



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

March 6, 1989

Mr. Robert E. Shaddock  
General Counsel  
State Department of Highways  
and Public Transportation  
11th & Brazos  
Austin, Texas 78701-2483

Dear Mr. Shaddock:

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# 5246; this decision is OR89-76.

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 State Department of Highways and Public Transportation (the "department") received a request from Mr. Jack Lewi, of Barron & Company Adjusters, Inc., for information on a fatal accident, specifically concerning the condition of the crash site. The requestor asked for copies of photographs taken at the scene, measurements, diagrams, statements, etc. The requestor's letter states that Barron & Company "represent[s] the Traffic Sign Company and anticipate[s] becoming involved in a lawsuit pertaining to the decedent's death." The department received this request on either November 23 or 25, 1988, but did not submit the documents to this office for consideration until December 21, 1988. You claim that the information contained in the documents submitted is excepted from disclosure by section 3(a)(3) of the Open Records Act.

Section 7(a) of the Open Records Act provides:

If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than 10 days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information. (Emphasis added.)

If a decision is not requested within 10 days, the information requested is presumed to be public. Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to overcome this presumption. Id. You failed to submit this information within the required time period. Thus, absent a compelling reason to withhold the information, it must be released.

You claim that section 3(a)(3) excepts this information from public disclosure. This section exempts from disclosure "information relating to litigation of a criminal or civil nature . . . ." The purpose of the exception is to protect the litigation interests of an entity involved in or about to be involved in a lawsuit. To claim this exception, the governmental body must show that litigation is actually pending or reasonably anticipated and that the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's interests in the litigation. Open Records Decision No. 478 (1987).

Although the requestor's letter specifically asks for the information in preparation for possible litigation, there is no evidence showing either that litigation has been commenced or even that it is being contemplated by the family of the victim. A mere chance of litigation is not sufficient to trigger protection under section 3(a)(3). Open Records Decision Nos. 331, 328 (1982). You have 10 days from the receipt of this letter to submit evidence that a lawsuit is realistically being contemplated and that the department has a compelling reason to withhold the information. Otherwise, the information must be released.

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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 OR89-76.

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/BLS/bc

cc: Mr. Jack Lewi  
7410 Blanco, Suite 220  
San Antonio, Texas 78216

Ref.: ID# 5246