



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 3, 1989

Mr. Joe Darnall
General Counsel
Texas Alcoholic Beverage Commission
P. O. Box 13127
Austin, Texas 78711

Dear Mr. Darnall:

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# 7018; this decision is OR89-233.

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 Alcoholic Beverage Commission (TABC) received an open records request from an individual for copies of all information sent to the TABC from the requestor's previous employers "which made the basis for my application no longer being actively considered for employment." You contend that section 3(a)(11) of the Open Records Act protects most of this information 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 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

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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.).

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. See also Open Records Decision No. 283 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, the information is not entitled to protection under section 3(a)(11). Open Records Decision No. 464 (1987). In this regard, section 3(a)(11) may protect solicited opinions of character references the department has contacted during the applicant's background check. See Open Records Decision No. 466 (1987).

Section 3(a)(11) does not, however, 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 also may be withheld. Open Records Decision No. 313 (1982).

This office generally agrees with your assessment of which portions of the requested information come under the protection of section 3(a)(11). We have, however, marked those portions of the requested information that are public that you indicated that you believe are protected. Much of this information must be released because it is factual in nature. Additionally, the entire first page of the "Business Preemployment Investigation" must 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 OR89-233.

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

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JSR/RWP/bc

Enclosures: Marked documents

cc: Steven Hinton
6424 Washington
Groves, Texas 77619

Ref.: ID# 7018
ID# 6824