



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

April 6, 1990

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

OR90-135

Dear Mr. Shaddock:

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# 8356.

The State Department of Highways and Public Transportation (the department) received two open records requests for certain documents that relate to an on-going construction project in Williamson County. We first address the issue, raised by the requestor of the records, of whether the department sought an open records decision for the first request in a timely manner. The facts surrounding the department's receipt of that request are these: The Highway Division of the Office of the Attorney General received an open records request on November 16, 1989, for certain of the department's records. The records request was forwarded to the department on November 29, 1989, and you sought a decision from this office on December 8, 1989. The requestor of the records contends that because the department did not seek an open records decision within ten days after the receipt of the request by the Highway Division, the department has waived the right to withhold the requested records.

If the Highway Division had actually held any of the requested documents at the time it received the open records request, it would have waived the right to withhold these records by failing to request an open records decision from this office. See V.T.C.S. art. 6252-17a, § 7(a). In this instance, however, the Highway Division did not possess the requested records, but nevertheless forwarded the open records request to the department as a courtesy to the

requestor. The department then sought a decision from this office within ten days after its receipt of the request. See V.T.C.S. art. 6252-17a, § 5. The department cannot be held accountable for failing to seek an opinion from this office where the open records request was directed to and received by another governmental entity. Because the department requested a decision from this office within ten days after its receipt of the request, it has not waived its right to withhold the requested information pursuant to section 7(a) of the act.

We now address whether the requested information is excepted from required public disclosure. You contend that the records in question come under the protection of section 3(a)(3) of the Open Records Act because one of the department's contractors, Duininck Brothers, Inc., has stated that it "will be making a claim against the state."

This office confirmed through a telephone conversation with one of your staff that Duininck has not further contacted the department with regard to its claim since the date of its letter, September 27, 1988. It is possible that Duininck may have at one time intended to pursue a claim against the department through the procedures established in 43 T.A.C. §§ 1.21-1.68. However, Duininck's failure to initiate any procedures within eighteen months of its first notice to the department, when coupled with the fact that it has brought suit against other parties relating to the issues raised in its notice to the department, indicate to this office that the possibility of litigation against the department is no more than mere conjecture. Open Records Decision No. 328 (1982); see also Open Records Decision No. 351 (1982) (litigation is not "reasonably anticipated" where lawsuit is threatened over the telephone and no further action is taken). Consequently, section 3(a)(3) does not protect the requested information; it must therefore 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 OR90-135.

Yours very truly,

David A. Newton

David A. Newton
Assistant Attorney General
Opinion Committee

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DAN/RWP/le

Ref.: ID# 8356, 8857, 8889, 9130

Enclosures: Documents Sent

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