



March 27, 2001

Mr. Robert G. Schleier, Jr.
Schleier & Brown
116 North Kilgore Street
Kilgore, Texas 75662

OR2001-1199

Dear Mr. Schleier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145333.

The City of Kilgore (the "city") received a request for the police department report concerning an altercation that occurred on January 9, 2001 between a specified person and a city patrolman. The city also received two identical requests for an audiotape of a meeting between two city police department employees and two other individuals concerning the altercation. You state that you have released "a copy of the first sheet of the report" to the requestor. You also state that you have provided the requestor with "a copy of the Texas Peace Officer's Accident Report." You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments forwarded by the requestor pursuant to section 552.304 of the Government Code.

First, we note that the submitted documents include *part* of 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). The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the

Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.¹ In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *See Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.²

Section 47(b)(1) of article 6701d 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:

.....

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

(i) the date of the accident;

¹ 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 of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

² Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. *See* Gov't Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

(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). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.³ Under this provision, a law enforcement agency employing a peace officer who made an accident report “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. *See id.* In this matter, the requestor has provided the city with the date of the accident and the specific location of the accident. Thus, you are required to release the *entire* accident report under section 47(b)(1) of article 6701d, V.T.C.S. You state that you have released a copy of the accident report to the requestor. However, we note that we only received pages one and three of the accident report in the documents you submitted to our office. You must release all parts of the accident report to the requestor pursuant to section 47(b)(1) of article 6701d.

Next, we consider the “other information” that the city seeks to withhold from disclosure. Section 552.301(e)(1)(D) of the Government Code requires the city to submit to this office for review “a copy of the specific information requested or representative samples” related to the request concerning the police department report about the altercation that allegedly occurred on January 9, 2001 between a specified person and a city patrolman. With the exception of the audiotapes, you did not submit the first sheet of the report or the rest of the report to our office for review in accordance with section 552.301(e)(1)(D). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to request an attorney general decision as provided by section 552.301 results in the legal presumption that the information is public and must be released. *See Gov’t Code § 552.302.* Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov’t Code § 552.302); *see also* Open Records Decision Nos. 319 (1982), 630 at 3 (1994).

Because you failed to provide our office with a copy of the police department’s report on this matter and “any other information” responsive to the request, with the exception of the audiotapes and accident report, the requested information is presumed public under the Public Information Act. You have not shown a compelling interest that overcomes the presumption that the information at issue is public. Accordingly, with the exceptions noted above, you must release all information responsive to the request that the city failed to submit

³ We note that the text of amended section 47 of article 6701d is not found in Vernon’s Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 74th Legislature at chapter 894, section 1. *See* 1995 Tex. Gen. Laws 4413.

to this office for our consideration. We caution that the release of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

Finally, we address your contention that the audiotape is excepted from public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(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.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. *See* Open Records Decision No. 551 at 3 (1990). The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental

body from an attorney for a potential opposing party.⁴ *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

In this case, the city received a notice letter from an attorney on January 11, 2001 stating that the attorney intends to join the issues surrounding the alleged January 9, 2001 altercation with other issues in a lawsuit against the city. However, the date of the city’s receipt of this letter was two days after the date the city received the request for the information at issue. In determining whether a governmental body has met its burden under section 552.103(c) of the Government Code, this office cannot consider information about events that occurred after the date of the request for information. *See* Gov’t Code § 552.103(c). Moreover, the requestor’s threats of litigation, while preceding the date of the city’s receipt of the request, are not concrete evidence that litigation will ensue. *See* Open Records Decision Nos. 518 at 5 (1989), 397 at 2 (1983), 361 at 2 (1983), 359 (1983). Therefore, we do not believe that the city established the first prong of section 552.103 of the Government Code. Accordingly, the audiotape is not excepted from public disclosure pursuant to section 552.103 of the Government Code. Therefore, you must release it to the requestor.

In summary, you must release the accident report in its entirety to the requestor. In addition, because you did not submit to our office any other information responsive to the request, you must also release to the requestor all responsive information that the city failed to submit to our office. Finally, you must release the audiotape as the city failed to establish that it is excepted from public disclosure pursuant to section 552.103 of the Government Code.

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

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/RJB/seg

Ref: ID# 145333

Encl. Submitted documents, audiotape

cc: Mr. Fred Gough
P.O. Box 1253
Kilgore, Texas 75663
(w/o enclosures)