



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 11, 1992

Mr. O. A. Cassity, President
Board of Trustees
Panola College
Henderson Highway
Carthage, Texas 75633

OR92-325

Dear Mr. Cassity:

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# 15425.

Panola College received a request for a copy of a "management letter" addressed to the Board of Trustees of Panola College. The letter is from a private corporation of certified public accountants which performed an audit of the college. The letter discusses the management of the college's finances and contains specific recommendations for improvement thereof. You contend that the letter is excepted from required public disclosure pursuant to sections 3(a)(1) and 3(a)(11) of the Open Records Act. Further, you raise section 3(a)(2) in regard to one portion of the letter, which you say implicates the privacy rights of an employee who was dismissed.

Section 3(a)(1) of the Open Records Act incorporates a statute that protects information from disclosure. In raising section 3(a)(1), you rely on V.T.C.S. article 41a-1, section 26, which establishes an accountant-client privilege, and which provides in part:

A licensee or a partner, officer, shareholder, or employee of a licensee may not voluntarily disclose information communicated to the licensee by a client in connection with services rendered to the client by the licensee in the practice of public accountancy, except with the permission of the client or a duly appointed representative of the client. This section does not

prohibit disclosure by the licensee of information required to be disclosed.

V.T.C.S. art. 41a-1, § 26 (subsections (1) through (5)) are not applicable in this situation. This provision generally prohibits a licensed accountant (or his partner, officer, shareholder, or employee) from revealing information acquired from a client while providing accountancy services, absent the client's permission. This provision makes confidential only information that is in the possession of a licensed accountant. It does not render confidential information in the possession of the *client* that happens to be a governmental body under the Open Records Act. Thus, section 26 does not prohibit disclosure of information by a client of an accountant, in this case, Panola College. Therefore, you may not withhold the management letter pursuant to section 3(a)(1) of the Open Records Act.

You raise section 3(a)(2) of the Open Records Act as an exception to the required public disclosure of a portion of the management letter which contains information about the job performance of an identifiable employee. We assume you are referring to section 20 of the letter. In determining whether information may be withheld pursuant to section 3(a)(2), this office applies the test for determining a violation of the common-law tort of invasion of privacy through the disclosure of private facts. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under that test, information may be withheld only if (1) it contains highly intimate or embarrassing facts about a person's private affairs such that the release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977).

While we appreciate the concerns you have for the privacy of the employee involved here, information about the manner in which an employee performs his job, though possibly embarrassing, is not information about a person's private affairs. See Open Records Decision No. 470 (1987) at 4. Moreover, the public has a legitimate interest in the job qualifications and performance of public employees. See Open Records Decision No. 405 (1983). Thus, we conclude that section 3(a)(2) may not be invoked to except from required disclosure information in the management letter about an employee's job performance, including information about the employee's dismissal. See Open Records Decision No. 444 (1986) at 4.

You also seek to withhold the management letter based on section 3(a)(11) of the Open Records Act which permits a governmental body to withhold interagency or intra-agency information consisting of advice, opinion, or recommendation that is used in the deliberative process. Open Records Decision No. 574 (1990). Facts and written observations of facts and events, when severable from advice, opinion, or recommendation, may not be withheld under section 3(a)(11). Open Records Decision No. 559 (1990). Section 3(a)(11) can apply to information created by an outside consultant on behalf of a governmental agency. Open Records Decision No. 563 (1990) at 5. We conclude that those portions of the letter which we have bracketed may be withheld under section 3(a)(11). The remainder of the letter is factual, and thus not excepted under this section. See Open Records Decision Nos. 219, 213 (1978).

Finally, you ask about the effect of the auditor's statement at the conclusion of the management letter that the letter "is intended solely for the information and use of the administration of Panola College and others within the administration of the cognizant audit agency and the appropriate Federal audit agencies." Information is not confidential because one submitting it to a governmental body expects or requests it to be kept confidential. *Industrial Foundation*, 540 S.W.2d at 677; Open Records Decision Nos. 575 (1990) at 3; 468 (1987) at 5. Thus, the fact that the auditor expected the management letter to be kept confidential does not constitute a reason for excepting it from required public disclosure. See Open Records Decision No. 180 (1977).

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 OR-325.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Opinion Committee

Ref: ID# 15425
ID# 15480
ID# 15859

cc: Mr. Charles McClure
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