



Office of the Attorney General
State of Texas

November 5, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Douglas A. Poneck
Attorney at Law
Escamilla, Poneck & Perez
310 S. St. Mary's, Suite 2201
San Antonio, Texas 78205

OR92-645

Dear Mr. Poneck:

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# 17405.

The Edgewood Independent School District (the "school district"), which you represent, has received a request for information relating to an informal school district investigation of Loma Park Elementary School employees. Specifically, the requestor seeks from the school district superintendent:

1. The letter or letters prepared and submitted to you by Loma Park teachers. . . .
2. Any other documentation that you have received from Loma Park teachers that relates to Ms. Cindy Rivas.
3. All other documentation that you used in arriving at your decision to transfer Ms. Cindy Rivas from her counseling position at Loma Park. . . .
4. A letter to Ms. Rivas, as you have told her you would prepare, detailing the reasons you removed her from Loma Park.
5. Any notes you made at the meeting with a portion of Loma Park teachers.

6. Any notes you made at the informal investigation you made by interviewing teachers at Loma Park. . . .

You claim that the requested information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(11) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the requested information is excepted from required public disclosure by section 3(a)(1) in conjunction with the informer's privilege. *See* Open Records Decision No. 549 (1990) at 4-5 (incorporating the informer's privilege into section 3(a)(1)). The informer's privilege applies when a person reports violations of the law to officials having a duty to enforce the law. Open Records Decision No. 515 (1988) at 2. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* The basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.* The informer's privilege under section 3(a)(1) is applicable not only to law enforcement agencies, but also to "administrative officials having a duty of inspection or of law enforcement within their particular spheres". Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence § 2374, at 767 (McNaughton rev. ed. 1961) and cases cited therein); *see also* Attorney General Opinion MW-575 (1982) at 2. The informer's privilege, however, may not be invoked to protect written statements complaining of a public employee's work performance when those statements do not reveal a crime or the violation of specific laws. Open Records Decision No. 515; *see also* Open Records Decision No. 218 (1978).

We have examined the documents submitted to us for review. The documents generally relate to personnel relations at the Loma Park Elementary School. None of the documents submitted to us for review, however, reveal any crime or violation of specific laws, nor do you indicate that any criminal laws were violated. We conclude therefore that the informer's privilege may not be invoked to protect these documents from required public disclosure.

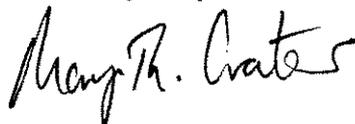
You also claim that the requested information is excepted from disclosure by section 3(a)(11), which excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." It is well established that the purpose of section 3(a)(11) 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). If factual information is inextricably intertwined with information excepted by section 3(a)(11), it may be withheld. Open Records Decision No. 468 (1987).

Having examined the documents submitted to us for review, we conclude that some of the requested information constitutes "advice, opinion, or recommendation" used in the school district's deliberative process. The marked portions of the letters dated May 27, 1992, and March 6, 1992, and the handwritten notes attached to the list of teachers include some "advice, opinion, or recommendation" which may be withheld from required public disclosure under section 3(a)(11). We have marked this information for your convenience. The handwritten notes of the school district superintendent dated August 20, 1992, contain "advice, opinion, or recommendation," but also include factual information. Because the "advice, opinion, or recommendation" is inextricably intertwined with the factual information, the superintendent's handwritten notes may be withheld in their entirety under section 3(a)(11) of the Open Records Act. The remaining information, including the memorandum dated August 20, 1992, the unsigned and undated letter to Dr. Munoz, the list of teachers, and the enrollment report, is factual 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 OR92-645.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/lmm

Ref.: ID#s 17405, 17419
ID#s 17719, 17733

cc: Ms. Marlene Hawkins
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