



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

March 6, 1989

Mr. H. Edwin Crow, P.E.  
Texas State Board of Registration  
for Professional Engineers  
P. O. Drawer 18329  
Austin, Texas 78760

Dear Mr. Crow:

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# 5161; this decision is OR89-70.

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 Texas State Board of Registration for Professional Engineers ("the Board") received a request for a complaint filed against a named engineer by a named complainant and any associated documents generated by your investigators or that reflect the Board's resolution of this complaint. You assert that the informer's privilege aspect of section 3(a)(1) of the act and section 3(a)(11) exempt the requested material from disclosure. This office disagrees with your argument concerning the informer's privilege, but agrees that portions of the documents submitted are exempt from disclosure under section 3(a)(11).

The informer's privilege has been recognized in Texas. See Aguilar v. State, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In Roviaro v. United States, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Emphasis added.)

The "informer's privilege" aspect of section 3(a)(1) protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Open Records Decision No. 515; Attorney General Opinion MW-575 (1982). This includes enforcement of civil laws. Open Records Decision No. 391 (1983). The privilege does not, however, protect the contents of communications if they do not reveal the identity of the informant. Roviaro v. United States, 353 U.S. at 60. Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the party complained of. See Open Records Decision No. 208 (1978).

You cited article 3271a, V.T.C.S. in your request letter. We note that article 3217a does not create a privilege for any of the Board's records and in fact affirmatively requires public access.

Despite the Board's assertion that the requestor's naming of the complainant is mere conjecture, it is apparent that the requestor is aware of the identity of the com-

plainant. As stated above, the informer's privilege no longer applies once the informer's identity is known. Roviaro v. United States, 353 U.S. at 60; see Open Records Decision No. 202 (1978).

You also raised section 3(a)(11). This exception applies to inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency. The test used to determine if information is exempt under this section is whether the information consists of advice, opinion, or recommendation that is used in the deliberative process. Open Records Decision No. 464 (1987).

Facts and written observations of facts do not constitute advice opinion, or recommendation and cannot be withheld under section 3(a)(11). Open Records Decision Nos. 450 (1986); 308 (1982). However, facts that are inextricably intertwined with excepted material are excepted from disclosure. Open Records Decision Nos. 298, 295 (1981); 345 (1982). On the other hand, severable factual information is not excepted from disclosure. Open Records Decision Nos. 231, 230, 225 (1979); 213 (1978).

Most of the documents you submitted for review are not either inter-agency or intra-agency documents, examples are the excerpts from court documents in a related lawsuit, copies of an OSHA complaint, newspaper articles, and excerpts from contract and bidding documents from the City of Round Rock. Of the documents that are inter-agency or intra-agency communications, most contain factual information. The memos to the file fall into the category of factual information, or at least the recordation of what the investigator or his contact believes to be factual information.

Some of the memoranda, however, do contain opinion or advice that was used in the Board's internal deliberative process. The documents or portions of documents that meet section 3(a)(11)'s test for withholding have been marked. You may withhold the information so marked.

The remainder of the information, including copies of any documents associated with the lawsuit, are public and must be released.

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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 OR89-70.

Yours very truly,

*Open Government Section  
of the Opinion Committee* 

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Assistant Attorney General

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Ref.: ID# 5161  
ID# 5274  
ID# 5279