



**THE ATTORNEY GENERAL
OF TEXAS**

April 27, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Boyd Johnson
General Counsel
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

Dear Mr. Johnson:

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# 5941; this decision is OR89-144.

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 Parks and Wildlife Department has received two requests for access to or copies of the report of an internal investigation conducted by the department concerning an antelope trapping incident involving the former director of the wildlife division of the department and several employees of the department. The first request was submitted by a newspaper reporter; the second is from a state senator who requests the information for legislative purposes. You contend that the report is excepted from disclosure to the first requestor by sections 3(a)(1) and 3(a)(8) of the Open Records Act. With respect to the second request, you ask whether it satisfies the criteria for legislative requests as provided in section 3(b) of the act and explained in a number of Open Records Decisions. See Open Records Decision Nos. 358 (1983); 163 (1977). We will address each request in order.

Section 3(a)(1) of the Open Records Act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including

information protected by the informer's privilege. Open Records Decision No. 515 (1988). It is this dimension of section 3(a)(1) that you invoke.

The informer's privilege was explained in Roviaro v. United States, 353 U.S. 53, 59 (1957):

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 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. (Citations omitted, emphasis added.)

Part of the purpose of the privilege is to protect informers from retaliation. Thus, it does not apply when the party complained of knows the identity of the informant. See Open Records Decision No. 208 (1978). The privilege also does not apply when the information in question either does not disclose the violation of any statute or describes activities falling outside the realm of criminal or quasi-criminal law enforcement. See Open Records Decision Nos. 218, 191 (1978). The informer's privilege dimension of section 3(a)(1) will, however, apply when the informer reports violations of statutes with criminal or civil penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981).

You note that the report contains statements of witnesses that charge a number of individuals with conduct that may violate the Lacey Act, 16 U.S.C. section 3372. Among other things, that federal statute makes it unlawful for a person

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce --

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

. . . .
(4) to attempt to commit any act described in paragraphs (1) through (4).

16 U.S.C. § 3372(a). The act imposes civil and criminal penalties. See id. § 3373. The act may be enforced by the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, or the Secretary of the Treasury. Id. § 3375(a). The Secretary taking action

may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency or Indian tribe for purposes of enforcing this chapter.

Id.

The report in question was not prepared for the purpose of investigating alleged violations of the Lacey Act but was instead compiled at the request of the executive director of the department for internal, administrative purposes. Furthermore, there is no indication that the department has executed an agreement with any of the aforementioned Cabinet Secretaries to provide services, personnel, or facilities for the purpose of enforcing chapter 53 of the Lacey Act. We, therefore, cannot assume that the statements contained in the report were furnished to "officers charged with enforcement of" the Lacey Act, Roviaro v. United States, supra, or to administrative officers having a duty to enforce the act within their particular spheres. Open Records Decision No. 279 (1981). Consequently, the

informer's privilege aspect of section 3(a)(1) does not except the report from disclosure.

You also claim that the report is excepted from disclosure by section 3(a)(8) of the Open Records Act. Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

The test for determining whether this section protects specific information is whether release of the requested information will unduly interfere with law enforcement and crime prevention. You inform us that a federal investigation into the incident described in the report is in progress and that criminal charges may still be filed in the matter, presumably under the terms of the Lacey Act. See 16 U.S.C. § 3373(d).

In Open Records Decision No. 340 (1982) this office determined that an ongoing federal criminal investigation kept alive the possibility that criminal charges could be filed in a matter that had been closed by a state grand jury and district attorney's office without the filing of criminal charges. This was deemed sufficient to warrant application of section 3(a)(8) to information in the custody of the district attorney such as the names of witnesses and their statements. The decision concluded that release of the information could endanger the prosecution by allowing such information to be used to the disadvantage of the prosecution, citing Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam 536 S.W.2d 559 (Tex. 1976).

You offer no explanation as to how release of the report would unduly interfere with law enforcement and crime prevention, nor do you explain how its release would endanger the federal government's law enforcement interests or its investigation of the matter. Furthermore, you inform us that the department has released a copy of the report to an attorney representing one of the employees whose conduct is at issue. This action raises the issue of waiver under section 14(a) of the Open Records Act:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

You argue that the release of the report to the employee's attorney is consistent with Open Records Decision No. 468 (1987). That decision held, in part, that when a governmental body allows an employee to see evaluations of his job performance pursuant to a reasonable policy or practice, it does not show them to a member of the public under section 14(a). The department, you advise, has a practice of allowing employees to see records evaluating their job performance. Since the report, in your judgment, evaluates the conduct of the employee in question, you conclude that the release of the report to his attorney does not constitute a waiver of an exception to disclosure that otherwise would apply.

We believe Open Records Decision No. 468 is distinguishable from the situation under consideration here. At issue in that decision was the availability of a particular employee's job performance evaluations, some of which were shown to the employee at various times during his employment. The evaluations were recorded on two standardized forms and were prepared for all employees of the governmental body by the employees' immediate supervisors specifically for the purpose of assessing the employee's performance of job-related duties. The information in the evaluations consisted almost entirely of opinion and recommendation and were thus protected by section 3(a)(11) of the Open Records Act. The facts disclosed that the evaluations were shown to the employee pursuant to the governmental body's policy of allowing employees to examine them in their role as employees.

In this instance, however, the report in question was not prepared as a personnel document but as an internal administrative investigation with the express purpose of ascertaining particular facts. Although prepared at the behest of the executive director of the department, the report does not contain statements of opinion or recommendation by the executive director concerning an employee's job performance. The only information that can arguably be classified as opinion are the conclusions of the investigator based on his interviews of the employees involved in the incident, whose statements themselves reflect recollections of fact. The draft was prepared in response to a specific incident rather than a departmental policy of

regular, routine job performance evaluations. The fact that a copy of the report was given to the attorney for the employee rather than the employee himself suggests that it was provided for reasons other than examination in the individual's role as an employee of the department.

Moreover, the release of the report to the employee undermines your section 3(a)(8) argument because the information contained in the report might now be used to the disadvantage of the federal investigation by an individual who might have an interest in thwarting the investigation. Unlike the situation here, the disclosure of the job evaluations to the employee in Open Records Decision No. 468 did not compromise the governmental body's assertion of an exception under the Open Records Act (in that instance, section 3(a)(11)). We are therefore unpersuaded that the department preserved its claim under section 3(a)(8) in light of its disclosure of the report to an attorney representing an employee involved in the incident under investigation.

Our conclusion that the report is not excepted from disclosure by either section 3(a)(1) or section 3(a)(8) of the Open Records Act makes it unnecessary to consider whether the department may withhold the report from a member of the legislature who has requested it for legislative purposes. The department must comply with both requests.

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 OR89-144.

Yours very truly,

Open Government Section
of the Opinion Committee
Open Government Section
of the Opinion Committee
Prepared by Steve Aragon
Assistant Attorney General

SA/bc

Ref.: ID# 5941