THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 5, 1989

Mr. A. W. Pogue
Commissioner
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 request was assigned ID# 6334; this decision is OR89-161.

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 Board of Insurance received a request for "all documentation relating to any complaints filed with the Texas Board of Insurance regarding Henry Joe Henke, Jr." You indicate that the board sent all of the information in its files that was responsive to the request except for investigators' reports and notes and a complaint letter. You claim that section 3(a)(3) protects these documents from required public disclosure.

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 Nos. 416 (1984); 180 (1977); 135 (1976). 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).

You indicate that a hearing in this case is set for June 12, 1989. We have reviewed the information at issue and have determined that section 3(a)(3) applies.

On the other hand, the Texas Open Records Act does not govern the scope of civil discovery or the scope of discovery in administrative proceedings. See Attorney General Opinion JM-1048 (1989) (copy enclosed). Section 3(a)(3) does not afford a basis to withhold information from a properly served request for production. Id.

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 OR89-161.

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/bc

Ref.: ID# 6334

Enclosure: JM-1048