



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

May 17, 1990

Mr. Ron Lindsey
Commissioner
Texas Department of Human
Services
P.O. Box 149030
Austin, Texas 78714-9030

Open Records Decision No. 555

Re: Whether information relating to an employee's termination is excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1956)

Dear Commissioner Lindsey:

The Texas Department of Human Services [the department] has received a request for information from a former employee pursuant to the Texas Open Records Act, article 6252-17a, V.T.C.S. The 38 items in the request are varied: some are requests for answers to fact questions, some are statements or a combination of statements and questions, some are requests for information that is not kept by the department or for which the department would need to compile information, and some are requests for documents that the department asserts relate to potential litigation between the former employee and the department. All of the items in the request concern the former employee's employment or his discharge.

The Open Records Act does not require governmental bodies to provide answers to general inquiries. Open Records Decision No. 342 (1982). It simply requires, with certain exceptions, that governmental bodies make available information they collect, assemble, or maintain. Thus, the Open Records Act does not require the department to respond to items 3, 4, 8, 9, 10, 11, 15, 16, 18, 20, 24, 27, 28, 29, 30, 32, 37, and 38.

The Open Records Act does not mandate the creation of new documents or the compilation of information in response to a request. Open Records Decision No. 342 (1982). Only that information in existence is subject to disclosure. Id.

Therefore, items 1, 6, 7, 15, 16, 20,¹ 21, 22, 23, 34, and 36 require a response only if the department has the information in a tangible form. Any documents you have in your possession which relate to the department's procedure, rules, and methods are public information. See V.T.C.S. art. 6252-17A, § 6(8), (9), (10), (13), (14).

The department, as well as the assistant attorney general in the relevant division of the Attorney General's Office, asserts that items 5, 12, 13, 14, 17, 19, 25, 26, 31, 33, and 35 are documents that relate to the subject matter of potential litigation between the department and its former employee, and therefore they should be excepted from required public disclosure by section 3(a)(3) of the Texas Open Records Act.

Section 3(a)(3) of the Open Records Act excepts from 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.

In order for the 3(a)(3) exception to apply, the information requested must relate to litigation that is pending or reasonably anticipated. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990). The test for the 3(a)(3) exception consists of two prongs: (1) Is litigation pending or reasonably anticipated? (2) Does the requested information "relate" to the pending or contemplated litigation? See Open Records Decision No. 386

1. Item number 20 can be interpreted as either an inquiry or a request for information about the department's policy and procedure.

(1983). We will first determine whether litigation is pending or reasonably anticipated.

In this case, no suit has been filed yet. The department advises that prior to and after his dismissal, the former employee filed complaints with the department's civil rights division alleging discrimination based on race and handicapped status. The former employee has now hired an attorney who has stated to the department and to an assistant attorney general in the attorney general's workers' compensation division that he intends to file suit against the department alleging discrimination based on race, disability, and wrongful discharge. We conclude that because steps toward litigation have been taken, i.e., the hiring of an attorney and the assertions of that attorney of an intent to sue, litigation is reasonably anticipated in this case. See Open Records Decision Nos. 551 (1990); 383 (1983); 289 (1981).

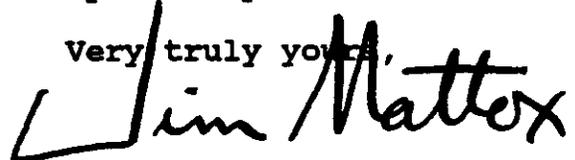
The 3(a)(3) exception also requires a demonstration that the information requested "relates" to the litigation. The assistant attorney general who represents the department has concluded that all of the information requested in items 5, 12, 13, 14, 17, 19, 25, 26, 31, 33, and 35 are appropriate to withhold under the section 3(a)(3) exception. The Department attorneys advised that many of the documents requested will be exhibits offered in evidence should litigation occur. In Open Records Decision No. 551, this office stated that the review of materials which are the subject of the 3(a)(3) exception is to be directed to the relation of the subject matter of the requested information to the pending or anticipated litigation, rather than to the strategy of the attorney representing the governmental body. Applying this standard, we conclude that the department has established the relatedness of the subject matter of the requested information to the litigation that is reasonably anticipated in this case. See Open Records Decision Nos. 386, 383 (1983); 289 (1981). Hence, the department may withhold the documents requested in items 5, 12, 13, 14, 17, 19, 25, 26, 31, 33, and 35 under section 3(a)(3) of the Texas Open Records Act.

S U M M A R Y

The Open Records Act does not require governmental bodies to provide answers to general inquiries. For section 3(a)(3) of the Texas Open Records Act to apply, the

information must relate to litigation that is pending or reasonably anticipated. The hiring of an attorney and the assertion of that attorney of an intent to sue establish that litigation is reasonably anticipated.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, sweeping initial "J".

J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
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RENEA HICKS
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RICK GILPIN
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Prepared by Kay H. Guajardo
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