



April 17, 2000

Ms. Janice Marie Wilson
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2000-1525

Dear Ms. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134312.

The Texas Department of Transportation (the "department") received a request to inspect "all documents, photographs and videotapes pertaining to the road improvement project(s) that was (were) either: (1) completed and encompassed that location during the two (2) year period prior to February 14th, 1999; (2) in progress and encompassed that location on February 14th, 1999; or (3) initiated and encompassed that location at any time after February 14th, 1999"; the request then lists thirteen specific types of records included in the request for information. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code, and that one document, Exhibit C, contains information that may be considered confidential by a third party.¹ You have notified the third party whose interests are at issue, in accordance with section 552.305 of the Government Code, in order to allow it to establish the applicability of an exception to disclosure should it seek to protect the information from public disclosure. *See Open*

¹We note that the general request and each of the thirteen types of information identified refer to records created on or after February 14, 1997. Many of the submitted documents were created prior to February 14, 1997. A governmental body has no duty to provide information not requested; therefore, we do not address the availability of those documents.

Records Decision No. 542 (1990). We have considered the exceptions you claim and reviewed the submitted information.²

You assert that section 552.103 of the Government Code excepts from disclosure the requested information. Section 552.103(a) reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *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. 588 (1991). In this instance, you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a).

However, section 552.103 does not protect from disclosure information specifically made public by other law. One submitted document is an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. See Transp. Code § 550.064 (officer's accident report). We believe access to this information is governed by provisions outside the Public Information Act. The Seventy-fifth Legislature repealed V.T.C.S. article 6701d and amended section 550.065 of the Transportation Code concerning the disclosure of accident report information. Act of May 29, 1997, 75th Leg., R.S., ch. 1187, 1997 Tex. Gen. Laws. 4575, 4582-4583 (to be codified at Transp. Code § 550.065). However, a Travis County district court has issued a temporary injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code. *Texas Daily Newspaper Association, v. Morales*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Oct. 24, 1997) (second amended agreed temporary injunction). A temporary injunction preserves the status quo until the final hearing of a case on its merits. *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 617, 358 S.W.2d 589 (1962). The Supreme Court has defined the status quo as "the last, actual peaceable, non-contested status that preceded the pending controversy." *Texas v. Southwestern Bell Tel. Co.* 526 S.W.2d 526, 528

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

(Tex. 1975). The status quo of accident report information prior to the enactment of S.B. 1069 is governed by section 47 of article 6701d, V.T.C.S.³

Section 47(b)(1) provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report *is required to release a copy of the report* on request to:

.....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident.

V.T.C.S. art. 6701d, § 47(b)(1) (emphasis added). Under this provision, a law enforcement agency “is required to release” a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has provided the department with two pieces of information specified by the above statute, the date of the accident and the name of a person involved. However, because the department is neither the “Department [of Public Safety],” nor “a law enforcement agency employing a peace officer who made an accident report,” we conclude that the department is not subject to the requirements of section 47(b)(1) of article 6701d of the Texas Civil Statutes. Thus, the department may withhold the accident report pursuant to section 552.103 of the Government Code.

Some of the submitted documents fall into one or more category of information designated as public under section 552.022 of the Government Code. We have marked information

³Although the Seventy-fourth Legislature repealed and codified article 6701d as part of the Transportation Code, the legislature did not intend a substantive change of the law but merely a recodification of existing law. Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25 1995 Tex. Gen. Laws 1025, 1870-71. Furthermore, the Seventy-fourth Legislature, without reference to the repeal and codification of V.T.C.S. article 6701d, amended section 47 of article 6701d, V.T.C.S., relating to the disclosure of accident reports. Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414. Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment is preserved and given effect as part of the code provision. Gov’t Code § 311.031(c). Thus, the amendment of section 47 of article 6701d, V.T.C.S. is the existing law regarding the availability of accident report information, and may be found following section 550.065 of the Transportation Code. *See also* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414.

which appears to be “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” Gov’t Code § 552.022(a)(1); “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” Gov’t Code § 552.022(a)(3); and “working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate,” Gov’t Code § 552.022(a)(5). That information is public unless expressly made confidential under other law. Gov’t Code § 552.022(a). Section 552.103 is not other law that makes the requested information confidential. Therefore, the department must release the marked documents.

Finally, you state that some of the requested information may implicate the property or privacy rights of a third party. Pursuant to section 552.305 of the Government Code, you notified the third party of the request for information. However, the third party has not submitted to this office any reason to withhold the requested information or any documentation in support of any such reason. As the department has authority to rely on the third party involved to make its own arguments under section 552.110 of the Government Code, and as the department did so rely and the third party did not respond, the information is not excepted under section 552.110. The information is also “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” Gov’t Code § 552.022(a)(3), so the information is not excepted from required public disclosure under section 552.103.

You express concern that this third-party information contains social security numbers and other information which may be confidential. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or “related record” may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We have marked several documents to which the opposing party in the anticipated litigation apparently has had access. The department must release those documents. In addition, the

applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must release documents we have marked as public information under section 552.022 of the Government Code and any responsive information to which the opposing party in the anticipated litigation has had access. The department may withhold the remaining information pursuant to section 552.103 and may be required to withhold social security numbers pursuant to federal law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia Michels Anderson".

Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/ljp

Ref: ID# 134312

Encl. Submitted documents

cc: Mr. Kurt Chadwell
111 Soledad
Suite 222
San Antonio, Texas 78205
(w/o enclosures)