Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 4, 1992

Ms. Beverly Luna
Branch Chief, Tort and Property Law
Legal Services
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR92-372

Dear Ms. Luna:

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# 15144.

The Texas Parks and Wildlife Department (the department) received two open records requests for all records pertaining to the department's investigation of allegations against the superintendent of Abilene State Park. Although you originally submitted to this office for review three large binders of materials coming within the ambit of the request, you now state that you have released most of those materials and now seek to withhold the contents of only a single binder.

You characterize most of the documents at issue as "personal notes made solely for the maker's own use, which . . . have remained in the sole possession of the maker and therefore do not contain information subject to the Open Records Act." Section 3(a) of the Open Records Act provides in part:

> All 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* is public information and available to the public during normal business hours of any governmental body . . . .

V.T.C.S. art. 6252-17a, §3(a) (emphasis added).

It is clear from a review of the materials that virtually every notation directly relates to the department's investigation of allegations against the park superintendent and that most of the information consists of notes taken during interviews or conversations between the author of the notes and others. These notes were created, used, and maintained by the department's employees in connection with their official duties and as such cannot be deemed to be outside the scope of the Open Records Act. *See generally* Open Records Decision No. 450 (1986) at 3-4. This office must therefore determine whether the requested information comes under the protection of the section 3(a) exceptions that you have raised.

You have divided the binder of materials into five sections. Although you contend that all of the documents contained in Section A are "privileged under section 3(a)(1), "you cite no authority for this assertion.[1] Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law 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. *Id.* at 683-85. After reviewing the contents of Section A, we could identify only one small portion of Document 37 that meets the test for common-law privacy. *See generally* Open Records Decision No. 470 (1987), *rev'd. in part on other grounds*, Open Records Decision No. 574 (1990). We are not aware, however, of any statute or judicial decision making the remaining information in Section A confidential for purposes of section 3(a)(1).

You also contend that a portion of Document 4 and all of Document 5 in Section A come under the protection of the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege as incorporated in section 3(a)(7) of the act protects only an attorney's legal advice and privileged attorney-client communications. Open Records Decision Nos. 589 (1991); 574 (1990) (copies enclosed). The portion of Document 4 that you have marked does not on its face appear to constitute legal advice or a privileged

[1]This office agrees with your contention that portions of Documents 13, 14, and 16 in Section A contain information that is not within the scope of the open records request. Thus, this ruling does not address whether this information is subject to required public disclosure.

communication; thus, this document must be released in its entirety unless you submit within ten days of the date of this letter additional explanation indicating otherwise. On the other hand, Document 5 may be withheld pursuant to section 3(a)(7), since it contains client confidences that must be withheld.

You characterize the documents contained in Section B as the notes of the attorneys for the department and as such protected from required public disclosure by section 3(a)(7). It appears that some of these notes were taken during interviews with various individuals, while other notes reflect information obtained from other communications with these or other individuals. To the extent that these notes reflect confidential communications from various departmental employees, they may be withheld pursuant to section 3(a)(7). We note, however, that the participation of anyone other than a departmental employee in these communications would likely eliminate the protection of section 3(a)(7). *See generally* Open Records Decision 574 at 5-7.

With regard to Section C, you have raised none of the Open Records Act exceptions to required public disclosure. None of the information contained in Section C is deemed confidential under section 3(a)(1) as discussed above. Accordingly, the department must release the three documents contained in Section C.

You contend that because Section D consists of complaints directed to the Internal Affairs Department and the Legal Services Division of the department, the contents of this Section D may be withheld pursuant to the informer's privilege. The "informer's privilege" as incorporated in section 3(a)(1) protects the identity of persons who report violations of law to law enforcement officials responsible for enforcing those laws. The privilege does not ordinarily apply to employees "reporting" to their employers about the job performance of other employees. *See* Open Records Decision No. 515 (1988). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285, 279 (1981); *see also* Open Records Decision No. 208 (1978).

After reviewing the contents of Section D, this office has concluded that each of the documents contain allegations of violations of the law. Further, although the privilege does not protect the contents of communications if they do not reveal the identity of the informant, in this instance we believe that the content of letters of

complaint would necessarily reveal the identity of the complainant. *Rover v. United States*, 353 U.S. 53, 60 (1957). Assuming the identities of the complainants have not previously been revealed to the parties complained of, the department may withhold Section D in its entirety pursuant to the informer's privilege. *See* Open Records Decision No. 208 (1978).

The only exception under the Open Records Act that you raise with regard to Section E is section 3(a)(17). Section 3(a)(17) makes confidential the home address and telephone number of public employees, but only if the employee has elected to make such information confidential pursuant to section 3A of the act. Further, a governmental body may not solicit a response from its employees under section 3A in response to a pending open records request. The character of requested information as public under section 3A and section 3(a)(17) is determined as of the time the request for information is made. Open Records Decision No. 530 (1989). Accordingly, the department may withhold the employees' home telephone numbers contained in Section E only if those employees elected, prior to the department's receipt of the pending open records requests, to keep their home addresses and telephone numbers confidential.[2]

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, we will raise section 3(a)(1) because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. *See* V.T.C.S. art. 6252-17a, § 10(a); Open Records Decision Nos. 455 (1987); 325 (1982). We have marked the portions of Section E that implicate privacy rights of a certain individual and therefore must be withheld pursuant to section 3(a)(1). The department must release the remaining portions of Section E.

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

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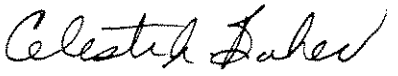
[2]We note that the telephone numbers of employees appear elsewhere in the documents at issue. It is not clear to this office, however, whether these are home or work numbers. Any employee's home telephone number contained in the documents must be kept confidential in accordance with the discussion above.

a published open records decision. If you have questions about this ruling, please refer to OR92-372.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/RWP/lmm

Ref.: ID# 15144
ID# 15163
ID# 16115
ID# 16288

Enclosures: Open Records Decision Nos. 589, 574
Marked documents

cc: Ms. Peggy Carpenter
KTXS News Director
CHUTES-TV
P. O. Box 2937
Abilene, Texas 79604
(w/o enclosures)

Mr. Bob Bartlett
News Director
CHUB-TV
P. O. Box 5676
Abilene, Texas 79608-5676
(w/o enclosures)