



Office of the Attorney General

State of Texas

March 31, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Jeff Hankins
Legal Assistant
Program Division, Legal Services, 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR93-141

Dear Mr. Hankins:

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# 17947.

The Texas Department of Insurance (the "department") has received a request for information concerning the Texas Retrospective Rating Plan Manual. You have indicated that most of the information will be made available to the requestor. You claim the remaining information is protected from disclosure by sections 3(a)(7) and 3(a)(11) of the Open Records Act.

Section 3(a)(7) 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.]

All communications between attorneys and their clients are not excepted by section 3(a)(7). The exception is limited to that information containing the attorney's legal advice or opinion and a client's confidential communications to his or her attorney. Open Records Decision No. 574 (1990) at 3. When an attorney or law firm functions in some capacity other than as legal counsel or advisor, their communications are not privileged under section 3(a)(7). Open Records Decision No. 462 (1987) at 11.

The March 5, 1992, February 27, 1992, and February 28, 1992 memoranda consist of confidential communications to or legal advice and opinion of an attorney who, you advise us, was then acting as a special counsel to the commissioner of the department. These documents are excepted by section 3(a)(7) and may be withheld in their entirety.

You have also submitted, however, a February 26, 1992 memorandum written by the chair of the State Board of Insurance to the commissioner. While the chair and the commissioner both happen to be attorneys, clearly the chair wrote the note in her capacity as a member of the governing board of a state agency, and the commissioner received the note not as legal counsel to the chair but as the administrative executive of her department. Accordingly, the February 26, 1992 memorandum may not be excepted under section 3(a)(7).

You also claim that the information constitutes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, is excepted from public disclosure. For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath*, 842 S.W.2d at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the February 26, 1992 memorandum and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the memorandum, you must re-submit your request and the document at issue, along with your arguments for withholding the document pursuant to section 3(a)(11) or any other exception that you have previously raised. You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this document.

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 OR93-141.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/LBC/le

Ref: ID# 17947

Enclosures: Marked documents

cc: Mr. Michael A. Logan
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(w/o enclosures)