# THE ATTORNEY GENERAL OF TEXAS

December 29, 1986

JIM MATTOX
ATTORNEY GENERAL

Mr. Kelly Frels
Attorney at Law
Bracewell & Patterson
2900 South Tower
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Open Records Decision No. 452

Re: Whether section 3(a)(3) of the Open Records Act, article 6252-17a, V.T.C.S., authorizes the Houston Independent School District to withhold a survey of the location of recently repainted school desks and chairs

Dear Mr. Frels:

As attorney for the Houston Independent School District, you have asked if section 3(a)(3) of the Open Records Act, article 6252-17a, V.T.C.S., authorizes the district to deny requests for documents relating to the location of recently repainted school desks and chairs. Before addressing this issue, we must deal with some threshold matters.

The information which has been submitted to us indicates that parents in the district have become increasingly concerned about the possible implications of reports that desks and chairs throughout the district have been repainted with leaded paint. We understand that the use of leaded paint violates federal law. An attorney for a district administrator has advised us that the district superintendent received, from a newspaper reporter, a letter dated November 21 which requested five items of information, including the documents at issue here. This attorney further advised that the superintendent delegated to this administrator the task of complying with this request. In his letter to us, the attorney stated:

> In furtherance of these instructions, my client compiled records which he considered to fall within the requested descriptions. Included among the records was a survey conducted of all school principals in the district which showed the location by schools of repainted desks and chairs. This survey, which my client considered to fall under the description in paragraph 5 [of the reporter's November 21 request] was finally compiled after the

> request was received, but before the district responded.

In your letter of December 5, you confirmed that this survey was compiled after the reporter's request was received by the superintendent. You also stated:

> It was also the judgment of this firm that the request by Mr. Brewton did not apply to the document in question since it did not exist at the time Mr. Brewton's request was received.

Finally, you stated that the district has furnished to the reporter the other four items of information which he requested and now seeks to withhold only this survey.

The district did not request our decision concerning the applicability of section 3(a)(3) to this survey until December 16. Section 7(a) of the Open Records Act provides:

> If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

We have construed this section to mean that if a governmental body does not request our decision within the allotted time, it may withhold requested information only if it can demonstrate compelling reasons for doing so. Open Records Decision No. 319 (1982), relied on in Kneeland v. NCAA, No. A-85-CA-616 (W.D. Tex. Nov. 4, 1986). It has been suggested that the district did not comply with section 7(a) and that this survey should therefore "be presumed to be public."

The foregoing facts raise two questions: (1) did the reporter's November 21 request embrace this survey, and (2) should the district be held to the "compelling need" standard in this instance? We answer both questions in the negative.

Section 3(a) of the act defines "public information" as information "collected, assembled, or maintained" by a governmental body. Section 2(2) defines "public records" as

> the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information.

Clearly inherent in these definitions is the notion that a document is not within the purview of the act if, when a governmental body receives a request for it, it does not exist. See Open Records Decision No. 342 (1982) at 3 ("Open Records Act applies only to information in existence, and does not require the governmental body to prepare new information"). The reporter's November 21 request for information, therefore, did not apply to this survey.

It has been suggested that even if this is so, the district was obliged either to inform the requestor of the existence of the survey after it had been prepared or to treat the request as embracing the survey after its preparation. We disagree. As noted, the plain language of the Open Records Act establishes that a request applies only to information in existence when the request is received by the governmental body, and nothing in the act explicitly creates either obligation discussed above. Practical considerations, moreover, militate against the conclusion that either obligation exists by implication. In this instance, so little time passed between the receipt of the request and the creation of the survey that the district could have easily applied the request to the survey. In other instances, however, it would be unreasonable to expect a governmental body to do this. If, for example, months or even years were to elapse between the time that an entity received a request for information and the time that it compiled that information, the entity could hardly be expected to automatically recall that it had received that request and to assume that it now had a viable Open Records Act demand on its hands. Reading such a requirement into the act would create a logistical nightmare.

We therefore conclude that the November 21 request did not embrace this survey. The survey did not exist when the district received the request for it, and the district was under no legal duty to treat the request as embracing the survey after its preparation. See Open Records Decision No. 362 (1983).

We also conclude that the "compelling need" standard does not apply here. The November 21 request did not trigger the ten-day requirement in section 7(a), since it sought information which did not exist when it was received by the district. We have not been advised of when, after the preparation of the survey, the district first received a formal request for it; accordingly, we cannot pinpoint the date on which the ten-day period began to run.

