



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 13, 1989

Mr. Edward H. Perry
City of Dallas
City Hall
Dallas, Texas 75201

Dear Mr. Perry:

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# 5214; this decision is OR89-026.

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 all documents, internal memoranda, Notice of Claim, work orders for the vehicle involved, and personnel files for the city employee involved in a particular accident. You provided this office with a copy of the Notice of Claim to the city as well as copies of the documents requested for review. You assert that sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(7), and 3(a)(11) exempt all or part of the material requested from required public disclosure. This office agrees that all of the information except the Notice of Claim is exempt under section 3(a)(3); the remainder of your arguments therefore need not be addressed.

Section 3(a)(3) of the Open Records Act, known as the litigation 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). The exception protects the litigation interests of an entity that is or is about to be involved in a lawsuit. The section requires that information relating to pending or contemplated litigation must be sought through the judicial discovery process. Open Records Decision No. 108 (1975); see also Attorney General Opinion JM-292 (1984) (discussing difference between discovery in administrative action and request under the Open Records Act).

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. Demonstrating that litigation is "reasonably anticipated" is more difficult. Recognizing this, the attorney general will find that litigation is "reasonably anticipated" only if a governmental body furnishes concrete evidence establishing that litigation involving a specific matter is realistically contemplated.

Filing a notice of claim with the city is a necessary prerequisite to filing a lawsuit for damages. Civ. Prac. & Rem. Code § 101.101. Given that a notice has been filed, it is reasonable to anticipate a lawsuit involving the accident.

In order to withhold information under section 3(a)(3), a governmental body must also show that the information relates to the anticipated litigation such that releasing the information would impair the governmental body's litigation interests. Open Records Decision Nos. 511 (1988); 478. This office is persuaded by the arguments in your letter of December 16, 1988, that the city's interests would be impaired by premature release of all of the

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information requested except for the Notice of Claim. Regarding the Notice of Claim, it is likely that the claimant has a copy of it. If the claimant does not have a copy, it is reasonable to presume the claimant recalls the contents of the notice. In either event, the claimant already has this information, and the city cannot reasonably assert that release of the notice would impair the city's litigation interests.

The Notice of Claim is not exempt under any of the other sections you cited. The Notice of Claim is public information and should be released. The remainder of the information requested may be withheld.

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 OR89-026.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
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Ref.: ID# 5214