



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

July 17, 1989

Mr. Robert E. Luna  
Law Offices of Earl Luna, P.C.  
For Richardson Independent School District  
4411 N. Central Expressway  
Dallas, Texas 75205

Dear Mr. Luna:

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# 6792; this decision is OR89-209.

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 Richardson Independent School District (RISD) received an open records request for, inter alia, "copies of all letters of inquiry and/or complaints from RISD employees regarding the provision of insurance benefits by Equicor Health Plan, Inc." You contend that subsections 3(a)(1), (a)(2), (a)(3), (a)(11), and (a)(14) of the Open Records Act protect the requested information from required public disclosure.

We initially note that of the documents you submitted to this office for review, only three documents come within the ambit of the open records request you received from Mr. Joe K. Crews. Please verify, with an affidavit, that these three letters are the only responsive documents held by the district and that the district does not have any other complaint letters or any contracts with Equicor or any bids

for the provision of insurance benefits. This ruling pertains only to the three "letters of inquiry and/or complaint" that you submitted for review. The requestor did not seek interagency memoranda. Section 3(a)(11), which protects inter-office memoranda, is therefore irrelevant here. For similar reasons, no portions of the requested letters come within the protection of section 3(a)(14), which protects student educational records.

Section 3(a)(3), known as the litigation exception, does not protect the letters at issue. Section 3(a)(3) excepts from required public disclosure, inter alia, information relating to litigation of a civil nature to which the state or a political subdivision is, or may be, a party. To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial proceeding is pending or reasonably anticipated. Open Records Decision No. 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision No. 328 (1982). 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. The requestor's letter indicates possible litigation only against Equicor Health Plan, Inc. You have not shown that litigation against RISD is more than mere conjecture; consequently you may not withhold this information pursuant to section 3(a)(3).

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." None of the letters at issue come within the confidentiality provisions of the Texas Medical Practices Act, V.T.C.S. article 4495b, section 5.08b.

Subsections 3(a)(1) and (a)(2) also protect the common-law and constitutional rights to privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). Section 3(a)(2) protection is the same as that for information protected by common-law privacy under section 3(a)(1): to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

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Only one of the letters submitted to this office contains information that meets the tests for common-law privacy. This letter, however, was written by the same individuals who are now making the open records request. Although portions of this letter must be withheld from the general public, you may not withhold the privacy information from the individuals to whom it relates. See Open Records Decision No. 481 (1987). No portion of the other letters may be withheld pursuant to section 3(a)(2) privacy.

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 OR89-209.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*

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of the Opinion Committee

Approved by Jennifer S. Riggs  
Chief, Open Government Section

JSR/RWP/bc

cc: Mr. Joe K. Crews  
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Ref.: ID# 6792

Enclosure: ORD-481