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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

June 4, 1991

Mr. Philip Barnes
Commissioner
State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Open Records Decision No. 588

Re: Application of the litigation exception of the Open Records Act, V.T.C.S. article 6252-17a, section 3(a)(3), to pending and contemplated administrative hearings (RQ-2181)

Dear Mr. Barnes:

A member of the public applied to the State Board of Insurance pursuant to section 4 of the Texas Open Records Act, V.T.C.S. art. 6252-17a, for information about the investigation of an insurance agent. Your office forwarded the information to us along with the written request from the member of the public and a statement of reasons why the Open Records Act did not require the State Board of Insurance to disclose this information to him. Your predecessor in office stated that the information related to anticipated litigation, specifically potential disciplinary action against the agent, thus invoking section 3(a)(3) as excepting this information from required disclosure under the Texas Open Records Act.

We agree with this conclusion. Section 3(a)(3) permits a governmental body to withhold

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.

This provision applies to information related to "reasonably anticipated" litigation as well as pending litigation. Attorney General Opinion H-483 (1974) at 7.

This office has held that "litigation" within section 3(a)(3) includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987); 368 (1983); 336, 301 (1982). Open Records Decision No. 301 (1982) determined that the litigation exception applied to records relating to a contested case before an administrative agency. This decision stated in part:

The Open Records Act does not define 'litigation.' However, the section 3(a)(3) exception was designed to protect the interests of the state in adversary proceedings or in negotiations leading to the settlement thereof, and we have no doubt that 'litigation' encompasses proceedings conducted in quasi-judicial forums as well as strictly judicial ones. 'Litigation' has been defined by the dictionary to include 'a controversy involving adverse parties before an executive governmental agency having quasi-judicial powers and employing quasi-judicial procedures.' Webster's Third International Dictionary at 1322. See San Antonio Public Service Company v. Long, 72 S.W.2d 696 (Tex. Civ. App. - San Antonio 1934, no writ). See also V.T.C.S. art. 6252-13a, § 14 (procedures for contested cases under the Administrative Procedure and Texas Register Act). Statutes providing for the administrative resolution of a controversy generally provide for judicial review of the matter. See V.T.C.S. art. 1446c, § 69; V.T.C.S. art. 6252-13a, § 19. Thus, the dispute before an administrative agency may be moved to a judicial forum. The lawsuit is in effect a continuation of the same controversy.

Since Open Records Decision No. 301 was issued, the Texas Supreme Court has issued two opinions on questions analogous to the question addressed in that decision. *See Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989); *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989). It has moreover been argued that *Flores* is inconsistent with our conclusion that "litigation" in section 3(a)(3) includes administrative proceedings. We will therefore consider whether these decisions have any effect on our interpretation of section 3(a)(3) of the Open Records Act as applicable to proceedings in a quasi-judicial forum.

State v. Thomas, 766 S.W.2d 217 (Tex. 1989), arose out of the attorney general's effort to intervene on behalf of state agencies as consumers of electricity in

electric utility rate cases before the Public Utility Commission. The hearing examiners presiding over the rate cases granted the attorney general's motion to intervene, but the commission reversed the examiners' joint order. 766 S.W.2d at 218-19. The attorney general then petitioned the supreme court for a writ of mandamus to compel the commission to rescind its order striking his intervention. *Id.*

In a five-to-four decision, the supreme court granted the petition for writ of mandamus, holding that article IV, section 22, of the Texas Constitution authorized the attorney general to intervene in rate cases before the Public Utility Commission. Article IV, section 22, which sets out the duties of the attorney general, provides in part:

The Attorney General . . . shall represent the State in all suits and pleas in the Supreme Court of the State . . . and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall . . . perform such other duties as may be required by law.

The supreme court determined that the attorney general was attempting to take action "in the courts" to prevent a utility company from charging unreasonable rates. In answering the commission's argument that the constitution only authorized action "in the courts" and not in an agency, the supreme court concluded that article IV, section 22, uses the term "courts" in a generic sense to refer to an adjudicative forum. It found that the constitutional provision implicitly authorized the attorney general to take action in "the adjudicative forum of first jurisdiction" whether it was a "court" or an "agency." 766 S.W.2d at 219. The legislature could not abrogate the attorney general's constitutional grant of power by statutorily creating an agency to serve the same function the courts once did.

