



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 20, 1989

Ronald C. Campana
Paul A. Philbin & Assoc., P.C.
6363 Woodway
Suite 725
Houston, Texas 77057

Dear Mr Campana:

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# 5223; this decision is OR89-035.

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.

The Palmer Plantation Municipal Utility District No. 1 (the District) received a request for information concerning a lawsuit filed by Galin Corporation against the District. Ms. Becky Black, of your office, informed us that the requestor marked on a separate sheet the information he seeks to review. This information includes: correspondence between Galin Corporation and the District, water treatment plant plans, pay estimates, certificates of acceptance and completion, change orders, audit information and other miscellaneous files. On behalf of the District, you assert that the information at issue is protected from required public disclosure by section 3(a)(3) of the Open Records Act.

Section 3(a)(3) 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.); Open Records Decision No. 511 (1988). The intent of this exception is to protect the litigation interests of an entity that is or is about to be involved in a lawsuit. The section requires that the information relating to pending or contemplated litigation must be sought through the judicial discovery process. Open Records Decision No. 108 (1975).

To secure protection under section 3(a)(3), 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 governmental body must also prove that the information "relates" to that litigation. See Open Records Decision No. 416 (1984). Information is considered to "relate to" litigation only if releasing the information would impair the governmental body's litigation interests. Open Records Decision 511 (1988). When litigation is pending, the attorney general makes this determination by reviewing the information in light of the pleadings in the lawsuit to see if it relates to the issues raised in those pleadings. Open Records Decision Nos. 382 (1983).

You have not submitted for our review a copy of the pleadings in the cases to prove that litigation is pending. However, you have provided the docket numbers of the cases in question as well as information regarding the district courts in which the cases will be heard. You advise that the suits concern money damages owed for alleged extra charges incurred in the execution of a public works contract and the alleged breach of a contract for other public works. If, as you claim, the suits concern such contractual issues, the information provided sufficiently relates to the pending litigation such that the governmental body's legal interests in the litigation would be impaired if the information was disclosed. You may withhold the information sought by the requestor.

Ronald C. Campana
January 19, 1989
Page 3

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 OR89-035.

Yours very truly,

Open Government Section
of the Opinion Committee

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of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/FAF/bra

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