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June 6, 1984

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Mr. John C. Ross, Jr.
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City of Lubbock
P. O. Box 2000
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Open Records Decision No. 416

Re: Whether information regarding
an explosion is excepted from
disclosure under the Open Records
Act

Dear Mr. Ross:

Two requestors have asked you to release certain information, and you have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to do so. Because both requests stem from the same occurrence, we shall deal with both in this decision.

The occurrence in question is a recent explosion and fire at the city-county health unit. You have provided the following pertinent facts:

As a result of the explosion and fire at the health unit . . . one individual was killed instantly and one has since died as a result of injuries received. In addition, the city of Lubbock has been placed on notice of claim for personal injuries and property damage from several other individuals as a consequence of the above. Copies of all claims received to date are attached to this request and marked as Exhibit 'A'.

The undersigned attorney together with legal counsel provided by the city's self insurance agreement with the Texas Municipal League arrived at the scene of the explosion and fire shortly after the fact and began to conduct an investigation in view of the probable litigation which the city would face arising from the occurrence.

The city's fire insurance carrier was also at the scene and has commenced an investigation into the explosion and fire.

Due to the complex nature of the explosion and fire, the chief of the Lubbock Fire Department has requested both insurance companies involved . . . to release to him information set forth in article 5.46A (1) through (5) of the Insurance Code.

The companies involved have commenced their investigation but have advised that due to the technical nature of the problems to be faced, it will be quite some time before any report is forthcoming.

. . . .

No reports are in possession of the city of Lubbock at this time detailing the specific or general cause of the explosion and fire above referred to.

The only information existing in relation to the explosion itself and the ensuing investigation, is that gathered by the attorneys involved as a part of their work product; and that accumulated within the minds and rough notes of the fire department and fire marshal, as part of continuing investigations and are not yet ready for decision as to cause.

The location of the explosion and the apparent ignition point of the resulting fire was in a room housing a boiler used to provide heat for the Health Department. (Emphasis in original).

The first request for information is for:

a copy of the initial fire department report on the explosion . . . and any follow-up reports as to specific or general cause of the explosion.

Also, we hereby request the name of the insurance carrier and the name of the insurance agent handling the liability insurance for the city of Lubbock Health Department and the gas boiler, if those boilers are covered by another insurance carrier and agent.

You contend that this information is excepted from disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(7) of the Open Records Act, which except:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

. . . .

(3) 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;

. . . .

(7) matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure (Footnote omitted).

The second request for information states:

I am hereby requesting that the Lubbock Avalanche-Journal be provided the following information and documents relating to operation and maintenance of certain boiler devices by the city of Lubbock prior to October 12, 1983 [date of explosion and fire].

These would include (as shown on the attached list) the records on any power boilers, steam heating boilers, hot water heating boilers, hot water supply boilers, lined portable water heaters and portable steam boilers operated by the city of Lubbock.

Specifically, this second request is for:

(1) Documents listing all such boilers operated by the city of Lubbock prior to October 12, 1983, and their rated PSI, or operating pressure.

(2) Documents showing when each boiler operated by the city of Lubbock was initially installed.

(3) Documents showing who installed each boiler and that such boiler was initially certified to operate safely by either a state inspector or an authorized inspector of an insurance carrier.

(4) Documents or comment reflecting precisely who in city government is the 'responsible agent' to insure that such boilers were properly certified to operate prior to October 12, 1983.

(5) Documents showing that all such boilers were certified to operate from the initial installation through proper periodic inspections by either a state inspector or an authorized inspector of an insurance carrier up to October 12, 1983.

(6) Documents showing what insurance carrier or carriers insured such boilers, including the one at the Lubbock Health Department, for the city of Lubbock prior to October 12, 1983.

(7) Documents showing that all such boilers operated by the city of Lubbock were being properly maintained and supervised prior to October 12, 1983.

(8) Documents specifically showing who maintained the required records of inspections on all such boilers, including the one at the Lubbock Health Department, prior to October 12, 1983.

(9) Documents showing that the city of Lubbock had certificates of operation for all such boilers operated by the city from the boiler division of the Texas Department of Labor and Standards prior to October 12, 1983.

(10) Documents showing the daily operators' log sheets for all such boilers, including the one at the Lubbock Health Department, were properly maintained prior to October 12, 1983.

(11) Documents showing the frequency with which such boilers operated by the city of Lubbock were being checked by a qualified operator prior to October 12, 1983.

You contend that this information is within section 3(a)(3). We note that to the extent this information is not in presently existing document form, you are not obligated to compile it. See Open Records Decision No. 342 (1982).

We shall first consider the request for the initial fire department report on the explosion and fire, any follow-up reports, and the name of the insurance carrier and agent handling liability insurance for the city. As we have noted, you have informed us that:

the chief of the Lubbock Fire Department has requested both insurance companies involved . . . to release to him information set forth in article 5.46A(1) through (5) of the Insurance Code. The companies involved have commenced their investigation but have advised that due to the technical nature of the problems to be faced, it will be quite some time before any report is forthcoming.

