



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 13, 1989

Mr. R. Clayton Hutchins
Office of the City Attorney
P. O. Box 530011
Grand Prarie, Texas 75053-0011

Dear Mr. Hutchins:

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# 5183; this decision is OR89-024.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

You received a request for an audit report prepared by Peat, Marwick, Main & Co. in connection with the misappropriation of funds at the municipal airport. You assert that the report is exempt from required public disclosure under sections 3(a)(3), 3(a)(8), and 3(a)(1) in conjunction with the attorney-client privilege. This office agrees that section 3(a)(3) exempts the report from disclosure, and declines to address your other arguments.

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 relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information relating 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.); Attorney General Opinion H-483 (1974); Open Records Decision No. 331 (1982).

To claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or reasonably anticipated; and 2) that the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). See Open Records Decision No. 416 (1984); 180 (1977); 135 (1976).

To secure the protection of this exception, a governmental body must first demonstrate to the attorney general that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. A governmental body can establish that litigation is "pending" by submitting a copy of the pleadings in a court case or proving that a contested case is pending at the administrative agency level. The burden of proof for demonstrating that litigation is "reasonably anticipated" is less definite. The affidavits and warrant you submitted for the arrest of an individual, however, are adequate to prove that litigation is reasonably anticipated.

A governmental body asserting section 3(a)(3) must also demonstrate that the information relates to litigation. Information "relates to" litigation within the meaning of 3(a)(3) only if releasing the information would impair the governmental body's litigation interests. Open Records Decision Nos. 511 (1988); 478 (1987); 416 (1984). The audit report is directly related to the anticipated litigation; according to the affidavits submitted by the city the report will be the basis of expected litigation. Release of the report could reasonably impair the City of Grand Prairie's legal strategy. You have met the burden of proof under section 3(a)(3) and may withhold the report.

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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 OR89-024.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
Prepared by Patricia Barnhard
Assistant Attorney General

PB/bra

Copy to: Mssrs. J. R. Sutterfield
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