



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 12, 1989

Mr. J. Scott Chafin
University Counsel
University of Houston System
4600 Gulf Freeway, Suite 425
Houston, Texas 77023

Dear Mr. Chafin:

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# 6179; this decision is OR89-175.

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 University of Houston System (the System) received an open records request for all memoranda and letters from the president of the University of Houston to the System board of regents. You contend that section 3(a)(11) protects these documents from required public disclosure.

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's executive deliberative process. See Open Records Decision No. 464 (1987). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.).

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Section 3(a)(11) does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). If, however, factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

You have submitted to this office for review four letters that fall within the ambit of the open records request. This office agrees that the first two of these letters, dated December 22, 1988, and February 14, 1989, clearly fall within the protection of section 3(a)(11): they consist primarily of the president's opinion and recommendations on how the University and the System should operate and interact with one another. These two letters are the precise type of documents section 3(a)(11) was intended to protect. You may withhold these two documents. If, however, the "Ideas on Direction and Structure for the University of Houston System" is adopted as policy, it must be released.

Section 3(a)(11) does not, however, apply as clearly to the remaining two letters, dated October 15, 1986, and January 26, 1987. Although the University president expresses various opinions in these letters, a mechanical application of an "opinion" test alone does not effect the public policy underlying section 3(a)(11) and the Open Records Act. Open Records Decision No. 439 (1986). To gain the protection of section 3(a)(11), it is not enough that a memorandum consist of opinion; to be excepted from required public disclosure, the document must be a direct part of the "give-and-take" that takes place during the decision-making and policy-making process. Open Records Decision No. 439. The opinions contained in these two memoranda were intended to be used as part of any deliberative or decision-making process. You may not, therefore, withhold these last two documents pursuant to section 3(a)(11). Because you raise no other exception with regard to these letters, they 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 OR89-175.

Yours very truly,

Open Government Section
of the Opinion Committee 

Open Government Section
of the Opinion Committee
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JSR/RWP/bc

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