



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 5, 1989

Mr. James R. Raup
McGinnis, Lochridge & Kilgore
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

Dear Mr. Raup:

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# 5852; this decision is OR89-162.

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 Brenham received open records requests for the following information:

1. Pre-Purchase Documents Notes and Records

A. Land purchase documents and records including all related photographs, correspondence, notes, earnest money contracts - executed and not executed - and minutes or records of all council and departmental meetings and reports relating to or pertaining to the acquisition of a site for a replacement dump commencing with January 1, 1984 and through and including the date of purchase of the present tract for which a permit is sought.

B. Pre-purchase engineering or technical studies undertaken by the City of Brenham or any other person for the purpose of determining the suitability of landsites for use as a dump site, and which were performed or came to hand during the period set forth in 1.B, above.

C. Prepurchase engineering studies, if any, performed for the purpose of ascertaining the suitability of the presently proposed site for use as a dumpsite.

D. Prepurchase land use studies or reports for the area which was adjacent to or believed by the City to be within sufficient proximity to be affected by the proposed dumpsite.

2. A. Deed, closing statement, and all documents relating to the acquisition of title to the proposed site and all minutes of meeting and departments relating thereto.

B. Copies of all engineering reports and minutes of all meetings related to the proposed landfill operation, including all alternatives which may have been rejected.

C. Estimated costs and budgets for all proposed plans and all plans which were evaluated and rejected relating to the operation of a garbage disposal system - especially the bailing system considered by the City.

D. Estimated waste tonnage and other revenues from sources other than the City of Brenham compiled by the City which might be available to jointly use and/or share the costs of the landfill operation.

3. A. The minutes of all council meetings and departmental meetings and all written documents and memos pertaining to the application for the landfill permit.

B. All correspondence pertaining to the operation of the existing landfill operated by the City which relates to or mentions

failure to comply with the law governing the operation of the landfill.

- [4]. [C]opies of any bids, proposals or contracts to dispose of waste for the City of Brenham which you have received since January 1, 1984.

The city contends that section 3(a)(3), the litigation exception, protects all of this information 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 city has shown that litigation is pending. The phrase "litigation" in section 3(a)(3) includes contested administrative proceedings. See, e.g., Open Records Decision No. 368 (1983).

The second part of the section 3(a)(3) test does not, however, apply to all of the information requested. For example, the minutes of public meetings are made public expressly by statute. See V.T.C.S. art. 6252-17, § 3B. The exceptions to disclosure in the Open Records Act, including section 3(a)(3), do not authorize withholding information expressly made public by statutes other than the Open Records Act. Open Records Decision Nos. 511 (1988); 146 (1976); 43 (1974); see also Open Records Decision No. 221 (1979). The requested minutes of public meetings therefore must be released.

The requestor also seeks copies of public contracts relating to the acquisition of a site for a replacement dump or for waste disposal generally. Section 6(3) of the Open Records Act expressly describes as public:

information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law.

The list of information expressly deemed public in section 6 does not override the act's exceptions to disclosure. Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 185 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex.

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1976); Open Records Decision Nos. 280 (1981); 233 (1980). On the other hand, the legislature did not intend the section 6 enumeration to be meaningless. At the least, it heightens a governmental body's burden under the act of showing which exceptions apply and why. -See Open Records Decision No. 514 (1988); see also Open Records Decision Nos. 395 (1983); 208 (1978); 75 (1975). Under the facts presented, the city must release copies of any executed contracts in this matter.

With regard to the remainder of the information requested, we conclude that it may be withheld from public disclosure under section 3(a)(3) until and unless it is discovered in the pending litigation or administrative proceeding. One purpose of section 3(a)(3) is to prevent circumvention of the judicial discovery process. Open Records Decision No. 108 (1975); cf. Attorney General Opinion JM-1048 (1989) (the Open Records Act does not create privileges from discovery).

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 OR89-162.

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

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Enclosure: JM-1048

cc: Craig Cantey, Jr. (with enclosures)
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