



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 12, 1989

Mr. Mark B. Taylor
City Attorney
City of Victoria
P. O. Box 1758
Victoria, Texas 77902-1758

Dear Mr. Taylor:

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# 6324; this decision is OR89-174.

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 City of Victoria received two open records requests for information pertaining to a settlement agreement the city reached with a former city employee concerning the employee's termination. Of the materials you submitted to this office for review, only the letter dated March 30, 1989, and the settlement agreement itself come within the ambit of the two requests. You contend that subsections 3(a)(2) and 3(a)(3) of the Open Records Act protect these documents from required public disclosure. Both the city and employee agree in the settlement not to disclose the terms of the settlement to third parties.

Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 930

Mr. Mark B. Taylor
June 12, 1989
Page 2

(1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement between the city and the former employee specifying otherwise. See id.

In Open Records Decision No. 245 (1980), this office considered a similar request for records. There, the City of Rio Hondo sought to withhold from the public the terms of a settlement agreement reached as the result of a city employee's complaint to the federal Equal Employment Opportunity Commission. In that decision, this office held, inter alia, that neither subsection 3(a)(2) nor 3(a)(3) protected the requested information. Open Records Decision No. 245 governs your request.

Section 3(a)(2) protects information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The test for section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.). There is nothing in the March 30 letter or in the settlement agreement that remotely relates to the former employee's personal privacy.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure "information relating to litigation . . . and settlement negotiations, to which the . . . political subdivision is, or may be, a party . . ." (Emphasis added.) The March 30 letter from the former employee's attorney to the city does not, however, fall within the protection of section 3(a)(3). Although it was written in an attempt to negotiate a settlement with the city, the negotiations have concluded. Further, the purpose of section 3(a)(3) is to protect the governmental body's litigation interests. Once opposing counsel has the information, the exception no longer applies.

The final settlement agreement itself also is not protected by section 3(a)(3); this type of information is in

Mr. Mark B. Taylor
June 12, 1989
Page 3

fact deemed public by section 6(3) of the Open Records Act (information in any contract dealing with the expenditure of public funds). The settlement agreement is public information. Open Records Decision No. 114 (1975). It must, therefore, be released.

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 OR89-174.

Yours very truly,

Open Government Section
of the Opinion Committee

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