



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 13, 1991

Mr. Donald S. Glywasky
Galveston County Legal Department
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR91-283

Dear Mr. Glywasky :

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# 12059.

Mainland Center Hospital (the hospital), a county hospital in Galveston County, received an open records request for 34 categories of information from a representative of the Sisters of Charity of the Incarnate Word, a nonprofit hospital also in Galveston County. You first contend that item numbers 3 and 4, which are requests for the hospital's "most recent patient origin report" and certain medical staff information, come under the protection of section 3(a)(4) of the Open Records Act because

[t]he Sisters of Charity are competitors of Mainland Center Hospital for medical staff and patients. This requested information would give an advantage to Mainland's competitor, since St. Mary's could utilize the information to provide incentives to the medical staff to both affiliate with St. Mary's and direct their patients to that facility.

Section 3(a)(4) of the Open Records Act protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. See Open Records Decision No. 463 (1987) (copy enclosed). The primary purpose of this section is to protect the government's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. There is in this instance no ongoing competitive bidding situation to which the information at issue

relates. We further note that governmental entities are not regarded as being in competition with private enterprises for purposes of section 3(a)(4). *Id.* Consequently, section 3(a)(4) does not apply to items 3 and 4 of the requested information.

You seek to withhold other information pursuant to section 3(a)(1) of the act, which protects "information deemed confidential by law." The certified agendas of executive sessions of the hospital's Board of Managers are made confidential by section 2A(c) of the Open Meetings Act, V.T.C.S. article 6252-17, and must therefore be withheld. You must also withhold all confidential "medical records," as that term is defined in section 5.08(b) of the Medical Practice Act, V.T.C.S. article 4495b.

You state that the hospital does not possess any of the records requested in item numbers 5, 13, 28, and 30. It is well established that the act does not require a governmental body to prepare new information in response to an open records request. Open Records Decision No. 342 (1982). If, however, the hospital possesses other records that come within the ambit of these requests, you have the duty to advise the requestor about these documents. *See* Open Records Decision No. 87 (1975) (copy enclosed).

With regard to item number 16, you inquire as to the extent the hospital is required to compile information stored in its computer data banks where the hospital currently does not possess a "hard copy" of the requested information. Although the Open Records Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor, some compilation of information may be required under the act. Attorney General Opinion JM-672 (1987). For example, a minimal computer search may be required for existing information stored in computers. If the requested information can be compiled by a minimal manipulation of information already in your computer, you must compile the information. On the other hand, the act does not require you to create an extensive new computer program to obtain particular sets of information. *Id.* Whether certain programming constitutes the creation of new material must be determined on a case-by-case basis. *Id.*

In this instance, it is impossible for this office to make the requisite determination as to whether an extensive new program would be required in order to fulfill the open records request. We therefore decline to further address this issue. Please note, however, that the hospital may not in any instance grant to the

requestor physical access to its computer terminals if such access could result in the alteration or loss of its records, *see* V.T.C.S. art. 6252-17a, § 5(a), or if confidential information contained in the computer data base might be compromised. *See* Open Records Decision No. 571 (1990) (copy enclosed).

Finally, you contend that most of the information requested in item numbers 20 and 21 comes under the protection of section 3(a)(3), the litigation exception. These requests are for records pertaining to malpractice and other litigation to which the hospital is or has been a party over the past five years. You indicate that a list of cases against the hospital that have been concluded has been released to the requestor, but

any other information concerning those cases is contained in the files of the hospital's attorneys and is their work product which the hospital chooses not to waive. Information in their files will also contain privileged communications between attorney and client which the hospital refuses to waive. Further, information as to the outcome of those cases is available in the Office of the District Clerk of Galveston County which is open to [the requestor].

The hospital may not withhold information under the Open Records Act merely because the same information is available from a different governmental entity. *See, e.g.*, Attorney General Opinion JM-266 (1984). The hospital must therefore release all information held by the hospital or its attorneys pertaining to the lawsuits referred to in the open records request unless the information comes under the protection of section 3(a)(3).

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 governmental body's attorney must also show that the requested material relates to the litigation. *See* Open Records Decision No. 551 (1990). Additionally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.* through discovery or by court order, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982).

The discovery privilege for attorney work product, as a facet of section 3(a)(3), exists only during the pendency of the litigation to which the work product

relates; once the litigation has concluded, the work product is no longer privileged for purposes of section 3(a)(3). See Open Records Decision No. 574 (1990) (copy enclosed). Therefore any work product relating to concluded litigation does not come under the protection of section 3(a)(3).

Although you raise the attorney-client privilege in the context of section 3(a)(3), this privilege is more properly deemed to be an aspect of section 3(a)(7) of the act, which protects, *inter alia*, "matters in which the duty of . . . an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited . . . from disclosure." In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's written advice and privileged attorney-client communications. Open Records Decision No. 574.

You have not submitted to this office for review any of the documents that you seek to withhold pursuant to section 3(a)(3) or the attorney-client privilege. Unless this office receives representative samples of these documents within 14 days of the date of this letter, this office will deem these exceptions as being waived.

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 OR91-283.

Yours very truly,

A handwritten signature in black ink, appearing to read "Steve Aragon", with a stylized flourish at the end.

Steve Aragon
Assistant Attorney General
Opinion Committee

SA/RWP/lb

Ref.: ID# 12059

Enclosures: Open Records Decision Nos. 574, 571, 463, 87

cc: Willis W. Thames
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