The court's description of the agency's role in the adjudicative process supports the determination of this office that "litigation" within section 3(a)(3) of the Open Records Act includes a contested case before an administrative agency. It stated that a ratemaking proceeding is a "contested case" within the meaning of the Administrative Procedure and Texas Register Act (APTRA); that is, a formal ad-

judicative proceeding in which the agency performs in a quasi-judicial function. V.T.C.S. art. 6252-13a, §§ 3(2), 13. In creating the Public Utility Commission, the legislature effectively shifted the forum of original jurisdiction for challenging a utility's rates from the district courts to the agency, so that a lawsuit to challenge the reasonableness of a utility's rates can be properly instituted only by intervening at the agency level. *See id.* § 19(d)(3). The dispute is, for all practical purposes, litigated in the agency, where the evidence is heard and the record is made. Judicial review is by the substantial evidence rule, unless the agency's statute expressly provides for review by trial *de novo*. *Id.* § 19. Thus, the court usually serves as the appellate tribunal for such cases, not as the forum for resolving a controversy on the basis of evidence.

Section 3(a)(3) of the Open Records Act enables a governmental entity to protect its position in litigation by requiring opposing parties to use the discovery process to obtain information relating to the litigation. Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 551 (1990); 454 (1986). The Open Records Act was not intended to provide parties to litigation earlier or greater access to information than was already available to them through existing procedures. Open Records Decision Nos. 551 (1990); 108 (1975). When a contested case is heard in a quasi-judicial forum, discovery takes place and the evidence is presented at the administrative level. *See* V.T.C.S. art. 6252-13a, § 14a (discovery under APTRA "subject to such limitations of the kind provided for discovery under the Rules of Civil Procedure"). Thus, fact questions are heard and resolved by the agency, regardless of whether the case reaches a court for review under the substantial evidence rule. The protection afforded by section 3(a)(3) relates to the facets of litigation that the legislature has delegated to a quasi-judicial forum. Section 3(a)(3) can have its intended effect only by applying it to information related to a contested case before an administrative agency "to which the state . . . is, or may be, a party"

In *Flores*, the claimant in a workers' compensation case sought discovery of investigative reports prepared by his employer, the City of San Antonio. The city refused to produce an investigative report prepared after notice of injury was filed with the Industrial Accident Board but before an appeal to a district court, basing its refusal on the party communications privilege set out in Rule 166b of the Texas Rules of Civil Procedure. The relevant portion of this rule reads as follows:

3. Exemptions. The following matters are protected from disclosure by privilege:

....

d. *Party Communications.* Communications between agents or representatives or the employees of a party to the action or communications between a party and that party's agents, representatives or employees, when made subsequent to the occurrence or transaction upon which *the suit* is based and in connection with the prosecution, investigation or defense of the particular *suit*, or in anticipation of the prosecution or defense of the claims made a part of the pending *litigation*.

Tex. R. Civ. Proc. 166b(3)(d) (emphasis added).

The privilege applied to the report only if it was prepared after there was good cause to believe suit would be filed or after the institution of a lawsuit. The court of appeals had held that litigation commenced when the plaintiff filed his claim for compensation with the Industrial Accident Board. *City of San Antonio v. Spears*, 751 S.W.2d 551 (Tex. App.--San Antonio 1988). The supreme court rejected the appellate court's holding, stating that the term "litigation" in Rule 166b referred only to court proceedings, "which in this case commenced when Flores filed suit in the district court." 777 S.W.2d at 39-40.¹ It cited cases from other states holding that a proceeding before workers' compensation agencies does not constitute litigation. The court distinguished *Thomas* as follows:

Unlike the Public Utility Commission, the Industrial Accident Board is not an agency which determines 'contested cases' within the meaning of the Administrative Procedure and Texas Register Act. Tex.Rev.Civ.Stat. Ann. art. 6252-13a, § 3(1) (Vernon Supp.1989).

