



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 25, 1989

Mr. Gustavo L. Acevedo, Jr.
Henslee, Ryan & Groce, P.C.
Attorneys for
Jim Hogg County ISD
3432 Greystone Drive, Suite 200
Austin, Texas 78731

Dear Mr. Acevedo:

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# 7198; this decision is OR89-314.

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 Jim Hogg County Independent School District received a request from a bidder for copies of the certified agenda, tape recording, and tape transcriptions of the district's entire meeting, including executive sessions, of July 3, 1989, at which the board awarded its school depository contract. The bidder also requested work or rating sheets and any other documents relating to the award of the contract. The district contends that section 3(a)(3) of the act, the "litigation" exception, protects this information from required public disclosure.

As a preliminary matter, in Open Records Decision No. 495 (1988), this office indicated that section 3(a)(1) of the act, which protects information deemed confidential by law, protects the certified agenda or tape recording of an

executive session held under the Texas Open Meetings Act, article 6252-17, V.T.C.S. Sections 2A(c) and (e) of the Open Meetings Act deem this information confidential within the meaning of section 3(a)(1). Accordingly, the district may withhold the certified agenda or tape recording of the executive session at issue.

Exception 3(a)(3) authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information relating to settlement negotiations involving such litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Attorney General Opinion H-483 (1974); Open Records Decision No. 331 (1982). 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).

To secure the protection of this exception, a governmental body must first demonstrate to the attorney general that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. A governmental body can establish that litigation is "pending" by submitting a copy of the pleadings in a court case or proving that a contested case is pending at the administrative agency level. Demonstrating that litigation is "reasonably anticipated" is more difficult. For example, in Heard v. Houston Post, 684 S.W.2d at 212, the court held that noting that an individual had been arrested and simply outlining the steps in the criminal justice system did not show that criminal litigation was reasonably anticipated with regard to offense reports.

The facts at issue here do not demonstrate clearly that litigation is reasonably anticipated. You submit affidavits from individuals who heard the bidder's attorney threaten to sue the district. The fact that individuals publicly threaten to file suit is insufficient to trigger section 3(a)(3). Open Records Decision Nos. 351, 331 (1982). You also note that the bidder made its request through its attorney. This fact alone does not trigger section 3(a)(3).

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Although we agree that the case you present is a closer case than that presented in Open Records Decision Nos. 351 and 331, close cases must be resolved in favor of disclosure. V.T.C.S. art. 6252-17a, § 14(d).

Moreover, it appears that some of the information requested cannot fall within the ambit of section 3(a)(3). The requestor seeks all tapes and transcripts of the July 3, 1989, meeting, not just the tape or certified agenda of the executive session. Section 3(a)(3) cannot protect the minutes or tape of a public meeting. Open Records Decision No. 221 (1979). The minutes or tapes of public meetings are expressly made public records by section 3B of the Open Meetings Act. Section 3(a)(3) therefore does not apply. See Open Records Decision Nos. 146 (1976); 43 (1974) (information expressly made public by statute cannot fall within section 3(a)(3)).

Similar considerations apply to the notice posted for the meeting at issue. Although the requestor refers to the "certified agenda" of the July 3, 1989, meeting, since he refers to "the" agenda for the entire meeting, it appears that he may seek the notice posted for the meeting or the general, working agenda for the entire meeting. The notice or agenda for the meeting is different from the certified agenda of an executive session. See Attorney General Opinion JM-840 (1988). The notice and general agenda of the public meeting cannot be withheld under section 3(a)(3).

Finally, the bids themselves must be released. Even if litigation were deemed to be reasonably anticipated in this case, the bids are not the type of information exception 3(a)(3) protects. See Open Records Decision Nos. 511 (1988); 395 (1983). You do not demonstrate how release of the bids themselves would impair the city's litigation interests; the bids do not reveal the impressions or actions of city officials or advisors.

You do not submit copies of any rating or work sheets. Consequently, we assume they do not exist. If any such information does exist, because it has not been submitted for review under section 7(b) of the act, we cannot conclude that section 3(a)(3) protects it. See also art. 6252-17a, § 6(5); Open Records Decision No. 71 (1975).

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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 OR89-314.

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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cc: Mr. Charles R. Borchers
Person, Whitworth, Ramos
Borchers & Morales
602 East Calton Road
Laredo, Texas 78041