



Office of the Attorney General  
State of Texas

March 15, 1993

DAN MORALES  
ATTORNEY GENERAL

Mr. James B. Bond  
Deputy Chancellor and General Counsel  
Texas A&M University System  
College Station, Texas 77843-1230

OR93-111

Dear Mr. Bond:

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# 18278.

The Texas A&M University System (the "university") has received a request from the Amarillo Globe-News (the "requestor") for information relating to a certain settlement agreement. Specifically, the requestor seeks "any documents and records of financial transactions relating to the settlement of the West Texas State University/Philip Isett lawsuit." You have submitted the requested information to us for review and claim that it is excepted from required public disclosure by sections 3(a)(3) and 3(a)(7) of the Open Records Act.

We first address whether the requested information is excepted from required public disclosure by section 3(a)(7) of the Open Records Act, which excepts:

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, *or which by order of a court are prohibited from disclosure.* [Footnote omitted.] [Emphasis added.]

You claim that you are prohibited from disclosing the requested information by order of the 251st Judicial District Court, Randall County. Indeed, an order of dismissal dated October 31, 1991, issued by the 251st Judicial District Court, and signed by the district judge, contains a confidentiality clause ordering that "the terms and conditions of the Release and Settlement Agreement by and between the parties . . . shall be confidential and prohibited from disclosure." An order of dismissal nunc pro tunc, however, was issued by the same court December 2, 1992, which replaced the first order. This order omitted the confidentiality provision present in the first order. In a letter dated December 2, 1992, to the attorney for the Amarillo Globe-News and the Office of the Attorney General, the district judge explained why the first order of dismissal was vacated:

To the extent that any party has relied upon the language contained in the second paragraph of page two of the Agreed Order of Disclosure to obstruct disclosure, it is relying upon a provision which was gratuitously included by the drafters of the Agreed Order of Disclosure. Such "relief" was not requested nor is it supported by the evidence. As such it constitutes surplusage to the order of the court and is void *ab initio*. To clarify this confusion, the court has hereby, sua sponte, entered an Order of Dismissal Nunc Pro Tunc omitting the questioned provision. If the parties believe that a sealing order is appropriate they can request that relief from the court pursuant to Rule 76A [of the Texas Rules of Civil Procedure].

To our knowledge, neither of the parties has requested relief pursuant to Rule 76A, or sought rehearing of or appealed the court's order of dismissal nunc pro tunc. Clearly, the requested information is not made confidential by court order. Therefore, it is not excepted from required public disclosure by section 3(a)(7) of the Open Records Act.

You also claim that the requested information is excepted from required public disclosure by section 3(a)(3) of the Open Records Act, which excepts:

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.

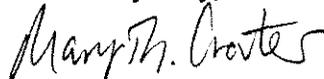
The requested Release and Settlement Agreement contains the following provision:

4. Confidentiality. The parties will fully maintain the confidentiality of this Agreement and will not communicate the terms of the Agreement to any member of the public, except as may be required by law; except that the parties may state that the matter has been settled. Any violation of this provision shall give rise to a cause of action which is not waived hereunder.

A governmental body may agree or contract to keep information confidential only if a statute specifically authorizes it to do so. *See* Open Records Decision No. 514 (1988).<sup>1</sup> You do not indicate, nor is it otherwise apparent, that a statute specifically authorizes the university to contract to keep this information confidential, as the university attempted to do by executing the confidentiality provision of this settlement agreement. Absent such statutory authority, the provision is void and unenforceable and cannot give rise to a cause of action. In addition, we note that the other party to the litigation has indicated in an affidavit that he does not object to release of the terms of the settlement agreement. It thus seems unlikely that he will sue the university under the confidentiality provision. The mere contemplation of future litigation by a governmental body is not sufficient to invoke the litigation exception. Open Records Decision No. 557 (1990). We conclude therefore that litigation may not be reasonably anticipated. The requested information may not be withheld under section 3(a)(3) of the Open Records Act and must be released in its entirety.

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 OR93-111.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

MRC/GCK/le

Ref.: ID# 18278  
ID# 18296  
ID# 18344

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<sup>1</sup>To avoid the constitutional prohibition against impairment of the obligation of contracts, a governmental body may withhold agreements it entered prior to June 14, 1973, pursuant to an express promise of confidentiality. Open Records Decision No. 284 (1981). *See* Open Records Decision Nos. 514 (1988) at 1-2; 444 (1986) at 6; 437 (1986) at 4; 414 (1984) at 3.