



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

March 16, 1989

Mr. James B. Bond
Deputy Chancellor for Legal
and External Affairs
Texas A & M University System
College Station, Texas 77843-1230

Dear Mr. Bond:

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# 5073; this decision is OR89-88.

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.

Texas A & M University received a request from five Texas newspapers for information related to the investigation of the A & M athletic program and the resignation of head coach Jackie Sherrill. The information requested includes statements, audio and video tapes, memos, correspondence, and reports made by A & M officials, various members of the athletic program, fan organizations, and a former student. Also included were requests for all correspondence concerning Mr. Sherrill's resignation, as well as settlement contracts, checks used in payment of the settlement, and checks used to pay Mr. Sherrill's salary prior to his resignation. The availability of the termination agreement was addressed in a previous ruling, OR89-67. The remainder of the information is addressed in this ruling. You claim that some of the information does not constitute information collected, assembled or maintained by

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a governmental body, and therefore is not covered by the Open Records Act. Alternatively, you claim that the information which is covered by the Open Records Act is excepted from disclosure under sections 3(a)(1), 3(a)(11), 3(a)(14), 6(1), or 14(e) of the act.

Also requested were documents concerning the National Collegiate Athletic Association's investigation of Texas A & M University. This request will be dealt with in a separate ruling.

Section 3(a) of the Open Records Act, art. 6252-17a, V.T.C.S., defines public information as "all information collected, assembled, or maintained by governmental bodies . . . in connection with the transaction of official business." The "personal notes" of an individual employee in his sole possession and made solely for his own use do not fall within the scope of the act. Open Records Decision Nos. 142 (1976); 77 (1975). This "exception," however, has been narrowly construed in subsequent decisions. Open Records Decision Nos. 450 (1986); 332, 327 (1982).

You claim that notes and tape recordings of interviews conducted by an A & M official with a former athlete are personal notes and do not come within the scope of the Open Records Act. You state that the interviewer was not required to take notes at the interviews and that these notes have remained in his possession. You also state, however, that this official was "serving as an investigator on behalf of the President of the University." Because this official was serving as investigator for the president, the notes were taken as part of his official duties, and played some part in actions that were subsequently taken. Under these circumstances, therefore, they are records subject to the Open Records Act. Cf. Open Records Decision Nos. 450; 327. You have not submitted samples of these notes for our review. You have 10 days from the receipt of this ruling to submit the documents in question; otherwise, they must be released to the public.

You also claim that the investigative report requested can be withheld, in its entirety until completed, by section 6(1) of the Open Records Act. Section 6 states: "Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information . . ." Included in section 6(1) are investigative reports made by governmental bodies when the reports are completed. Section 6 does not limit the meaning of other sections of the Open Records Act. See Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177

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(Tex. Civ. App.- Houston [14th Dist] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision Nos. 460 (1987); 407 (1984); 344, 321 (1982). The only applicable test for required disclosure under the Open Records Act is whether the information falls within the scope of section 3(a), and, if so, whether the information falls within one of the 22 specific exceptions to disclosure listed in section 3(a). See Open Records Decision Nos. 460; 407. All information not falling into one of these exceptions is deemed public and must be released at the time of the request. Section 6 does not authorize delaying or prohibiting disclosure.

You assert that some of the information may be withheld under sections 3(a)(14) and 14(e) of the Open Records Act. Section 3(a)(14) protects "student records at educational institutions funded wholly, or in part, by state revenue." Section 14(e) adds to this protection by incorporating into the Open Records Act the Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g (known as the Buckley Amendment). Information that falls under the definition of "education records" may be withheld if it either pertains directly to the student involved or would tend to identify that student. Open Records Decision No. 447 (1986). The Buckley Amendment applies to both present and former students, but does not protect from disclosure information held by the institution which pertains to their activities subsequent to their enrollment. See 34 C.F.R. 99.3 "Education records" § (b)(5) (stating that "education records" do not include information relating to a student after the student is no longer enrolled at the educational institution). The information you submitted that describes the student's activities while enrolled at A & M cannot be released without the student's written consent. But see Vandiver v. Star-Telegram, 756 S.W.2d 103 (Tex. App. - Austin 1988, no writ). Information discussing his activities after he left the university is public and may not be withheld unless it falls under one of the other exceptions. We have marked the documents you submitted to indicate what may be withheld under this exception. If the student consents to public disclosure of the protected information, it cannot be withheld.

You also claim that some of the information submitted is exempt from disclosure by section 3(a)(1) of the Open Records Act. This section excepts information made confidential by law, either by Constitution, statute or judicial decision. You contend that the checks, money orders, or other forms of payment sent by Texas A & M University to Jackie Sherrill, either while he was employed

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or as part of his settlement, are protected by section 3(a)(1), under the common law right of privacy. We disagree.

The common-law right of privacy that is relevant here is "public disclosure of private facts." Information is deemed private under this theory 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. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 683-85 (Tex. 1976) cert. denied 430 U.S. 930 (1977). This right of privacy is designed primarily to protect the feelings and sensibilities of human beings rather than to safeguard property, business, or other pecuniary interests. Open Records Decision No. 192 (1978). The information requested is not highly intimate or embarrassing to the individual's feelings and sensibilities and it is of legitimate concern to the public. Thus, it cannot be withheld under the common law privacy provision of section 3(a)(1). Additionally, both Open Records Decision Nos. 7 (1973) and 98 (1975) found cancelled checks to be public information. These decisions stated that section 6(3) of the act also serves to make such information specifically public absent a law to the contrary. Open Records Decision No. 7. See also Open Records Decision No. 518 (1989). The checks requested are public information and must be released.

Finally, you assert that some of the information contained in the report falls within section 3(a)(11) of the act. Section 3(a)(11) protects information of the type that would be privileged from discovery in a legal proceeding under the "executive privilege" doctrine. The test under this section is whether the information consists of advice, opinion, or recommendation that is used in the executive deliberative process. Open Records Decision No. 464 (1986). Facts or written observations of facts cannot be withheld under this section if they can be severed from the advice, opinion, or recommendation which is being withheld. Id.; Open Records Decision Nos. 470 (1987); 450 (1986). The materials you submitted contain some information that may be withheld under this exception; however, it can be severed from the factual information. We have marked the documents showing which portions may be withheld.

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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 OR89-88.

Yours very truly,
Open Government Section
of the Opinion Committee 

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of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/BLS/bra

cc: Brad Owens, Bryan-College Station Eagle
W. O Cawley, Bryan-College Station Eagle
David Pickle, Houston Chronicle
Daniel J. Langendorf, Dallas Times Herald
Doug Bedell, Dallas Morning News
Thomas J. Williams, Attorney for Fort Worth
Star-Telegram

Ref: ID# 5073
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Enclosure: Marked documents
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