



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

March 20, 1990

Mr. Michael L. Knapek
Jackson & Walker
Attorney for the
City of Arlington
901 Main Street, Suite 6000
Dallas, Texas 75202

OR90-110

Dear Mr. Knapek:

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# 7474.

The City of Arlington received an open records request from Combustion Engineering, Inc. (Combustion) for certain records pertaining to the construction of the Southwest Water Treatment Plant owned by the city. Although the city released some of the requested documents, you contend that other documents come under the protection of sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(10), and 3(a)(11).

Combustion and MMR, Inc., the electrical contractor for the project, have sought adjustments in their respective contracts with the city because of construction delays purportedly outside their control. Although the city has reached a settlement agreement with MMR, no such agreement has been reached with Combustion, who now seeks "relief of" liquidated damages in an amount in excess of \$600,000 and "reserves its right to seek recovery for other damages." You contend that section 3(a)(3), the litigation exception, excepts this material from required disclosure because the city anticipates litigation with these two contractors.

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). 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.

With regard to MMR, you have not demonstrated that the initial test for section 3(a)(3) protection has been met. Although a genuine dispute existed between the city and MMR, a settlement has been reached in that matter. Consequently, it cannot be said that litigation with MMR regarding a specific matter is "reasonably anticipated." Once a settlement agreement has been reached, section 3(a)(3) is generally no longer applicable. See Open Records Decision No. 245 (1980). Your contention of anticipated litigation with Combustion, however, presents a closer case. In Open Records Decision 346 (1982), this office held that where, as here, a demand for a disputed payment is presented by an attorney to a governmental entity, there are legitimate grounds for concluding that litigation is "reasonably anticipated."

In addition to the first test for section 3(a)(3) protection, the governmental body's attorney must show that the requested material relates to the litigation, see Open Records Decision No. 323 (1982), such that disclosure of the materials would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988). Combustion contends that it was delayed in completing its work on schedule as a result of the delays of the electrical contractor. Thus, any information relating to such delays may be withheld pursuant to section 3(a)(3), with the exception of minutes of any public meetings in which construction progress or claims made by Combustion or MMR were discussed. Open Records Decision No. 221 (1979).

Section 3(a)(3) normally does not protect the final terms of settlement agreements. See Open Records Decision No. 245 (and authorities cited therein). In this instance, however, the terms of the agreement with MMR have a direct bearing on the dispute between the city and Combustion; the release of this information could adversely affect the city's negotiating position in reaching an agreement with Combustion. You may therefore withhold the city's settlement agreement with MMR at this time. The remaining information submitted to this office may also be withheld pursuant to section 3(a)(3); we need not, therefore, discuss the applicability of the other exceptions that you raise.

Because 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 OR90-110.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/RWP/le

Ref.: ID# 7474, 7540, 7639, 7646, 8020

Enclosure: Documents Sent

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