



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 10, 1988

Honorable John C. Ross, Jr. Open Records Decision No. 511
City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

Re: Whether an attorney for a governmental body may unilaterally decide that certain information relating to litigation may be withheld under section 3(a)(3) of the Texas Open Records Act, article 6252-17a, V.T.C.S., without an independent determination by the attorney general under section 7 of the act. (RQ-1411)

Dear Mr. Ross:

The city of Lubbock seeks reconsideration of our informal open records ruling OR88-013. The city received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for four firefighters' pay and time sheets and for daily log sheets maintained by the fire marshal's office. The Open Records Act requires the release of all information held by governmental bodies unless one of the act's exceptions protects the information from required disclosure. Decision OR88-013 rejected the city's claim that section 3(a)(3) protects the information at issue.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, 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.

This exception authorizes governmental bodies to deny requests for information that relate to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information that relates to settlement negotiations involving such litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). Information "relates" to litigation within the meaning of section 3(a)(3) if releasing the information would impair the governmental body's litigation interests. Open Records Decision No. 478 (1987). To determine whether specific information meets these tests, the attorney general reviews the information. See art. 6252-17a, § 7(b).

You challenge this office's interpretation of section 3(a)(3) and this office's application of section 3(a)(3) to the information at issue. First, you assert that section 3(a)(3) grants to the attorney for the governmental body the authority to determine whether information should be withheld and that this determination is not subject to review by the attorney general. You note that section 3(a)(3) authorizes withholding information relating to litigation "that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection" (emphasis added). You claim that this office's review of information under section 3(a)(3) places the attorney general in the position of representing an entity that is not the attorney general's client.

This is not, however, the effect of the review required of the attorney general under the Open Records Act. The reference to the attorney general in section 3(a)(3) is not to the attorney general as the decision-maker under the Open Records Act; section 3(a)(3) refers to the attorney general as representative of client state agencies.

In fulfilling his constitutional and statutory responsibilities, the attorney general performs a number of different roles. See Open Records Decision No. 412 (1984); see also Public Utility Commission of Texas v. Cofer, 754 S.W.2d 121 (Tex. 1988). State agencies are clients of the attorney general with regard to litigation against the agencies. See Tex. Const. art. IV, § 22. Because the Open Records Act applies to state agencies, the attorney general, representing client agencies, must make the initial determination under section 3(a)(3) that specific

information relates to litigation. This initial determination, like that made by "the respective attorneys of the various political subdivisions," is subject to review by the division of the attorney general's office that administers the Open Records Act. See, e.g., Open Records Decision Nos. 289, 282, 281, 280 (1981).

Section 7 of the Open Records Act provides:

(a) If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

(b) The attorney general shall forthwith render a decision, consistent with standards of due process, to determine whether the requested information is a public record or within one of the above stated exceptions. The specific information requested shall be supplied to the attorney general but shall not be disclosed until a final determination has been made. The attorney general shall issue a written opinion based upon the determination made on the request. (Emphasis added.)

Although section 3(a)(3) vests the attorney for a governmental body with discretion to determine whether section 3(a)(3) should be claimed, see Open Records Decision No. 143 (1976), that determination is subject to review by the attorney general under section 7. This review is not the equivalent of the attorney general representing an entity that is not the attorney general's client. The review performed under section 7 is not legal representation; it is a quasi-judicial function. See Kneeland v. National Collegiate Athletic Association, 650 F.Supp. 1064, 1074-75 (W.D. Tex. 1986), rev'd on other grounds 850 F.2d 224 (5th Cir. 1988).

You also challenge this office's interpretation of the language in section 3(a)(3) that information "relate to litigation" before it may be withheld. As indicated, information "relates" to litigation within the meaning of section 3(a)(3) only if releasing the information would impair the governmental body's litigation interests. Open Records Decision Nos. 478 (1987); 416 (1984). This is neither a new interpretation of section 3(a)(3), nor one applied only by this administration. See Open Records Decision Nos. 222 (1979); 180 (1977); 135 (1976).

The only reported case law on section 3(a)(3) addresses the meaning of "reasonably anticipated" litigation, the first part of the section 3(a)(3) test. See Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). Absent dispositive case law on the Open Records Act, the decision of the attorney general must be consulted. See Kneeland v. National Collegiate Athletic Association, 850 F.2d 228 (5th Cir. 1988). The deference paid by courts to formal opinions of the attorney general is accentuated for open records decisions because the Texas Legislature directed that the Attorney General interpret the Open Records Act. Kneeland, 850 F.2d at 228 (citing article 6252-17a, § 7); see also Heard v. Houston Post Co., 684 S.W.2d 210 ((Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); City of Houston v. Houston Chronicle Publishing Co. 673 S.W.2d 316 (Tex. Civ. App. - Houston [1st Dist.] 1984, no writ) (attorney general decisions entitled to consideration by courts).

Sections 1 and 14(d) of the Open Records Act require a liberal construction that favors granting requests for information. The exceptions must therefore be interpreted narrowly. Interpreting section 3(a)(3) as broadly as you suggest would eviscerate the Open Records Act.

The information requested from Lubbock's fire department consists of four firefighters' pay and time sheets and the daily log sheets maintained by the fire marshal's office. Two of the firefighters sought the information at issue. They filed suit against the city of Lubbock, alleging the city failed to pay both firefighters their respective overtime rates for time spent not in active duty but in on-call status. Decision OR88-013 determined that section 3(a)(3) does not protect basic facts, the release of which would not impair the governmental body's legal strategy. The decision relied on Open Records Decision No. 395 (1983) and on Open Records Decision Nos. 416 (1984), 180 (1977), and 135 (1976). See also Open

Records Decision No. 221 (1979) (section 3(a)(3) does not under any imaginable circumstances protect the minutes of a school board's public meeting); Open Records Decision No. 208 (1978) (section 3(a)(3) does not protect certain fundamental factual information regarding a complaint against a police officer); Open Records Decision Nos. 146 (1976); 43 (1974) (information expressly made public by statute cannot fall within section 3(a)(3)).

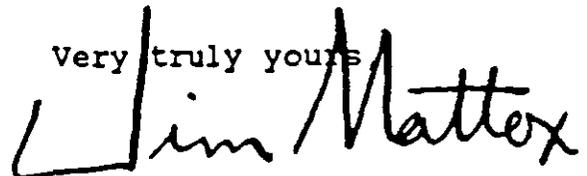
We need not reach this issue, however, because we understand that the information at issue in OR88-013 has been released to the two firefighters through the discovery process. When parties to litigation have inspected records pursuant to discovery, the governmental body in the litigation may not invoke section 3(a)(3). Open Records Decision No. 349 (1982). The information is public.

S U M M A R Y

Section 3(a)(3) of the Texas Open Records Act, article 6252-17a, V.T.C.S., requires that the respective attorneys for governmental bodies covered by the act determine initially whether the governmental body should claim section 3(a)(3). This determination and the information at issue are subject to review by the attorney general under section 7 of the Open Records Act.

Governmental bodies may withhold information under section 3(a)(3) only if the information relates to litigation such that releasing the information would impair the governmental bodies' litigation interests. For this reason, information may not be withheld from public disclosure once it has been seen by the parties in litigation with the governmental body.

Very truly yours



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