Our holding, that proceedings before the Industrial Accident Board do not constitute litigation, does not conflict

¹The majority opinion represented the view of six members of the supreme court. The dissenting opinion agreed with the court of appeals that litigation commenced when Flores filed his workers' compensation claim.

with our holding in *Thomas*. *Thomas* did not address discovery or when litigation commences, but concerned the issue of whether the attorney general could intervene in utility rate cases before the Public Utility Commission.

Judicial review of a workers' compensation case is vastly different from a utility rate case. A workers' compensation claim differs from other matters considered by administrative agencies because the Industrial Accident Board is a 'way station' a party must pass through to reach the trial court. Either party, including the City as a self-insured entity, can appeal the board's award and demand a trial by jury.

A party or intervenor appealing from an adverse decision of the Public Utility Commission is *only* entitled to a review under the substantial evidence rule. It may *not* remake the record at the trial court level and cannot contest issues of fact found by the Commission. In contrast, a party appealing an Industrial Accident Board award is not bound by the record made at the agency level and can make a new record at the trial court level, where the jury determines contested issues of fact.

777 S.W.2d at 40 (emphasis in original) (some citations omitted).

In distinguishing *Thomas*, the majority opinion in *Flores* emphasizes the differences between a contested case under the Administrative Procedure and Texas Register Act and proceedings before the Industrial Accident Board. In a contested case under APTRA, fact questions are determined before the administrative agency, while the party who appeals an Industrial Accident Board award to a trial court can have a jury determine contested issues of fact. Thus, the legislature has delegated far less of the fact-finding part of litigation to the Industrial Accident Board than it has to agencies that adjudicate contested cases under APTRA.

It is also significant that the *Flores* case addressed the construction of a rule of civil procedure. Rule 2 provides that "[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature." Tex. R. Civ. Proc. 2. The rule interpreted in *Flores* is one provision of a body of law adopted to govern actions in a judicial forum, and it is consistent with

the statutory context of Rule 166b to conclude that its references to "court" or "litigation," meant a judicial forum. No such presumption can be drawn from the Open Records Act, the context in which section 3(a)(3) is found. This presumption is moreover inconsistent with the purpose of section 3(a)(3) – to prevent parties opposing a governmental body from using the Open Records Act to achieve earlier or greater access than was available through discovery prior to its adoption.

We need not consider at this time whether *Flores* would require us to conclude that administrative proceedings before the Industrial Accident Board are not litigation within the Open Records Act.² The *Flores* case does not change our conclusion that a contested case under APTRA is litigation for purposes of applying section 3(a)(3) of the Open Records Act. Proceedings before the State Board of Insurance are subject to the Texas Administrative Procedure and Texas Register Act, V.T.C.S. art. 6252-13a. See *Commercial Life Ins. Co. v. Texas State Bd. of Ins.*, 774 S.W.2d 650 (Tex. 1989). The records requested in this case are information related to anticipated litigation within section 3(a)(3) of the Open Records Act.

It is also necessary to consider whether article 6252-17b, V.T.C.S., has any bearing on public access to information about the investigation of an insurance agent. This statute, adopted by Senate Bill 838 of the 71st Legislature, provides in part:

Sec. 2. Each licensing agency shall keep within its files records concerning each license holder regulated by it. The agency shall maintain the file in a manner which permits public access to:

(1) all the information in the file relating to any license holder regulated by the agency, including information regarding a contested case, *unless the information is excepted by law from public disclosure*; and

²We do not need to reach this issue to resolve the question before us. The Workers' Compensation Act moreover provides that "[i]nformation in or derived from a claim file regarding an employee is confidential," subject to certain exceptions. V.T.C.S. art. 8308-2.31. This provision must be addressed in resolving requests for information about claimants. See, e.g., Attorney General Opinions JM-966 (1988); MW-202 (1980).

(2) notice of information in the file as defined by Section 3 of this article.

