THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

April 23, 1990

Honorable Larry W. Schenk
City Attorney
City of Longview, Texas
P.O. Box 1952
Longview, Texas 75606-1952

Open Records Decision No. 551

Re: The relationship of section 3(a)(3) of the Open Records Act, article 6252-17a, V.T.C.S., to civil discovery where litigation is reasonably anticipated (RQ-1972)

Dear Mr. Schenk:

You have received an open records request for the eight categories of information designated in the request as items (a) through (h).

Items (b) through (h) request various information regarding the tenure and compensation of a former employee of the City of Longview. Item (a) requests:

> A complete copy of all policies of insurance which might provide either a defense to the City of Longview or individual members of the City Council in their official and/or individual capacities or pay damages after the verdict is returned, including attorney's fees and punitive damages.

With respect to all of the information requested, you claim exception from public disclosure under section 3(a)(3) (the "litigation exception") of the Open Records Act, which excepts

> 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 or the various political

> subdivisions has determined should be withheld from public inspection.

As the open records request is included within an attorney's letter demanding damages and stating that unless damages are paid, the attorney has been authorized to file suit, we agree with your assertion that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation.

You claim additionally that the information requested in item (a) is excepted from public disclosure by section 3(a)(1), which excepts information deemed confidential by law. In this respect you direct our attention to section 101.104 of the Civil Practice and Remedies Code, which provides with respect to suits against governmental units under the Texas Tort Claims Act:

> (a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under this chapter.
>
> (b) Neither the existence nor the amount of the insurance is subject to discovery.

Where compelling public policy based on constitutional considerations or law outside the Open Records Act requires public access to information, its relationship to litigation cannot justify withholding it. See Open Records Decision Nos. 221 (1979) (minutes of public meetings); 146 (1976) (election returns); 43 (1974) (information made public by statute).

The City of Longview has adopted a "Self-insurance and Risk Management Program Ordinance," as well as an ordinance establishing "The City of Longview Officer and Employee Liability Plan." Longview, Tex. Ordinance Nos. 1907, 1879 (1987). These programs have been adopted as ordinances of the city in open meetings by vote of the city council. Thus, the information submitted for our inspection as responsive to the request in item (a) consists of municipal ordinances.[1] It is difficult to conceive of a more open

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1. We do not consider whether these ordinances constitute insurance policies. The information in the ordinances is responsive to the request for information.

record. The law, binding upon every citizen, is free for publication to all. Banks v. Manchester, 128 U.S. 244, 253 (1888). This policy is based on the concept of due process which requires that the people have notice of the law. Building Officials & Code Admin. v. Code Technology, Inc., 628 F.2d 730, 734 (1st Cir. 1980). Given this constitutional consideration, it is difficult to hypothesize a circumstance that would bring a law or ordinance within an exception to public disclosure.

Moreover, the provisions of section 101.104 of the Civil Practice and Remedies Code are limited to civil discovery and admissibility at trial and, at least under these circumstances, are not relevant to the availability of the information to the public. The relation of the Open Records Act to discovery is discussed below. The information requested in item (a) must be released.

Much of the information requested in items (b) through (h) concerning the compensation and tenure of a former city employee is made open to the public by section 6 of the Open Records Act which provides, in part:

> Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:
>
> . . . .
>
> (2) the names, sex, ethnicity, salaries, title, and dates of employment of all employees and officers of governmental bodies.

This office has long held that the information listed in section 6 is illustrative, though not exhaustively so, of the information covered by section 3 (defining "public information"), and does not limit the applicability of the exceptions enumerated in section 3. Attorney General Opinion H-118 (1973).

Section 3(a)(3) enables governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all. Open Records Decision Nos. 454 (1986); 288 (1981). We do not believe that the Open Records Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation. Open

Records Decision No. 108 (1975). The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. Attorney General Opinion JM-1048 (1989).

