



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 26, 1989

Mr. Mark D. Dalpiaz
Legal Counsel for the
Bexar County Sheriff's Department
200 N. Comal
San Antonio, Texas 78207-3505

Dear Mr. Dalpiaz:

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# 6017; this decision is OR89-189.

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 Bexar County Sheriff's Department received an open records request from a former employee for copies of all documents currently contained in his "confidential" personnel file. The "confidential" personnel file contains documents and reports gathered during the employee's pre-employment background check. You contend that subsections 3(a)(1), 3(a)(8), and 3(a)(11) protect the file from public disclosure.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Many of the documents contained in the "confidential" personnel file are made confidential by statute or federal regulation:

1) criminal history information obtained from the Federal Bureau of Investigation (28 C.F.R. §§ 20.30, 20.33);

2) criminal history information obtained from state and local criminal justice agencies (28 C.F.R. § 20.21);

3) records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician (V.T.C.S. art. 4495b, § 5.08(b)); and

4) declarations by psychologists or psychiatrists of psychological and emotional health (Gov't Code § 415.057).

These types of documents should be withheld from the general public. This open records ruling does not address whether the requestor has a special right of access to these documents, a right granted by statutes other than the Open Records Act. See, e.g., Attorney General Opinion MW-95 (1979) (individual has right to review his own criminal history records).

Other information contained in the requested file is protected from public disclosure pursuant to the common-law right to privacy. See, e.g., Open Records Decision No. 481 (1987) (individual's personal financial history is protected by right to privacy); Open Records Decision No. 455 (1987) (medical information on applications for public employment regarding applicants' operations is protected by right to privacy). These types of information, however, were supplied in part by the applicant himself during the hiring process. Section 3(a)(1) cannot be used to prevent the disclosure of information protected by a privacy right to the person to whom it pertains. Open Records Decision No. 481. Consequently, this type of information must be released to the requestor.

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. 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

Mr. Mark D. Dalpiaz
June 26, 1989
Page 3

ref'd n.r.e.). Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). If, however, the 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).

The "confidential" file contains the opinions of several interviewers who participated in the decision to hire the requestor/applicant. Some of the opinions are in the form of written comments while others are merely recorded by a circled number on a standardized evaluation sheet. Portions of the written comments are clearly protected from disclosure by section 3(a)(11). In Open Records Decision No. 464, however, this office held that section 3(a)(11) does not protect anonymous standardized responses that could not reveal the identity of the evaluator because the release of such anonymous responses would not prevent the evaluators from providing similar opinions in the future. You may therefore delete only the names of the evaluators from the standardized evaluation forms; the remaining information on those forms must be released.

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 3(a)(11) must be prepared by a person or entity with an official reason or duty to provide the information in question. This assures that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 3(a)(11). Open Records Decision No. 464. In this regard, section 3(a)(11) also protects solicited opinions and recommendations of character references the department has contacted during the applicant's background check. See Open Records Decision No. 466 (1987). This section does not, however, protect any factual information that the character references submitted to your office or the identity of any reference your department contacted; this factual information must be released.

We have marked those portions of the documents contained in the requested file that you may withhold pursuant to section 3(a)(11). None of the remaining information comes within the protection of section 3(a)(8), which protects information pertaining to the prevention, detection, and prosecution of criminal activity. All other information contained in the file must, therefore, be released.

Mr. Mark D. Dalpiaz
June 26, 1989
Page 4

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 OR89-189.

Yours very truly,

*Open Government Section
of the Opinion Committee* 

Open Government Section
of the Opinion Committee
Prepared by David A. Newton
Assistant Attorney General

DAD/RWP/bc

Enclosures: Marked documents

Copies to: Richard Henry Hackett, Jr.
3212 West Ashby
San Antonio, Texas 78228

Ref.: ID# 6017