



**THE ATTORNEY GENERAL  
OF TEXAS**

August 9, 12989

**JIM MATTOX  
ATTORNEY GENERAL**

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:

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# 6932 this decision is OR89-240.

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 received an open records request from a plaintiff's attorney for information concerning maintenance and repair work performed on a stretch of highway where a fatal automobile accident occurred. The attorney requested records of road work and maintenance on the road, including activities relating to the repair, treatment, surfacing, sanding, or cleaning of the road as well as barricade erection, placement of bridge warning devices, warning structures or other devices for traffic control or safety, and lists and descriptions of all materials used in any procedure performed on the particular stretch of highway where the accident involving his clients' occurred. The open records request was preceded by a Texas Tort Claims

Act Notice and Demand letter sent to the department. You submitted to this office various documents you consider responsive to the open records request, including diary entries of the maintenance foreman and assistant foreman who worked on the road, employee time sheets, warehouse stock cards, and computer printouts of material used in repairing the bridge and the guardrail where the accident occurred. You seek to withhold all of the information under section 3(a)(3) as information related to possible litigation.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure:

information relating to litigation of a civil or criminal nature and settlement negotiations, to which the state or a 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.

You contend that section 3(a)(3) excepts this material from public disclosure because litigation is likely, as evidenced by the notice and demand letter sent by the attorney representing the plaintiffs to your office, and because disclosure of the information would hamper the department's litigation or strategy in any suit involving issues related to the accident that is the basis for the suit.

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. Further, 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).

We conclude that the notice and demand letter sent to the department sufficiently supports a reasonable belief that litigation is likely. The letter is an explicit notice to the governmental body of a cause of action arising from the accident. Such notice to a governmental body is required by statute as a condition precedent to suit. See Tex. Civ. Prac. & Rem. Code § 101.101. The very purpose of such notice is to enable a governmental body to investigate the occurrence giving rise to the claim, to settle claims and to prepare for litigation. City of Houston v. Torres 621 S.W.2d 588 (Tex. 1981). That a real possibility of litigation exists is made clear by the letter, in which the attorney states that suit will be filed if settlement is not made. Thus, the probability of litigation is greater than mere conjecture. We think this notice passes muster under the first prong of the test under 3(a)(3).

The second prong of the test under section 3(a)(3) requires a determination that the information relates to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or position in the litigation. Open Records Decision No. 478 (1987). When litigation is anticipated rather than pending, it is necessary to look at the contemplated cause of action, at least as it is set forth in the demand letter. See Open Records Decision No. 416 (1984); 382 (1983). The demand letter sets forth a cause of action for negligence, specifically involving the department's awareness of an allegedly dangerous existing condition on the highway and the department's alleged failure to remedy such condition. The information you have submitted relates to the condition and the maintenance of the highway where a fatal accident occurred and to the department's awareness of the maintenance status or condition of the road. Since the information requested might tend to reveal facts directly bearing on issues involved in a negligence suit, we conclude that the governmental body's legal strategy or litigation interests would be adversely affected by releasing the information. Therefore, the information requested may be withheld from disclosure under section 3(a)(3).

Because case law and prior published open records decisions resolve your request, we are resolving this matter

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with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-240.

Yours very truly,

*Open Government Section  
of the Opinion Committee*   
Open Government Section  
of the Opinion Committee  
Prepared by David A. Newton  
Chief, Open Government Section

DAN/bc

Ref.: ID# 6932

cc: Mr. Richard Naylor  
AG - Highway Division

Mr. James G. Kinser  
326 Heights Blvd.  
Houston, Texas 77007