



Office of the Attorney General  
State of Texas

October 16, 1992

DAN MORALES  
ATTORNEY GENERAL

Mr. Charles Karakashian, Jr.  
Assistant General Counsel  
Texas Department of Public Safety  
P. O. Box 4087  
Austin, Texas 78773-0001

OR92-606

Dear Mr. Karakashian:

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# 15975.

The Texas Department of Public Safety has received three open records requests for an investigation report of a fatal accident. You seek to withhold this report or portions thereof pursuant to sections 3(a)(3), 3(a)(11) and 3(a)(19) of the Open Records Act. You say you will release the accident report, as indeed you must pursuant to article 6701d, V.T.C.S., section 47. *See* Open Records Decision No. 43 (1974).

Section 3(a)(3) of the Open Records Act, the litigation exception, permits a governmental body to withhold from required public disclosure information that relates to litigation that is pending or reasonably anticipated. Open Records Decision No. 551 (1990). In this case, no litigation concerning the accident has begun. However, you claim that litigation is reasonably anticipated for several reasons. You inform us that "an officer has heard that the department may be sued over this incident." Additionally, you have received a statement from someone who heard a certain individual say she is going to hire an attorney and file suit against the department. Finally, you provided us with copies of newspaper letters to the editor and newspaper articles about the accident.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 350 (1982). The anticipation of litigation cannot be considered "reasonable" unless it is based on concrete evidence showing that litigation may ensue, rather than on mere conjecture. Open Records Decision No. 452 (1986). Section 3(a)(3) is not triggered when a requestor publicly states on

more than one occasion an intent to sue. Open Records Decision No. 331 (1982). Nor does a telephone threat of litigation, by itself invoke the litigation exception. Open Records Decision No. 351 (1982). In certain circumstances, several threats of litigation may demonstrate a likelihood of litigation sufficient to invoke section 3(a)(3). *See* Open Records Decision No. 452 (1986).

In this case, no concrete steps have been taken toward instituting a suit. Nor has the department received a threat of litigation. The underlying facts do not totally discount the possibility of litigation, but they do not suggest a strong likelihood of litigation. In view of the facts presented, the possibility of litigation in this case is not so strong as to allow the conclusion that litigation is reasonably anticipated at this time. Consequently, you may not withhold the report pursuant to section 3(a)(3) of the Open Records Act.

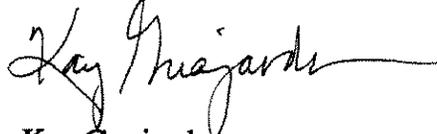
You raise section 3(a)(11) of the Open Records Act which permits a governmental body to withhold interagency or intra-agency information consisting of advice, opinion, or recommendation that is used in the deliberative process. Open Records Decision No. 574 (1990). The exception does not apply to facts and written observations of facts and events, when such information is separable from advice, opinion, or recommendation. *Id.* Most of the report consists of facts to which section 3(a)(11) does not apply and which, consequently, must be released. We have marked a small portion of the report containing advice, opinion or recommendation which you may withhold based on section 3(a)(11).

The investigation report includes a video which at times depicts several peace officers. You seek to withhold these depictions based on section 3(a)(19), which protects from disclosure the photographs of certain peace officers. The exception enumerates certain circumstances, not present here, in which the exception does not apply. *See* Open Records Decision No. 502 (1988). Given the fact that the reason for this exception is to protect a peace officer from any dangers that might occur from the release of a photograph with his or her depiction, we think the exception should also apply to a video that depicts a peace officer. *See id.* Thus, you may withhold the portions of the video which depict a police officer.

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 OR92-606.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a long horizontal flourish extending to the right.

Kay Guajardo  
Assistant Attorney General  
Opinion Committee

KHG/lmm

Ref.: ID# 15975  
ID# 16442

cc: Mr. Arthur P. Chavarria  
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