



THE ATTORNEY GENERAL
OF TEXAS

JIM SLACKTON
ATTORNEY GENERAL

January 11, 1990

Mr. Robert E. Shaddock
General Counsel
State Department of Highways
and Public Transportation
11th & Brazos
Austin, Texas 78701-2483

Dear Mr. Shaddock:

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# 7384; this decision is OR90-020.

The State Department of Highways and Public Transportation ("the department") received an open records request for any and all records in the custody of the department and any information concerning a fatal accident in which a highway construction worker fell to his death while working on a bridge. The department seeks to withhold from required public disclosure an investigative report that was prepared by a department employee in response to a Texas Tort Claim Act notice and demand letter, and a certificate of insurance of the construction company that was the department's contractor. The department claims that the investigative report is excepted from disclosure under section 3(a)(3) of the Open Records Act and that the certificate of insurance is excepted from disclosure under section 3(a)(1) as information deemed confidential by law, specifically section 101.104 of the Texas Civil Practice and Remedies Code.

Section 3(a)(3) of the Open Records Act protects information relating to litigation that is either pending or reasonably anticipated. See Heard v. Houston Post Co., 684 S.W. 2d 210 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 331 (1982). That the department may reasonably anticipate litigation concerning the accident in question is clear from the tort claim notice sent to the department by the survivors' attorney.

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The investigation report consists of several components: an inter-office memorandum about the accident; an incident report by the Port Arthur Police Department, a sketch of the scene of the accident, photographs, negatives, and a plan and profile of the bridge where the accident occurred, and a statement from the assistant engineer for the bridge project. The investigative materials were prepared by the department as a direct result of the possibility of litigation, in order to evaluate the possible liability of the department and its litigation strategy in defending itself against a possible tort claim.

In Open Records Decision No. 383 (1983), this office held that highway designs relating to a highway where a fatal accident occurred were protected by section 3(a)(3) from required public disclosure. It is highly likely that all of the information contained in this investigative report could relate to any lawsuit arising from the accident, and therefore it may be withheld in its entirety. It is reasonable to conclude that withholding the information is necessary to preserve the department's strategy in any potential litigation, since the report deals with various issues that would likely arise in the litigation of a tort suit of this kind. As such, the investigation report is excepted from disclosure under section 3(a)(3) of the act.

We note that the police incident report was not included among the documents you submitted to this office. We assume that you have released the police incident report. It is in any case not protected from disclosure by section 3(a)(3). See V.T.C.S. art. 6701d, § 47 (accident reports made by peace officers after January 1, 1970 are public records.)

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The department contends that the certificate of insurance, which names the state as an additional insured, is deemed confidential by section 101.104 of the Civil Practice and Remedies Code, which provides as follows:

(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.

Section 101.104 deals with the admissibility at trial of a governmental unit's insurance coverage and the pretrial

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discovery of such information. This section makes both the fact and amount of insurance coverage of a governmental body privileged from discovery and not admissible at trial. Information that is privileged by statute is not necessarily confidential for purposes of the Open Records Act. See Open Records Decision Nos. 290 (1981); 458 (1987). In this case, however, there is no meaningful distinction to be made between the terms "confidential" and "privileged". It would be highly anomalous in the context of anticipated litigation if information that was made privileged by statute were available under the Open Records Act. The intent of the statute is to make such information immune from discovery. Thus, this statute effectively makes confidential the fact and amount of insurance held by the governmental body. To make such information subject to disclosure as public information under the Open Records Act would be to circumvent the clear intention of the statute to make such information inaccessible to parties in litigation. The Open Records Act is not a tool to avoid discovery. Cf. Open Records Decision No. 251 (1980) (regarding section 3(a)(11)). Moreover, the insurance information is excepted from disclosure under section 3(a)(3) as well, as it consists of information that would relate directly to the litigation of the accident in question. The certificate of insurance may be withheld.

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 OR90-020.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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Ref.: ID# 7384

Enclosure: Documents Sent