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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

August 19, 1991

Mr. James B. Bond
Deputy Chancellor and
General Counsel
Texas A&M University System
College Station, Texas 77843-1230

OR91-383

Dear Mr. Bond:

As general counsel for the Texas A&M University System, 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# 12066.

Texas A&M University (the university) received two open records requests for a document submitted to the university by its former head basketball coach and his attorney

that detail[s] [the coach's] response to the university's internal investigation of alleged NCAA rules violations within the A&M basketball program. This includes the original document as it was presented to the university, and before key sections were deleted from the section entitled 'High Expectations.'

The second requestor of this document acknowledged the fact that the names of student athletes contained in the report must be deleted. You state that the university has released the report to the requestors but has deleted the names of all student athletes in accordance with the Family Educational Rights and Privacy Act of 1974. *See* 20 U.S.C. § 1232g. You also seek to withhold three paragraphs from the section entitled "High Expectations," contending that this information is not subject to the Open Records Act; alternatively, you contend that this information comes under the protection of sections 3(a)(1) and 3(a)(11) of the act.

You state that during a meeting between university representatives and the basketball coach and his attorneys, at which it was made apparent that the coach would be replaced, the report at issue was given to you by one of the coach's attorneys. You then

took such report personally and never delivered it out of [your] possession, utilizing it only to observe and recognize the relative position on certain matters taken by [the coach]. . . . From time to time, throughout the course of the remainder of the meeting, individual sections other than the information at issue here were observed by one or more of the University officials. No further focused discussion was held by and between the two attorneys regarding such response as prepared by [the coach].

Later in the meeting university officials announced to the coach that they intended to release to the public the results of the university's investigation as well as the coach's response to those results. The coach then indicated that he wished to delete the information at issue from his response. Such deletion was made by the university and the remaining information was furnished to the news media. You state that the unedited first draft of the coach's response has never left your possession and has never been delivered to any other university official.

You first contend that the information at issue is not a "public record" as defined in section 2(2) of the Open Records Act because

it was not intended to represent a final document stating [the coach's] position or response to the University's own report. . . . He alone decided to edit out the language under consideration, and the mere fact that an unedited earlier version was left in the hands of the General Counsel does not convert that information into a public record.

Section 2(2) of the act provides:

Public records means the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains *public information*. (Emphasis added.)

Section 3(a) of the act defines "public information," with certain specified exceptions, as

[a]ll information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business. (Emphasis added.)

It is clear to this office that you were acting as an agent of the university when you received a copy of the original response and that you now possess this document as the university's agent. Further, university officials have had access and continue to have a right of access to this document. *Cf.* Open Records Decision No. 499 (1988) (copy enclosed). Consequently, the information is subject to the Open Records Act and must be released unless excepted from required public disclosure by the exceptions listed in section 3(a) of the act.

You next contend that the information may be withheld pursuant to section 3(a)(11) of the act. Section 3(a)(11) excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the deliberative process. Open Records Decision No. 538 (1990). You correctly assert that this office determined in Open Records Decision No. 559 (1990) that "where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document." You fail to acknowledge, however, that Open Records Decision No. 559 also expressly held that severable factual information that appears in a preliminary draft but not in the final version is not protected by section 3(a)(11). Because the information you seek to withhold is purely factual in nature, the university may not withhold this information pursuant to section 3(a)(11). *See* Open Records Decision No. 450 (1986).

You assert that the requested information is excepted by two aspects of common-law privacy: disclosural privacy and false light privacy.¹ Disclosural privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). It is unclear to this office exactly whose privacy you intend to protect by withholding the paragraphs at issue: after the deletion of the single student athlete's name that appears in the paragraphs, the identity of any specific individual, other than the former coach, is not ascertainable. Nor does the information at issue meet the second prong of the disclosural privacy test because the information at issue is of legitimate public interest. The information therefore is not protected by disclosural privacy.

You also contend that the release of this information will invade the privacy of "certain identifiable persons" by placing them in a false light. Again, it is impossible to discern the identity of any individual, other than the coach, from the information at issue after the student's name is deleted. We also note, as discussed in Open Records Decision No. 579 (1990) (copy enclosed), that the gravamen of a false light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception such as section 3(a)(1) that focuses on the confidentiality of information does not embrace this particular tort doctrine. Consequently this type of information may not be withheld on such a basis.

None of the exceptions you raise act to protect the excerpted information from public disclosure. With the exception of the name of the student athlete contained the paragraphs at issue, the requested information must be released in its

¹You also contend that the "property interests of the parties implicated in the extracted language would be implicated." You do not explain, nor is it apparent to this office, the nature of the property interests to which you allude.

entirety.² 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 OR91-383.

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee

RG/RWP/mc

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Enclosures: Open Records Decision Nos. 579, 499

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²If, however, the information at issue is in fact inaccurate or untrue, there is no reason that the university may not also release, along with the requested information, other supplemental information that explains why and to what extent the information is inaccurate or that otherwise clarifies the information contained in the records at issue.