The fundamental purposes of the Open Records Act and of discovery provisions differ. Id. In a lawsuit, discovery provides an orderly and proper means for the development of relevant information under the supervision of a court of appropriate jurisdiction. The court may resolve disputes, determine and protect the interests of the parties, impose sanctions and enforce its orders. The Open Records Act, on the other hand, governs the public's right to information in the possession of governmental bodies. By excepting information from required public disclosure under the Open Records Act when access to such material is more appropriately sought through discovery, section 3(a)(3) protects the discovery process and avoids interference in matters properly resolved in court. In striking this balance between public access to records and the litigation interests of governing bodies, the legislature may have imposed some inconvenience on persons who are not parties to the litigation. However, it should be noted that the litigation exception will only apply while the litigation is reasonably anticipated and during the actual pendency of the litigation. Moreover, the litigation exception may no longer be claimed with respect to a particular lawsuit once all parties to the litigation have inspected the information pursuant to discovery. Open Records Decision No. 454 (1986).

For information to be excepted from public disclosure by section 3(a)(3), litigation must be pending or reasonably anticipated and the information must relate to that litigation. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.). In addition, this office has stated that withholding the information must be necessary to protect the governmental body's strategy or position in the litigation. See Open Records Decision Nos. 478, 474 (1987). This has sometimes been stated as a separate test for the applicability of section 3(a)(3), sometimes as an aspect of relatedness. In some opinions this office has stated that the release of certain basic factual information would not impair a governmental body's legal strategy. Open Records Decision Nos. 511 (1988); 395 (1983).

As noted above, the litigation exception protects a governmental body's position in litigation, in part, by imposing the necessity that the adverse party develop

information through the normal process of discovery. The litigation exception does not assume that the excepted information will not be discoverable by the adverse party. The applicability of the exception is in no way conditioned on the applicability of any discovery privilege. Thus, it is clear that the exception does not serve to prevent adverse parties in litigation from gaining relevant information. However, the exception does ensure that the timing and manner in which information is developed will be governed by the rules of discovery, and that requests for information relevant to the litigation will be directed to the governmental body's attorney and released only with the knowledge and consent of counsel.

As Open Records Decision No. 511 correctly points out, the decision to withhold information under section 3(a)(3) is subject to review by the attorney general pursuant to section 7 of the Open Records Act. Such review is a safeguard against abuse of the exception. However, we are of the opinion that it is more appropriate and more in keeping with the statutory wording of the litigation exception to direct our review to the the relation of the subject matter of the requested information to the pending or anticipated litigation, rather than to the strategy of the attorney representing the governmental body. As noted above, in some instances constitutional considerations or laws outside the Open Records Act will preclude the application of the litigation exception to certain information. However, it would be impractical and inappropriate for this office to determine what is necessary for the litigation strategy of a governmental body's attorney. Litigation is a dynamic, often complex process. The attorney directly responsible for the conduct of his client's case is in the best position to determine how to protect his client's interests. A court of law is in the best position to resolve disputes between litigants before it. We conclude that where our review of a governmental body's decision to withhold information pursuant to the litigation exception indicates that the governmental body has reasonably established the relatedness of the subject matter of the requested information to the litigation, the discovery process should be allowed to operate. In most cases, the more basic the information, the more quickly it will be the subject of discovery, or otherwise become available to the parties to the litigation, and removed from the coverage of the exception. As tests under section 3(a)(3), the discussion of "purely factual information" in Open Records Decision No. 395 is overruled; and the discussion of "basic facts" in Open Records Decision No. 511 is overruled.

As noted above, we find your assertion that the information requested in items (b) through (h) are related to anticipated litigation reasonable under the circumstances. Therefore, the information in items (b) through (h) may be withheld.

S U M M A R Y

A municipal ordinance may not be withheld from public disclosure under section 3(a)(3) of the Open Records Act.

Where a governmental body has reasonably established the relationship of the subject matter of the requested information to litigation, the discovery process should be allowed to operate, and the information will be excepted from public disclosure by section 3(a)(3) of the Open Records Act.

Very truly yours,

Jim Mattox

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