



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 9, 1989

Mr. Robert E. Shaddock
General Counsel
State Department of Highways
and Public Transportation
DeWitt C. Greer State Highway Bldg.
11th & Brazos
Austin, Texas 78701-2483

Dear Mr. Shaddock:

In conjunction with earlier correspondence from you for an Open Records Act ruling for which we issued an informal letter ruling, OR89-159 dated June 5, 1989, (ID# 6304), you have submitted more information which you consider is responsive to the request made of your agency for information. You ask whether this additional 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# 6565; this decision is OR89-324.

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 Department of Highways and Public Transportation (the department) received a request from an attorney representing the survivor and the decedents' estates of several individuals who were involved in a fatal automobile accident that occurred on the elevated, curving ramp of a Houston highway interchange where a temporary barricade had allegedly been placed after a prior accident had damaged the existing guardrail. The attorney requested records of the department concerning the investigation of the incident that

Mr. Robert E. Shaddock

October 9, 1989

Page 2

originally caused the damage to the guardrail, the construction records of the ramp relating to concrete core samples, the design drawings, and the contractor specifications and any construction bids relating to guardrail damage of that highway interchange within the last twenty-four months. You sent this office various documents that you consider responsive to this request, including a bid summary sheet for expedited maintenance work, the contract for expedited maintenance work, a bid item sheet, non-collusion affidavits, a business entity information sheet, department notes governing specifications and special provisions, proposed highway improvement plans, and the contract for a certain highway construction project. The department seeks to withhold all of this information under section 3(a)(3) of the act as information related to litigation.

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 interest in the litigation. Open Records Decision No. 478 (1987); see Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976). In our previous ruling related to this same request, OR89-159, we acknowledged that the correspondence the department received concerning the accident constituted a demand letter reasonably supporting a belief that litigation is anticipated. Thus, the first requirement under section 3(a)(3) has been met.

In order to determine whether the information relates to the anticipated litigation such that withholding the information is necessary to preserve the department's strategy or legal interest in the litigation, it is necessary to look at the contemplated cause of action, at least as it is set forth in the demand letter sent by the prospective plaintiffs' attorney to the department. See Open Records Decision Nos. 416 (1984); 382 (1983); 323 (1982). The allegations in the demand letter relate to the alleged negligence of the department in failing to maintain or to repair the highway in a timely fashion, or to provide an adequate temporary barricade. The proof or defense of these issues will necessarily address the construction of the roadway, the department's knowledge of defects and the department's methods of scheduling or repairing of such defects. In Open Records Decision No. 383 (1983) we held that part of a highway department report, which discussed

Mr. Robert E. Shaddock
October 9, 1989
Page 3

the design and construction of a portion of highway where a fatal accident occurred and that was the subject of litigation, was excepted from disclosure under section 3(a)(3) because it was likely that all the information in the reports would be implicated in the suit and thus related to the litigation in such a way that release of the information would adversely affect the department's position in that litigation. We think that some of the information requested here is similarly protected under section 3(a)(3), as it may reasonably be thought to relate to potential litigation concerning negligence issues.

Information concerning contract costs, bids for maintenance, and the names of contractees, however, are not protected, and must be released. See Open Records Decision No. 514 (1988). Such bid information, or any information concerning the expenditure of public funds, is specifically deemed public under section 6(3) of the act. The terms of public contracts are also public. See Open Records Decision No. 75 (1975).

Thus the bids received for the repair work, the terms of the contract for repairs, the bid item sheets, and the non-collusion affidavit must be released. The construction design and plans and other such information may be withheld. Note, however, that disclosure of this latter information may be made at your discretion. Most information excepted from disclosure by sections of the act protecting governmental interests may be released to the public at the discretion of the governmental body, so long as the information is not selectively disclosed. See V.T.C.S. art. 6252-17a, §§ 3(c), 14(a); Open Records Decision Nos. 473, 463 (1987). This discretion does not, of course, extend to information which is deemed confidential by law. Under the act, confidential information cannot be released. See V.T.C.S. art. 6252-17a, § 10(a), (e).

Further, please note that the fact that information is protected under section 3(a)(3) does not mean that it cannot be discovered in litigation. Id. § 14(f); Attorney General Opinion JM-1048 (1989). The purpose of section 3(a)(3) is simply to prevent circumvention of discovery rules. Once information has been discovered, it may not be withheld from public disclosure.

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

Mr. Robert E. Shaddock
October 9, 1989
Page 4

published open records decision. If you have questions about this ruling, please refer to OR89-324.

Yours very truly,

*Open Government Section
of the Opinion Committee* 

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