



## Office of the Attorney General

State of Texas

November 19, 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

OR92-657

Dear Mr. Hankins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 17282.

The Texas Department of Insurance (the "department") has received a request for three internal audit reports the department prepared. Specifically, the requestor seeks the following reports:

1. IA 1990-219 06/22/90 Theft and Travel Abuse;
2. IA 1990-220 07/09/90 Travel Abuse Survey; and
3. IA 1990-216 11/30/89 Theft of Telephone Services.

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

### Section 3(a)(3) excepts from required public disclosure

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). "Whether litigation is reasonably anticipated must be determined on a case-by-case basis." Open Records Decision No. 452 (1986) at 4.

You advise us that the Travis County Public Integrity Unit currently is investigating allegations arising out of the three requested internal audit reports and has requested that the department withhold the reports. Travis County has since advised us that the internal audit reports requested here do not relate to an ongoing county investigation and that Travis County thus does not object to their release. As you have not explained that these reports otherwise relate to pending or anticipated litigation, we have no basis for concluding that section 3(a)(3) of the Open Records Act excepts them from required public disclosure.

You also claim that section 3(a)(11) of the Open Records Act, 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," excepts from disclosure the marked portions of the document submitted to us for review. 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 exception 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 information for which you claim the section 3(a)(11) exception and conclude that some of it constitutes "advice, opinion, or recommendation" used in the decisional process. Section 3(a)(11) thus authorizes the department to withhold from required public disclosure portions of the records. For your convenience, we have marked the information the department may withhold. The remaining information, however, is factual, and the department must release it.

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 OR92-657.

Yours very truly,



Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee

KKO/GCK/lmm

Ref.: ID# 17282  
ID# 17295  
ID# 17654

cc: Mr. Derek A. Howard  
Howard & Kobelan  
Attorneys at Law  
100 Congress Avenue, Suite 1720  
Austin, Texas 78701