



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 13, 1989

Mr. A. W. Pogue
State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Dear Mr. Pogue:

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 requests were assigned ID# 5146 and 5237; this decision is OR89-027.

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 two requests for information, one for all records relating to Clare G. Weakley, an insurance agent, and one for all records relating to T. H. E. Insurance Company. You stated that both of these are the subjects of board investigations, and claimed the information requested is exempt under section 3(a)(3) of the act. This office holds that some, but not all, of the information is exempt under section 3(a)(3).

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). The term "litigation" embraces contested cases before administrative agencies as well as court cases. Open Records Decision Nos. 368 (1983); 301 (1982); see also Open Records Decision No. 336 (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 Nos. 511 (1988); 478 (1987). See Open Records Decision No. 416 (1984); 180 (1977); 135 (1976).

Both of the investigation files you submitted are active, therefore it is reasonable to anticipate litigation in each case. However, most of the information submitted would not impair the board's litigation interests if released. Information in this category is either already public or should be known to the party investigated. This category includes, without limitation, the following: affidavits signed by the party investigated; agreements between the party investigated and third parties; correspondence between the board and the party investigated; court pleadings; insurance policy statements originating with the party investigated; correspondence between the party investigated and third parties; and copies of records taken from the files of the party investigated.

Information that does fall within the scope of section 3(a)(3) includes correspondence between the board and third parties concerning the investigations, witness statements, information compiled internally for purposes of evaluating the cases, and internal memoranda and notes. You may

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withhold this information under section 3(a)(3); the remainder is public and must be released.

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 OR89-027.

Yours very truly,

Open Government Section
of the Opinion Committee
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Prepared by Patricia Barnhard
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PB/bra

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Ref.: ID# 5146
ID# 5237
ID# 5268
ID# 5190