



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

April 23, 1991

Ms. Cynthia N. Milne  
Assistant General Counsel  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, Texas 78705-4294

OR91-207

Dear Ms. Milne:

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# 11744.

The Department of Banking received a request for any documentation concerning responses by a funeral home and its counsel to allegations of violations of article 548b, V.T.C.S. You advise that a contested case against the funeral home was scheduled before the department on March 6, 1991. You ask whether the requested information may be excepted pursuant to section 3(a)(3) of the Open Records Act.

Section 3(a)(3) excepts from required public disclosure

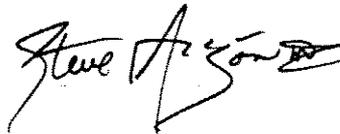
information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

For information to be excepted by section 3(a)(3), two things must be shown. First, it must be established that litigation is pending or reasonably anticipated. Second, it must be demonstrated that the requested information relates to the anticipated litigation. - *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). The term "litigation" includes contested cases before administrative agencies. Open Records Decision No. 368 (1983). Where the attorney for the governmental body determines that the information relates to pending or anticipated litigation, this office's review will be confined to ascertaining whether that determination is reasonable in light of the facts. See Open Records Decision No. 551 (1990).

The information appended to your letter as Exhibits B-1 through B-5 consist of copies of correspondence from the attorney for the funeral home to the department and a letter from the funeral home to an individual concerning the possible appointment of his firm as agent for management of trust funds. Section 3(a)(3) will not shield information from public disclosure once the parties in litigation with the governmental body have seen or received the information. Open Records Decision No. 511 (1988). Because the documents at issue were drafted by the funeral home and, further, because the department has obtained these documents in its capacity as a party to the contested case, the department may not withhold them 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 published open records decision. If you have questions about this ruling, please refer to OR91-207.

Yours very truly,



Steve Aragon  
Assistant Attorney General  
Opinion Committee

SA/lb

Ref.: ID# 11744

cc: Mr. John McDougall  
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