



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

February 7, 1989

Mr. James R. Lindley
American Educational Complex System
P. O. Box 1432
Bell-Coryell Counties
Killeen, Texas 76540

Dear Mr. Lindley:

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# 5134; this decision is OR89-45.

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 American Educational Complex System (AECS) has received a request from the Houston Chronicle for the following information:

Any documents relating to the disability pension or any other financial arrangements existing between [a] former [employee] and the AEC, AGTC, its insurers or any related entities since his resignation in July.

You advise that "no documents or other financial arrangements exist between the former employee [sic] since his resignation." The Open Records Act does not require a governmental body to create new information, Open Records Decision No. 342 (1982), nor does the act require a

Mr. James R. Lindley
February 7, 1989
Page 2

governmental body to obtain information that is not in its possession. Open Records Decision Nos. 445 (1986); 317 (1982). Therefore, if the financial information requested does not exist, AECS is not required to produce it.

You suggest that V.T.C.S., article 4495b, section 5.08(a) and sections 3(a)(1) and 3(a)(2) of the Open Records Act protect from disclosure the former employee's disability pension information. You have provided for our review the employee's disability claim form and notes from two physicians who have diagnosed the employee's condition.

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.

This section incorporates specific statutes that protect information from disclosure. Article 4495b, section 5.08, V.T.C.S., provides, in pertinent part:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided by this section.

Section 5.08(b) deals with the medical records created by a physician as part of physician-patient communications. We interpret this section to govern notes from physician to patient indicating a diagnosis of the patient's condition and recommendations for treatment. See Open Records Decision No. 487 (1988). Section 5.08(h) limits access to this information to persons demonstrating a legitimate interest in the medical information such that they should have access to those records without special leave of court. Subsection (h) does not include representatives of the media as persons entitled to access to the medical notes at issue. Consequently, the physicians' notes may not be released.

The final issue to be resolved is whether the disability claim form itself is protected from disclosure. You suggest that section 3(a)(2) protects this information from disclosure. Section 3(a)(2) protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 3(a)(1) of the act. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652

Mr. James R. Lindley
February 7, 1989
Page 3

S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Section 3(a)(1) protects information if that 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 interest to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied 430 U.S. 931 (1977). Upon review of the disability form you have submitted, we have found no information on the form that meets the test articulated under section 3(a)(1). Further, the information at issue does not concern constitutional "zones of privacy," i.e. matters concerning marriage, procreation, contraception, family relationships, or child rearing and education, which have been protected by the courts. See id. at 681. In Open Records Decision No. 298 (1981), this office determined that the amount of disability payments cannot be withheld under section 3(a)(1) or section 3(a)(2).

All of the information not deemed protected by this decision must be released to the requestor. 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 OR89-45.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
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PAB/FAF/bc

Ref.: ID# 5134

cc: Ms. Nancy Stancill
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