



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 17, 1992

Ms. Robin S. Bobbitt
Attorney
Coats, Rose, Yale, Holm, Ryman & Lee
800 First City Tower
1001 Fannin
Houston, Texas 77002-6707

OR92-29

Dear Ms. Bobbitt:

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# 13897.

As attorney for the Harris County Water Control and Improvement District No. 92 (the district), you inform this office that the district received an open records request from Mr. Gene E. Stewart. The request, dated October 7, 1991, reads in part:

On September 11, 1991, I reviewed . . . records of [the district]. In the records I was given to review was a copy of the opinion you had requested from the Attorneys for the District relative to the purchase of recreation facilities by the District. I was denied a copy of this document.

[T]he burden of proving that records are excepted from public disclosure is on the District and the District must either release requested information or request a decision from the AG within 10 days of the request for information.

Section 7(a) of the act requires a governmental body to release requested information or to request a decision from the attorney general within ten days of

receiving a request for information that the governmental body wishes to withhold. When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) (copy enclosed). In this instance, however, the district did seek an open records decision from this office within ten days of receiving the open records request at issue here.¹ You contend that the requested information may be withheld pursuant to the attorney-client privilege as incorporated in sections 3(a)(1) and 3(a)(7) of the Open Records Act.

Although you raise the attorney-client privilege in the context of section 3(a)(1), this privilege is more properly deemed to be an aspect of section 3(a)(7) of the act, which protects, *inter alia*, "matters in which the duty of . . . an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure." See Open Records Decision No. 574 (1990) (copy enclosed); see also Open Records Decision No. 589 (1991). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* The information at issue clearly consists of the legal opinion of the district's attorney and accordingly comes under the protection of section 3(a)(7).

We note, however, that because Mr. Stewart has previously reviewed the information at issue, we must also determine whether the district has waived the right to withhold this information. Section 14(a) of the Open Records Act provides:

This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; *provided that such records shall then be available to any person.* (Emphasis added.)

The Open Records Act prohibits selective disclosure. Open Records Decision No. 400 (1983) at 2. Once a governmental body exercises its discretion to release certain

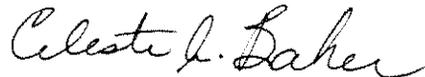
¹Mr. Stewart became aware of the legal opinion while reviewing records sought in a previous open records request he had made to the district. The legal opinion did not come within the scope of, and thus is not governed by, that prior request.

information, it must ordinarily release it "to any person" who requests it. If a governmental body voluntarily releases information to one member of the public, the act's exceptions to disclosure are waived unless release of the information is prohibited by law. *See id.*

You contend, however, that the release of the legal opinion was not voluntary, but that the opinion was released to the requestor only because it had inadvertently been placed in the district's "correspondence file." Given these facts alone, this office cannot make a determination that the district has necessarily waived the attorney-client privilege. This office has previously held that the Open Records Act does not preclude a governmental body from invoking one or more of the act's exceptions to protect from *further* public disclosure information that has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body. *See e.g.* Open Records Decision No. 376 (1983) at 2 (copy enclosed). If the placing of the legal opinion in the correspondence file was in fact inadvertent, this office concludes that the district has not waived the right to now withhold the legal opinion, despite its earlier release. *See* Open Records Decision No. 435 (1986) at 4 (attorney general cannot resolve disputed questions of fact in the opinion process) (copy enclosed).

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 OR92-29.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/RWP/lcd

Ref.: ID# 13897
ID# 13648
ID# 13705
ID# 14630

Enclosures: Open Records Decision No. 574, 435, 376, 319

cc: Gene Stewart
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Spring, Texas 77373
(w/o enclosures)