Sec. 3. (a) Whenever the information in the agency file concerning the license status of one or more licensees is removed, the agency shall:

(1) describe the content of the removed record;

(2) indicate the reason the particular record is no longer a part of the agency file; and

(3) state the date and time the record was removed.

(b) Subsection (a) of this section does not apply to a record that is removed for destruction as permitted by law.

V.T.C.S. art. 6252-17b, §§ 2, 3 (emphasis added); *see* Acts 1989, 71st Leg., ch. 911, § 1, at 3942. We need to determine whether the emphasized language refers to exceptions in the Open Records Act, or only to statutes expressly providing confidentiality for a category of information. Records of the legislative history of Senate Bill 838 may be consulted to establish the legislature's intent as to this provision. *See, e.g., Red River Nat'l Bank v. Ferguson*, 206 S.W. 923 (Tex. 1918); *Howard v. State*, 690 S.W.2d 252 (Tex. Crim. App. 1985); *Felton v. Johnson*, 247 S.W. 837 (Tex. Comm'n App. 1923, opinion adopted).

The Bill Analysis for Senate Bill 838 states in part:

[S]tate agencies are required to provide public access to many agency records. However, the processes employed by many agencies for gaining this access effectively restrict the public's ability to examine public records. Persons testifying at interim hearings held by the Senate Subcommittee on Health Services claimed that access to documents relating to contested cases and permits have been severely restricted. The standard agency requirement that a document be specifically identified before access is provided also makes it very difficult for the public to review public documents.

SB 838 requires that agencies maintain comprehensive files on all of their licensees. The files must contain all information pertaining to that license holder, including information regarding a contested case, unless the information is excepted from disclosure by law. The filing system must also include a procedure for tracking information removed from a file.

Bill Analysis, S.B. 838, 71st Leg. (1989).

The Senate Subcommittee on Health Services mentioned in the bill analysis held interim hearings on the regulation of uranium mine tailings. SENATE SUBCOMMITTEE on HEALTH SERVICES, INTERIM REPORT: URANIUM MILL TAILINGS (1989). The subcommittee heard testimony that state agencies, the Department of Health in particular, had reduced public access to permit files "by refusing to provide documents unless specifically identified, by refusing permission to review complete permit files, and by severely restricting access to any document relating to a contested case." *Id.* at 47. To correct this problem, the committee recommended legislation that would include the following provision:

All documents submitted by the license holder and all agency documents pertaining to the license should be placed in a central public records file, *except where exempt from public disclosure under other provisions of the Texas Radiation Control Act or the Open Records Act.* When any document is removed under an exemption, a notation should be placed in the public file, describing the general content of the document, and explaining the reason for the document's exemption.

Id. at 48 (emphasis added).

Article 6252-17b, V.T.C.S., thus seeks to make licensing records more accessible by requiring agencies to keep all documents about a license holder together in one file and to make a notation when a document is removed pursuant to an exception in the Open Records Act or a specific confidentiality provision. It does not override the exceptions from public disclosure found in the Open Records Act. Under section 2(1) of article 6252-17b, V.T.C.S., information within an exception of the Open Records Act need not be kept in a file that is accessible to the public. *See generally* Open Records Decision No. 562 (1990) (release of

information "required by law" under Local Government Code section 143.089(f) included release pursuant to Open Records Act).

Accordingly, information related to an anticipated disciplinary action against a licensee of the State Board of Insurance is excepted from public disclosure as information related to anticipated litigation under section 3(a)(3) of the Open Records Act. Article 6252-17b, V.T.C.S., does not change the application of Open Records Act exceptions to information in licensing files.

SUMMARY

Information related to a contested case before an administrative agency, to which the state is, or may be, a party, is "information relating to litigation" within section 3(a)(3) of the Open Records Act, V.T.C.S. article 6252-17a. Article 6252-17b, V.T.C.S., requires licensing agencies to maintain files about its licensees in a manner that permits public access to all information about them, unless the information is within an exception to the Open Records Act, or is made confidential by some other provision of law.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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