



**THE ATTORNEY GENERAL
OF TEXAS**

September 26, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Thomas L. Allensworth
City Attorney
City of Grand Prairie
P. O. Box 530011
Grand Prairie, Texas 75053-0011

Dear Mr. Allensworth:

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# 7236; this decision is OR89-316.

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 City of Grand Prairie received a request for copies of investigative files relating to a local real estate agent who was subject to a police investigation involving forgery. The city previously received a request from the Dallas Morning News for the same file. You contend that sections 3(a)(3) and 3(a)(8) protect the information from required public disclosure.

Exception 3(a)(3) authorizes governmental bodies to deny requests for information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees as well as information relating to settlement negotiations involving such litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Attorney General Opinion H-483 (1974); Open Records Decision No. 331 (1982). To claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or

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reasonably anticipated; and 2) that the information in question "relates" to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987); see Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976).

To secure the protection of this exception, a governmental body must first demonstrate to the attorney general that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. You state that no charges have been filed against the suspect and that the complainant declined to prosecute. In Heard v. Houston Post, supra, at 212, the court held that simply outlining the steps in the criminal justice system did not show that criminal litigation was reasonably anticipated with regard to offense reports. Consequently, section 3(a)(3) does not apply here. Although we agree with you that litigation shall be deemed to be pending as long as the applicable statute of limitations has not expired and all appellate and postconviction remedies have not been exhausted, V.T.C.S. art. 6252-17a, § 3(e); see Creel v. Sheriff of Medina County, 751 S.W.2d 645 (Tex. App. - San Antonio 1988, no writ), this issue is not relevant unless litigation is reasonably anticipated in the first place.

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure:

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

The purpose for this exception is clear. If a law enforcement agency's internal law enforcement and crime prevention techniques were readily available to the public, those techniques could be rendered ineffective. See Open Records Decision Nos. 133, 127 (1976). In Ex parte Pruitt, 551 S.W.2d 706, 709 (Tex. 1977), the Texas Supreme Court addressed the applicability of section 3(a)(8) in the context of a habeas corpus proceeding. In dicta, the court stated that section 3(a)(8) protects information the release

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of which would "unduly interfere" with law enforcement and crime prevention.

When an investigation is closed, it is less likely that release of information about the investigation will unduly interfere with law enforcement efforts. See Open Records Decision No. 252 (1980). An affidavit submitted by Mr. Harry L. Crum, Chief of Police for the City of Grand Prairie, states:

I further certify and attest that I have been made aware of information [that] the complainant, Benchmark Mortgage Company, does not at this time wish to pursue the matter further at this time. I further certify and attest that at the time that I was made aware of the complainant's position that the investigation was called to a close with the understanding that the investigation would be reopened if and when the complainant expressed an intent to prosecute.

Under the circumstances presented, we do not believe that release of the file would unduly interfere with law enforcement. Although this situation presents a closer case than that presented in Open Records Decision No. 252, close questions must be resolved in favor of disclosure. V.T.C.S. art. 6252-17a, § 14(d).

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 OR89-316.

Yours very truly,

*Open Government Section
of the Opinion Committee* 

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Prepared by Jennifer S. Riggs
Chief, Open Government Section

JSR/bc

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ID# 6909

cc: Mr. Owen Fuller
Grievance Committee Chairman
Grand Prairie Board of Realtors, Inc.
214 S.W. 4th Street
Grand Prairie, Texas 75051

Mr. Eddy Vela
Reporter
The Dallas Morning News
2201 N. Collins Street #255
Arlington, Texas 76011