



Office of the Attorney General  
State of Texas

August 24, 1992

DAN MORALES  
ATTORNEY GENERAL

Robert Giddings  
Office of General Counsel  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2981

OR92-504

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), V.T.C.S. article 6252-17a. Your request was assigned ID# 15795.

The University of Texas at Austin (the "University") has received a request for information relating to a personnel action which removed Dr. James Duban from his position as Director of the Honors Program in English. Specifically, the requestor seeks "all correspondence between Bob King & James Duban from Aug. 1st[,] 1991[,] through Ap. 7[,] 1992." You explain that the requested correspondence consists of two letters with multiple attachments. As you state:

The first letter, dated November 1, 1991, is essentially a grievance filed by Dr. Duban with Dean Robert King. There are numerous attachments that Dr. Duban has marked as "EXHIBITS" to this grievance. The original grievance dated October 24, 1991 from Dr. Duban to the Chairman of the English Department marked Exhibit 1; a letter from the Chairman to Dr. Duban dated September 24, 1991 is marked Exhibit 3; notes of quotations from faculty members marked Exhibit 5; and Exhibits 8-12 appear to be correspondence between Dr. Duban and another member of the faculty. Exhibit 15 appears to be a letter from a former student. Additional exhibits appear to be newspaper or magazine articles and would not be exempt from disclosure because of prior publication. The second letter, dated November 4, 1991, is a follow-up letter to

Dean King from Dr. Duban. Attached to this letter is the response of the Chairman of the English Department to Dr. Duban's grievance.

You have submitted copies of the requested documents for our review.

You advise that all of the requested documents have become part of Dr. Duban's personnel files. Consequently, you contend, section 3(a)(2) of the act exempts all of the requested documents (except the newspaper and magazine articles) from required public disclosure. Additionally, you advise that the appropriate officials at the University currently are reviewing Dr. Duban's removal from his position as Director of the Honors Program in English and his grievance based on the removal. You claim that, as a result of the pending grievance proceeding, section 3(a)(11) of the act exempts the requested documents (except the newspaper and magazine articles) from required public disclosure.

Section 3(a)(2) exempts from required public disclosure

information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act.

Initially, we note that the requestor is not Dr. Duban, nor does the requestor claim to be Dr. Duban's designated representative. Thus, the requestor is entitled only to the information the act permits the University to disclose.

According to its terms, section 3(a)(2) exempts information from required public disclosure only if its release would cause a "clearly unwarranted invasion of personal privacy." Open Records Decision No. 444 (1986) at 3. The Texas Court of Appeals, in *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.), stated that an unwarranted invasion of personal privacy occurs only if the release of personnel file information would cause an invasion of privacy tort under the standards of *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, this tort occurs when information is disseminated publicly even though it is highly intimate or embarrassing such that a

reasonable person would object to its release *and* the public has no legitimate interest in it. *Industrial Found. of the So. v. Texas Indus. Accident Bd.*, 540 S.W.2d at 685.

As the newspaper and magazine articles make clear, Dr. Duban's removal from the directorship is a matter in which the public has a legitimate interest. See Open Records Decision No. 444. Thus, even if the information were sufficiently intimate or embarrassing, section 3(a)(2) would not permit the University to withhold the information from the requestor. We therefore consider whether section 3(a)(11) of the act authorizes the University to withhold the requested information from the requestor.

Section 3(a)(11) excepts from required 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." The test under section 3(a)(11) is whether interagency or intra-agency information consists of advice, opinion, or recommendation that is used in the deliberative process. Open Records Decision No. 574 (1990) at 1-2. Section 3(a)(11) does not permit a governmental body to withhold facts and written observations of facts and events, when such information is separable from advice, opinion, or recommendation. *Id.* at 2. We agree that some of the information you seek to withhold consists of advice, opinion, or recommendation, and relates to the University's deliberative process. However, other information is either factual or does not relate to the deliberative process. Accordingly, section 3(a)(11) does not permit the University to withhold such information from the requestor. For your convenience, we have marked on the copies the information we believe to be advice, opinion, and recommendation germane to the University's deliberative process.

We would like to comment specifically on Exhibit 15, attached to Dr. Duban's October 24, 1991, letter to Dean King: a letter dated September 26, 1991, from a former student of Dr. Duban's to Mr. Kruppa. Section 3(a)(11) excepts this type of document, in effect an outside evaluation, only if 1) a governmental body has authority to conduct an evaluation; 2) the governmental body initiated the evaluation; and 3) the governmental body had a purpose for seeking information from the source in question. Open Records Decision No. 565 (1990) at 9. The University did not initiate any contact with the former student and did not solicit this letter in any way. Accordingly, section 3(a)(11) does not protect Exhibit 15 from disclosure to the requestor.

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 OR92-504.

Yours very truly,



Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee

KO/lmm

Re: ID #15795

cc: Ms. Kathy Mitchell  
816 Congress Avenue  
Austin, Texas 78701