



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 13, 1989

Mr. Mark S. Houser
Orr & McWilliams
P. O. Box 844
McKinney, Texas 75069-0844

Dear Mr. Houser:

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# 6388; this decision is OR89-183.

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 McKinney received a request for "a copy of a claim in connection with a Dec. 7, 1988 fatal accident involving former city employee Bill Ruckoldt." The claim at issue is a form filled out and signed by the claimant and submitted to the city secretary. The McKinney City Charter requires the submission of such forms. You contend that section 3(a)(3), the litigation exception, protects the form 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 purpose of the exception is to protect the litigation interests of an entity that is, or is

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about to be, involved in a lawsuit. The section requires that information relating to pending or contemplated litigation must be sought through the judicial discovery process. Open Records Decision No. 108 (1975). Regardless of whether requested information relates to pending or reasonably anticipated litigation, however, a governmental body may not withhold the information under section 3(a)(3) if its release would not likely affect adversely the litigation interests of the governmental body. Open Records Decision No. 349 (1982). For example, section 3(a)(3) does not apply if the adverse party has access to the document. Id.

In the case you present, the adverse party submitted the information at issue to the city. For this reason, section 3(a)(3) does not protect the claim form from required public disclosure; it must be released.

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 OR89-183.

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# 6388

cc: Suanne Smith
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