



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 18, 1989

Mr. H. Wayne Hendrick
Superintendent
Plano Independent School District
1517 Avenue H
Plano, Texas 75074

Dear Dr. Hendrick:

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# 6458; this decision is OR89-297.

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 Plano Independent School District (PISD) received an open records request for a copy of an internal audit of the PISD maintenance department. The audit consists of inter-office memoranda, purchase orders and invoices, parts lists, competitive bidding forms and related information, correspondence between PISD and suppliers, records of employee overtime, witness statements and interviews, and audit and investigative summaries. Although the audit was conducted by PISD personnel, the audit was turned over to the Collin County District Attorney because the audit revealed possible criminal conduct. This office confirmed through a telephone conversation with the district attorney's office that a former employee named in the audit has been indicted by the Collin County Grand Jury as a result of the audit. You contend that you may withhold the audit from

the public pursuant to subsections 3(a)(1), (a)(2), (a)(3), and (a)(11) of the Open Records Act.

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 rights under section 3(a)(1): 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 no information in the audit that comes under the protection of section 3(a)(2).

You also contend that section 3(a)(3) excepts this material from required public disclosure because there are pending criminal charges against the former employee and because that individual has hired an attorney and requested copies of any district policies that would govern a school administrative review of his termination. To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision No. 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision No. 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Id. Further, the governmental body's attorney must show that the requested material "relates" to the litigation, see Open Records Decision No. 323 (1982), and that disclosure of the materials would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988).

You have not shown that the requested material meets these tests. The PISD is not a party to the pending criminal litigation. Further, the fact that the terminated employee has requested copies of district policies for administrative review is not sufficient by itself to raise the likelihood of litigation against PISD beyond speculation. Consequently, the district may not withhold the audit pursuant to section 3(a)(3).

You next contend that section 3(a)(1) of the Open Records Act, pursuant to the informer's privilege, excepts

from public disclosure all witness statements. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."

For a person's identity to come under the protection of the informer's privilege, the individual must furnish information in connection with an investigation of a possible violation of law to a law enforcement officer or a member of a legislative committee. See Tex. R. Crim. Evid. 508; Open Records Decision No. 515 (1988). Although the witness statements, which contain allegations that may show official misconduct, official oppression, and misapplication of fiduciary property, were originally taken by PISD personnel and later transferred to law enforcement officials pursuant to a criminal investigation, you do not show that these employees are "confidential informants" under Texas law. In fact, the information you provide indicates that they will testify as witnesses.

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain sensitive advice, opinion, or recommendation intended for use in the entity's policymaking/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.) (emphasis added).

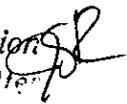
Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinion, and recommendation. Open Records Decision No. 450 (1986). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked the one sentence of the audit summary that you may withhold pursuant to section 3(a)(11).

None of the remaining information contained in the audit comes under the protection of any of the act's exceptions. You must, therefore, release the rest of the audit. 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

Dr. H. Wayne Hendrick
September 18, 1989
Page 4

records decision. If you have questions about this ruling,
please refer to OR89-297.

Yours very truly,

Open Government Section
of the Opinion Committee 

Open Government Section
of the Opinion Committee
Approved by Jennifer S. Riggs
Chief, Open Government Section

JSR/RWP/bc

cc: Mr. Tim Leifeste
City Editor
The Plano Star Courier
P. O. Box 86248
Plano, Texas 75074

Mr. David Donaldson
Graves, Dougherty, Heron & Moody
P. O. Box 98
Austin, Texas 78767

Ref.: ID# 6458
ID# 6456
ID# 6457
ID# 6611

Enclosures: Marked documents