



The Attorney General of Texas

December 20, 1982

MARK WHITE
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1367
Telecopier 512/475-0266

1607 Main St., Suite 1400
Dallas, TX. 75201-4709
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

220 Dallas Ave., Suite 202
Houston, TX. 77002-6986
713/650-0666

806 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1685
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

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Mr. Michael J. Cosentino
Assistant City Attorney
P. O. Box 220
McAllen, Texas 78501

Open Records Decision No. 323

Re: Whether information on
park development fees held by
city is open to public

Dear Mr. Cosentino:

You have requested our decision under the Open Records Act, article 6252-17a, V.T.C.S., as to whether certain information regarding park development fees is open to the public.

In 1980, in Berg Development Company v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. App. - Houston [14th Dist.] 1980, writ ref'd n.r.e.), the Houston Court of Civil Appeals declared a Missouri City, Texas, park dedication ordinance unconstitutional on the ground that it violated article I, section 17 of the Texas Constitution, which prohibits the taking of private property for public use without adequate compensation. Among other things, the Missouri City ordinance required developers of residential subdivisions, as a condition precedent to subdivision plat approval, to dedicate land within a subdivision for park purposes in the amount of one-half acre for every 150 residents.

You advise that a McAllen city ordinance enacted in 1973 requires, as a condition of subdivision plat approval, the contribution of a fee to be set aside for park development. It further provides that raw land may be contributed if the developer or the city commissioner desires. Apparently, some people in McAllen believe there are parallels between the McAllen ordinance and the Missouri City ordinance which was struck down in the Berg case. Shortly after Berg was handed down, the board of commissioners of the city of McAllen began receiving demands for refunds of park development fees collected since 1973. You advise that in response to these demands, the board decided informally to (1) suspend the imposition of the park fee ordinance, and (2) begin refunding park fee contributions collected pursuant to it.

Eventually, these reimbursements depleted the park escrow fund, and the city commission then decided to stop making refunds. After this decision was made, an attorney representing two developers

unsuccessfully demanded a refund of the park fees paid by his clients. You advise that he stated publicly before the city commission that he is prepared to sue the city, but that he has not yet done so. You further advise that this attorney requested, by letter, the following information in the city's possession: (1) the total amount of park fees refunded by the city; (2) the developers to whom refunds were made; (3) the dates on which refunds were made; (4) the total amount of park fees retained by the city; (5) the names of developers to whom refunds have not been made; and (6) the names of developers whose properties were taken in lieu of payment of the park fee.

You state that the foregoing information was compiled by the finance department of the city of McAllen at the request of the city attorney's office in anticipation of litigation involving the McAllen park fee ordinance. You contend that this information is excepted from required public disclosure under sections 3(a)(3), 3(a)(7), and 3(a)(11) of the Open Records Act.

Section 3(a)(7) does not permit the withholding of any information not already excepted by section 3(a)(3), which will be addressed below. Section 3(a)(11) has been construed to except only "advice, opinions and recommendations." Open Records Decision Nos. 315, 310, 308 (1982). The information you have submitted is essentially factual, and we do not believe that section 3(a)(11) is applicable thereto.

Section 3(a)(3) is applicable only "where litigation is pending or reasonably anticipated in regard to a specific matter." Furthermore, the information for which the exception is claimed must be clearly relevant to the pending litigation. Open Records Decision Nos. 311 (1982); 289 (1981); 139 (1976).

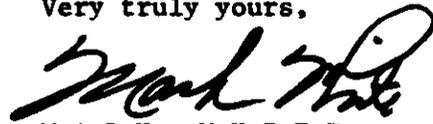
In our opinion, the first standard has clearly been met in this instance. First, the fact that the city began receiving requests for refunds of the park fees shortly after the Berg decision was announced demonstrates that there are certainly some people in McAllen who are aware of that decision and who believe that it might have a bearing on the McAllen ordinance. The likelihood that someone will challenge the validity of the McAllen ordinance on the grounds that were successfully asserted in Berg lends support to the conclusion that litigation is likely to result here.

In addition, you indicate that the attorney who publicly stated his intent to sue the city, and who requested the information at issue here, apparently intends to base his suit on the city's decision to cease refunding park fees after it has already refunded some fees to other developers. Thus, it is reasonable to conclude not only that the validity of the McAllen ordinance might soon be challenged, but that litigation involving the city's decision to terminate refunds

after making some refunds might be initiated. These factors, taken together, warrant the conclusion that litigation is likely in this instance.

Finally, the information at issue directly relates to the anticipated litigation. If an aggrieved party brings an action to recover a refund, all of the requested information will be at issue in the suit. Since you have determined, in your capacity as attorney for the city, that the information should be withheld from disclosure at this time, we must conclude that you are entitled to invoke section 3(a)(3). Accordingly, the information at issue here is excepted from disclosure under section 3(a)(3) of the Open Records Act.

Very truly yours,



MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant Attorney General

Prepared by Rick Gilpin
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Susan L. Garrison, Chairman
Jon Bible
Rick Gilpin
Patricia Hinojosa
Jim Moellinger