



Office of the Attorney General

State of Texas

May 8, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Jeff Hankins
Legal Assistant
Program Division, Legal Services, 110-1C
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR92-197

Dear Mr. Hankins

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# 15439.

You have received a request for information relating to the reduction in force plan implemented on January 29, 1992, by the Texas Department of Insurance (the "department"). Specifically, the requestor seeks 13 categories of information relating to "the actions surrounding the planning, execution, and after action regarding the reduction in force action(s) carried out on January 29, 1992, at the Texas Department of Insurance," including information relating to department employees, job qualification specifications, terminated department employees qualified for rehire, certain department policies, and other documents and memorandums relating to the planning and implementation of the reduction in force plan.

You advise us that the department is not in possession of information responsive to items 1, 2, 3, 5, 7, 9, 12, and certain information included in item 13 of the request.¹ The Open Records Act applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision No. 572 (1990). Accordingly, you are not obligated under the Open

¹You advise us that some of the information requested in item 13 has been made available to the requestor.

Records Act to provide the requestor with information responsive to items 1, 2, 3, 5, 7, 9, 12, and certain information included in item 13 of the request.

You have submitted to us for review a memorandum dated April 9, 1992, and an attachment to that memorandum, a document dated September 1991, which you claim are responsive to items 4, 6, 8, 10, and 12 of the request. You claim that this information is excepted from required public disclosure by section 3(a)(11) of the Open Records Act.

Section 3(a)(11) excepts from 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." It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision Nos. 538 (1990); 470 (1987). Purely factual information, however, does not constitute advice, opinion, or recommendation and may not be withheld under section 3(a)(11). Open Records Decision No. 450 (1986).

We have examined the documents submitted to us for review. Neither the memorandum dated April 9, 1992, which contains only factual statements, nor its attachment dated September 1991, which describes the department's reduction in force policy, contain advice, opinion, or recommendation. Therefore, they are not protected by section 3(a)(11). We note, however, that the memorandum, dated April 9, 1992, was prepared after the department received the request for information. A document is not within the purview of the Open Records Act if it is created after it has been requested. Open Records Decision Nos. 452 (1986); 342 (1982). Accordingly, the memorandum dated April 9, 1992, need not be released to the requestor. The document dated September 1991 obviously predates the request and 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 OR92-197.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GK/lmm

Ref.: ID# 15439

ID# 15630

cc: Mr. Dean E. Weirtz
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