In your brief, you place a great deal of emphasis upon the applicability of article 5.46 of the Insurance Code to the reports that have been requested by the fire chief. This article authorizes "the chief of any established fire department in Texas," among others, to require certain information from insurance companies in certain instances, and it provides that anyone who receives such information "shall hold the information in confidence until such time as its release is required pursuant to a criminal or civil proceeding." Ins. Code art. 5.46(A), (D). At this time, however, any discussion of the possible application of article 5.46 would be premature. First, the Open Records Act applies only to "information collected, assembled, or maintained" by governmental bodies, section 3(a), and the investigative reports requested by the fire chief are not yet in this category. When they have been submitted to the fire chief, they will be in this category, and the applicability of article 5.46 will then be at issue. Until that time, however, these reports are not subject to the Open Records Act. Second, since the reports are not yet in final form, we cannot at this time determine the extent to which article 5.46 may or may not apply to them.

In your brief, you state that:

save and except a Dispatchers Incident Report, a Texas Fire Incident Report and handwritten notes

made by the Lubbock Fire Department Personnel (copies of which are attached as Exhibit B), there is not in existence at this time any report that details or relates the general or specific cause of the explosion and fire (Emphasis in original).

We next consider whether these three items must be released.

Regarding your section 3(a)(3) claim, litigation is, in this instance, both "pending" and "reasonably anticipated." See, e.g., Open Records Decision No. 331 (1982) (section 3(a)(3) applicable where litigation is pending or reasonably anticipated). One lawsuit against the city has already been filed. You have, moreover, submitted copies of claim forms filed by individuals who suffered either personal injuries or property damage during the explosion and fire. The filing of these claims constitutes the first step in a process that may well culminate in additional lawsuits.

This does not, however, end our inquiry. Section 3(a)(3) does not except information from disclosure when its release "would not adversely affect the interest of" the governmental entity. Open Records Decision No. 180 (1977), citing Open Records Decision No. 135 (1976). We have examined the three requested items, and we cannot conclude that their release would adversely affect the city's interests in forthcoming litigation. These reports simply contain information such as the date and time of the fire department's response, the number of units that responded and the manner in which they did so, and the location of the explosion and fire. If there were in this instance any indication that the manner in which the city fire department handled the explosion and fire might be litigated, we would likely conclude that these documents should not be released. Absent any such indication, however, we cannot conclude that their release would be harmful.

The remaining part of the first request for information involves the name of the city's insurance carrier and agent. For the same reasons that we conclude that section 3(a)(3) does not except the foregoing reports and notes, we conclude that it does not except this information. You also assert, however, that this information is protected by sections 3(a)(1) and 3(a)(7). You cite Rule 411 of the Texas Rules of Evidence, which states that evidence of whether a person is insured is not admissible upon the issue of whether he acted negligently or otherwise wrongfully, and you argue that information that cannot be introduced to a jury because of its prejudicial effect likewise cannot be made public.

We disagree. First, Rule 411 does not require the exclusion of evidence of insurance against liability when offered on some issues,

such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness. Thus, the rule itself does not stand as an absolute barrier to the introduction of such evidence. Even if it did, moreover, we would not reach your conclusion. Absent a court order compelling nondisclosure of particular information, we believe that what information can or cannot be introduced during a trial and what information can or cannot be released to the public under the Open Records Act are two entirely different issues. To reach your conclusion, we would have to conclude that a governmental unit that possesses information is prohibited from releasing it to the public if it conceivably could be introduced into evidence at some trial that may or may not be held in the future, even though the entity would have no way of knowing that such a trial might be held or that the information might be introduced at that trial. Besides stretching the bounds of reason, such a conclusion would be impossible to implement.

You also cite Disciplinary Rule 7-107(G) of the Rules Governing the State Bar of Texas and Rule 402 of the Texas Rules of Evidence. It appears, however, that your contention is that these provisions apply to the investigative reports and follow-up reports. As we have noted, since no such reports are presently in the possession of the city of Lubbock, we decline at this time to hazard any guess as to the possible application of the Open Records Act to them.

For the foregoing reasons, we conclude that the information contained in Exhibit B and the name of the city's insurance carrier and agent are available to the public. We decline to speculate as to the availability of the investigative reports requested by the city's fire chief.

We next consider the second request for information. You contend that the requested documents are excepted under section 3(a)(3). As we have noted, a lawsuit against the city of Lubbock has been filed, and other suits may reasonably be expected. Thus, litigation is both "pending" and "reasonably anticipated." See, e.g., Open Records Decision No. 331 (1982). The second part of the section 3(a)(3) test is whether the requested information "relates" to the pending or contemplated litigation. With respect to this issue, we said in Open Records Decision No. 395 (1983) that:

it is far more difficult to decide whether information 'relates' to litigation when the litigation is anticipated rather than pending. Where litigation is anticipated, one cannot confidently predict what legal issues will be litigated or what the precise scope of those issues will be. Therefore, it is virtually impossible to conclude with any degree of assurance that particular information will

definitely not be implicated in the litigation if it does ensue. (Emphasis in original).

In Open Records Decision No. 395, we noted that an extremely broad range of issues might be litigated. The same is true here. With this in mind, we reviewed the list of requested documents, and we conclude that all documents other than those listed in numbers six and eight may be withheld at this time. In our opinion, a lawsuit alleging negligence or other wrongful action on the part of the city with respect to the health unit could easily involve the information contained in these documents; most assuredly, we cannot say that such litigation would not implicate this information. On the other hand, applying the holding that section 3(a)(3) does not protect information if its release would not adversely affect the city's position in litigation, we conclude that the information specified in numbers six and eight must be released. We have already dealt with the information in number six, and we see no way in which release of the names of those who merely maintained the required records of inspection on the boilers could be harmful to the city.

Very truly yours,



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