provisions of the Family Educational
Rights and Privacy Act of 1974, as enacted by
Section 513 of Public Law 93-380, codified as
Title 20 U.S.C.A. Section 1232g, as amended.

The Family Educational Rights and Privacy Act of 1974,
which is informally known as "the Buckley Amendment,"
provides that no federal funds will be made available under
any applicable program to an educational agency or institu-
tion that releases education records (or personally identi-
fiable information contained therein other than directory
information) of students without the written consent of the
parents to anyone but certain numerated federal, state, and
local officials and institutions. See 20 U.S.C. § 1232g
subsections (a)(1)(A), (a)(2), (b)(1). When a student has
attained the age of eighteen years or is attending an
institution of postsecondary education, the student holds
the rights accorded by Congress to inspect these records.
20 U.S.C. § 1232g(d). "Education records" means those
records that contain information directly related to a
student and are maintained by an educational agency or
institution or by a person acting for such agency or
institution." 20 U.S.C. § 1232g(a)(4)(A).

For purposes of the Buckley amendment, the transcripts
at issue constitute "education records" to the extent that
they contain information about identifiable students.
Consequently, you must withhold those portions of the
transcripts unless you receive permission to release the
information from the parent of the student or from the
student himself if qualified to do so as specified above.
We have marked those portions of the transcript coming under
the protection of section 3(a)(14).

You have not shown compelling reasons why the remaining
portions of the requested information should not be
released. The remaining information is presumed public
information and must be released. Please be advised that
failure to provide information that the attorney general has
determined to be public may give rise to an action for a

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writ of mandamus pursuant to section 8 of the Open Records Act or to criminal sanctions under section 10 of the act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-39.

Yours very truly,

Open Government Section
of the Opinion Committee 

Open Government Section
of the Opinion Committee
Prepared by Patricia Barnhard
Assistant Attorney General

PB/RWP/bc

Enclosures: Marked documents

Copy to: H.A. Schenkel
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Ref: ID# 4927
ID# 5022
ID# 4808
ID# 4540