



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 30, 1989

Ms. Mary Ann Courter
Legal Counsel
Texas Department of Public Safety
5805 N. Lamar Blvd.
Austin, Texas 78773-0001

Dear Ms. Courter:

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# 7083; this decision is OR89-353.

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. Attorney General Opinion H-436 (1974). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Department of Public Safety received a request for a copy of a TCIC-NCIC audit report of the Plano Police Department performed February 22, 1989, and issued March 17, 1989. The audit is required by and conducted by the United States Department of Justice, Federal Bureau of Investigation, and consists of a review of the procedures and records of the Plano Police Department in using the TCIC/NCIC system in order to verify the police department's compliance with NCIC procedures. The audit consisted of an interview with the the Terminal Agency Coordinator and a review of on-line records for completeness, accuracy, and validity. The audit includes orders for mandatory actions

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for improvements the audited agency must take in order to meet compliance standards, as well as recommended actions.

The department claims that the audit report is excepted from required public disclosure under sections 3(a)(1) and 3(a)(11) of the Open Records Act.

Section 3(a)(1) protects information deemed confidential by law, either by Constitution, statute or judicial decision. The department cites no law making the audit report confidential. While access to NCIC information itself is restricted by federal regulations, see 28 C.F.R. 20.20c, no law makes the audit report confidential. Section 3(a)(1) is therefore inapplicable to the audit report.

Section 3(a)(11) excepts from required public disclosure

"inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

This section protects advice and opinions on policy matters in order to encourage frank and open discussion within an agency in connection with its decision-making process. See Open Records Decision No. 464 (1987). Only advice, opinion or recommendation that actually plays a role in the decision-making process is excepted from disclosure. Id. Facts and written observation of facts and events, when such information is severable from advice, opinion or recommendation, cannot be withheld under section 3(a)(11).

The audit in question here consists of facts or observations of facts concerning operations and procedures of the TCIC/NCIC at the Plano Police Department. Advice as to "recommended" and "required" actions are not shown to be part of any agency decision-making process. The advice is instructional or directive, running from a superior to a subordinate agency. It does not consist of the kind of information covered by the "executive privilege," the information that section 3(a)(11) was designed to protect. The audit is therefore not protected from disclosure under section 3(a)(11) and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter

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with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-353.

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

DAN/le

cc: Mr. Ed Wilks, Reporter
Plano Star Courier
801 East Plano Parkway, Suite 100
Plano, Texas 75074

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