



**THE ATTORNEY GENERAL
OF TEXAS**

February 9, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Ms. Nancy S. Footer
Associate University Counsel
University of Houston System
4600 Gulf Freeway, Suite 425
Houston, Texas 77023

Dear Ms. Footer:

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# 5074; this decision is OR89-41.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The University of Houston received a request from Mr. Fabian Vaksman, a former teaching assistant at the university, for all information assembled or maintained by two University of Houston attorneys in connection with Mr. Vaksman's expulsion from the Ph.D. program at the University of Houston. Mr. Vaksman also requested all information concerning the administration of the university's Ph.D. program from 1981 to the present and the administration of the university's history department during the same time period. You informed us that Mr. Vaksman has filed suit in the U.S. District Court for the Southern District of Texas against the University of Houston claiming discriminatory employment practices. Vaksman v. Board of Regents of the University of Houston, CA No. H-88-2346 (S.D. Tex. filed July, 1988). As a result of Mr. Vaksman's production requests, you provided him with copies of his own academic records, including his "academic files, personnel records, pertinent university, college, and departmental

policies, and other relevant information." You claim that the remainder of the information is excepted from disclosure by sections 3(a)(3) and 3(a)(7) of the Open Records Act.¹

Section 3(a)(3) of the Open Records Act excepts from public disclosure "information relating to litigation of a criminal or civil nature." To claim this section, the governmental body must show that litigation is actually pending or reasonably anticipated; and that the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). You have demonstrated that litigation is pending. In addition, the documents you have submitted which are relevant to the request do relate to the litigation sufficiently to trigger the exception. Therefore, you may withhold these documents under the Open Records Act. We do not address whether they can be obtained through other methods such as discovery. Also, because the documents you submitted can be withheld under section 3(a)(3), we will not discuss your 3(a)(7) argument.

Although your office has not raised section 3(a)(14) of the Open Records Act to protect student records submitted, the attorney general will raise this exception to protect the rights of third parties. Section 3(a)(14) protects "student records at educational institutions funded wholly, or in part, by state revenue." The Open Records Act incorporates the Buckley Amendment, 20 U.S.C.A. § 1232g (1974), through sections 3(a)(14) and 14(e). Student records are thus exempt from disclosure under the Open Records Act. Open Records Decision No. 447 (1986). Therefore, you must not release to Mr. Vaksman any student records other than his own.

1. You state that you have already released the academic records that relate solely to Mr. Vaksman to him, as is required under the Open Records Act. Open Records Decision No. 431 (1985) (a governmental entity cannot withhold a student's academic records from the student claiming exception under 3(a)(3)).

Ms. Nancy S. Footer
February 9, 1989
Page 3

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 OR89-41.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
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Assistant Attorney General

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cc: Barry Abrams
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