



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

April 26, 1989

Mr. R. Clayton Hutchins  
City Attorney  
City of Grand Prairie  
P. O. Box 530011  
Grand Prairie, 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# 6028; this decision is OR89-141.

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 city of Grand Prairie received several open records requests for information pertaining to a February 8, 1989, emergency rescue operation by the city and the city's ambulance service. The incident involved an ambulance's delayed response to an individual who died of a heart attack. You contend that section 3(a)(3) of the Open Records Act protects the requested documents from required public disclosure.

We initially note that two of the requestors ask for copies of the contract between the city of Grand Prairie and the Dallas/Fort Worth Medical Center for Emergency Medical Services, which provides ambulance service to the city. You do not state whether you released the contract to the requestors. The contract is a public record, see V.T.C.S. art. 6252-17a, § 6(3), and must be released.

Mr. R. Clayton Hutchins  
April 26, 1989  
Page 2

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.

The language of section 3(a)(3) does not authorize attorneys of political subdivisions of the state to unilaterally decide that information may be withheld from the public pursuant to section 3(a)(3). Open Records Decision No. 511 (1988) (copy enclosed). Attorneys for a governmental body make only an initial determination that section 3(a)(3) protects requested information. Section 7 of the act requires that the attorneys submit their determinations to the attorney general. Id.

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision No. 452 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Id. You provided this office with a copy of a notice of claim letter from a surviving family member and a sworn affidavit from the city attorney stating that an attorney representing the surviving family indicated he was preparing to file a written claim against the city. Based on this evidence, it is apparent that you have met the first test to withhold the requested information pursuant to section 3(a)(3).

This is not, however, all that you must show to gain the protection of section 3(a)(3). The governmental body's attorney must show that the requested materials relate to the litigation, see Open Records Decision No. 323 (1982), such that disclosure of the materials would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988). You have not shown, and it is not readily apparent to this office, that each of the documents

Mr. R. Clayton Hutchins  
April 26, 1989  
Page 3

you seek to withhold meets this second test. Consequently, unless you submit to this office within ten days of receipt of this letter ruling additional information explaining how each of the requested documents meets this test, you may not withhold this information pursuant to section 3(a)(3).

Finally, we assume that none of the information in the records at issue has previously been made available to the requestors. No section 3(a)(3) interest exists with respect to information already obtained by all parties to the litigation, e.g., through discovery or by court order. Open Records Decision No. 349 (1982). If the requestor has seen any of the information in these records, there is no justification for withholding the information from the requestor pursuant to section 3(a)(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 OR89-141.

Yours very truly,

*Open Government Section  
of the Opinion Committee*

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of the Opinion Committee  
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JSR/RWP/bc

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