We must also consider another factor. It has been confirmed that the district did not request our decision regarding the applicability of section 3(a)(3) to this survey before December 16 because it had been informally advised by this office that such a request is unnecessary when a requestor does not object to a governmental body's determination that section 3(a)(3) protects particular information. The district was told, in other words, that it must seek our decision only if, after being informed that his request had been denied under section 3(a)(3), the requestor renewed his request and specifically asked the governmental body to seek our decision. From the standpoint of expediency, this approach would seem workable. The plain language of section 7(a), however, says that whether or not a requestor objects to a governmental body's decision to invoke section 3(a)(3), the entity must, if the availability of that information has not been previously determined, request the decision of the attorney general. See Open Records Decision No. 435 (1986). Policy considerations also dictate the same result. Although the vast majority of section 3(a)(3) determinations made by governmental bodies are undoubtedly made in good faith, the act clearly contemplates a role for the attorney general in reviewing such determinations.

We therefore conclude that governmental bodies denying requests for information on section 3(a)(3) grounds must seek our decision regarding the permissibility of such denials. The Houston school district, however, can hardly be faulted for heeding our informal advice to the contrary, and this is a factor to consider in determining the appropriate standard for review in this case. As noted, moreover, once it is determined that the reporter's November 21 letter did not trigger the section 7(a) ten-day requirement, the facts of this case become so tangled that it is impossible to pinpoint the date on which that period began to run. For these reasons, the compelling need standard does not apply here.

We now consider the section 3(a)(3) issue. This section applies only if litigation is pending or reasonably anticipated. Heard v. Houston Post Company, 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, no writ); Open Records Decision No. 416 (1984). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 331, 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 350 (1982).

In assessing the validity of your section 3(a)(3) claim, we rely on the following statements in your letter of December 5:

> [An administrator] stated that there had been numerous calls to the HISD threatening lawsuits

> over the use of leaded paint. . . . [The administrator] was asked to get more information about threatened litigation. . . . [In response to a question from a lawyer with Bracewell and Patterson, the administrator] indicated that several calls had been received from parents complaining of the situation and threatening suits. Furthermore, [the administrator] stated that one call had been received from an attorney on behalf of a parent threatening a lawsuit over the situation. . . . We have attached notes of telephone conversations and a letter from a parent on this matter. In addition, a receptionist at the HISD took a call from a man who refused to be transferred to anyone and said he was going to sue HISD because his child had lead poisoning.

Where a requestor publicly states on more than one occasion an intent to sue, that alone does not trigger section 3(a)(3). Open Records Decision No. 331 (1982). An isolated telephone threat of litigation, without more, also does not invoke this section. Open Records Decision No. 351 (1982). On the other hand, we have applied section 3(a)(3) where an attorney made a written demand for disputed payments and stated that further legal action would be necessary unless the payments were forthcoming, and where other facts indicated a real dispute between the parties. Open Records Decision No. 346 (1982). We have also held that where a governmental body produced nine affidavits from individuals who stated that they had heard a former employee say that he intended to sue the entity, and where the entity was contemplating litigation against the employee, section 3(a)(3) applied. Open Records Decision No. 288 (1981).

The present situation fits somewhere in between these decisions. The main reason that the district believes litigation is likely is that it has received telephone threats of lawsuits. No papers have been served on the district, and no claims for compensation have been filed. The district has, however, received several telephone threats, including one from an attorney purporting to represent a parent. Although one threat would clearly not be sufficient to trigger section 3(a)(3), several threats, including at least one from an attorney, suggest a stronger likelihood of litigation. Added to this is the factual setting of this case. We are dealing here with the possibility that some children in the district may have experienced lead poisoning -- in fact, the evidence before us includes claims by parents that such poisoning has actually occurred -- and that the use of leaded paint in repainting desks and chairs may have been a causal factor. We could hardly expect such possibilities to be taken lightly, particularly by the parents of students in the district. As noted, moreover, the use of leaded paint violates federal law.

In this instance, therefore, there is a genuine dispute concerning a very serious matter involving a possible violation of federal law. Although no claims for reimbursement are pending, several threats of litigation, including at least one by an attorney on behalf of a parent, have been made. Documents submitted by the district also reveal that parents have claimed that their children have experienced lead poisoning. In view of these facts, we conclude that the district's conclusion that litigation is likely is reasonable. As the survey in question would undoubtedly be implicated in a lawsuit, it "relates" to the expected litigation within the meaning of section 3(a)(3) and may therefore be withheld under that section.

Very truly yours,

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