The Attorney General of Texas

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MARK WHITE
Attorney General

Supreme Court Building
P.O. Box 12548
Austin, TX. 78711
512/475-2501

701 Commerce, Suite 200
Dallas, TX. 75202
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905
915/533-3484

1220 Dallas Ave., Suite 202
Houston, TX. 77002
650-0666

806 Broadway, Suite 312
Lubbock, TX. 79401
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205
512/225-4191

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Norman V. Suarez, General Counsel
Texas Department of Public Safety
5805 N. Lamar
Austin, Texas 78773

Open Records Decision No. 251

Re: Whether accident reports prepared by the Department of Public Safety as part of its internal investigation of accidents involving DPS vehicles are public under the Open Records Act

Dear Mr. Suarez:

You have asked us to decide whether the Open Records Act, article 6252-17a, V.T.C.S., requires the Texas Department of Public Safety to release certain investigative information pertaining to an automobile collision involving a department officer and a private citizen. You state that the information is not part of a peace officer's accident or supplemental report, but was prepared as part of an internal investigative procedure designed to aid the department in preparing for litigation and in determining whether departmental policies have been violated. You seek to withhold the material under section 3(a)(8) of the Open Records Act and rule 167, of the Texas Rules of Civil Procedure.

In Open Records Decision No. 43 (1974), this office held that the Open Records Act required the Department of Public Safety to release supplementary reports concerning a one-car accident. These reports, which consisted of witnesses' statements, pictures, and a report of a follow-up investigation of the accident, were prepared in addition to the standard "Texas Peace Officer's Accident Report" required by section 44(c), article 6701d, V.T.C.S. The opinion noted that accident reports are specifically made public information under section 47, article 6701d, V.T.C.S., and concluded that because the supplemental reports were part of the official accident report, they were also public information. Open Records Decision No. 43, however, concerned reports made by police investigators as disinterested third-party investigators, not as participants in the accident or as agents for a participant. We must decide whether reports fitting the latter description must be released.

Section 47, article 6701d, V.T.C.S., provides, in pertinent part:

> All accident reports made by persons involved in accidents, by garages, or peace officers shall be. . . privileged and for the confidential use of the Department or other State agencies having use for the records for accident prevention purposes. . . provided that accident reports submitted by peace officers after January 1, 1970, are public records open for inspection. (Emphasis added).

The first question is whether form ST-2, the "Driver's Confidential Accident Report," is an accident or supplemental report submitted by a peace officer, which must be disclosed, see Open Records Decision No. 43 (1974), or whether it is an accident report made by a person involved in an accident, which may be maintained for the confidential use of the department. We think the latter is more accurate. The form was prepared by the driver of one of the automobiles involved in the collision who incidentally happened to be a peace officer, and therefore was not part of the official accident report required of peace officers under section 44(c), article 6701d, V.T.C.S.

While section 47 makes accident reports public when submitted by a peace officer, we think this provision was clearly intended to apply only to reports made by disinterested officers in the investigation of an accident and not to reports submitted by persons involved in an accident, even though they might happen to be peace officers. Thus, form ST-2, the "Driver's Confidential Accident Report," is not made public by article 6701d, section 47; on the contrary, it is information deemed confidential by statute.

We next consider the diagrams and the two reports submitted to a superior officer by the trooper involved in the collision and by his sergeant. These items are not part of the Driver's Confidential Accident Report. You seek to withhold them under section 3(a)(8), article 6252-17a, V.T.C.S., and rule 167 of the Texas Rules of Civil Procedure. Your reference to rule 167 was, we assume, intended to invoke section 3(a)(11), article 6252-17a, V.T.C.S., which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency."

While the exception is normally discussed in terms of excepting opinion, advice and recommendation, it extends to other information excepted from discovery as well. Section 3(a)(11) was clearly patterned after 5 USC section 552(b)(5), and although the language of section 3(a)(11) is inartful, we determined shortly after the statute was enacted that it was intended to parallel the federal exception. Attorney General Opinion H-436 (1974). Congress intended by this provision to exempt from public disclosure memorandums or letters which could not be obtained through discovery by a private party in litigation with an agency, and we think section 3(a)(11) must be similarly construed to protect information which a party in litigation with an agency could not obtain through discovery. Accordingly, in order to determine whether the diagrams and reports may be withheld, we must decide whether they could be obtained under rule 167 of the Texas Rules of Civil Procedure by a party in litigation with the Department of Public Safety.

Rule 167 provides that the right of discovery shall not extend:

> to other written statements of witnesses or other written communications passing between agents or representatives or the employees of either party to the suit, or to other communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen.

In Allen v. Humphreys, 559 S.W. 2d 798 (Tex. 1977), the Texas Supreme Court observed that this privilege can be invoked where three factors coexist:

> (1) [T]he material sought to be discovered is either (a) a written statement by a non-expert witness, (b) a written communication between agents, representatives, or employees of either party to the suit, or (c) written communications between any party and his agents, representatives, or their employees; (2) the statement or communication is made subsequent to the occurrence or transaction upon which the suit is based; and (3) the statement or communication is made in connection with the prosecution, investigation, or defense of the particular suit or in connection with the investigation of the particular circumstances out of which it arose.

559 S.W. 2d at 802. Allen was a workmen's compensation suit against Charter Oak Fire Insurance Company, the insurer of Safeway Stores, Inc. In order to facilitate proof of her case, plaintiff sought discovery of numerous items. Responding to plaintiff's challenge to a trial court's denial of a motion for discovery under rule 167, the Supreme Court observed that:

> It is argued that any such surveys or tests would be privileged because they were done in anticipation of or as part of the investigation of a claim or lawsuit. The results of a test or survey done after the institution of Mrs. Allen's suit or after Safeway and Charter Oak had good cause to believe such a suit would be filed would be privileged if defendant could show the survey or test was made 'in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen'. . .

559 S.W. 2d at 803 (Emphasis added). The Court vacated the trial court's orders denying discovery of the surveys and tests because Charter Oak "denied that any survey or test of the type requested had been performed in connection with Mrs. Allen's claim." Id.

We think the material at issue here satisfies the three-part test enunciated in Allen for determining whether material is discoverable under rule 167. The reports and diagrams clearly constitute written communications between department employees; they were obviously prepared subsequent to the collision; and they were prepared in connection with the investigation of the collision at a time when the department had good cause to believe a suit would be filed. Regarding the last point, you have in fact stated that the materials were prepared to aid the department in the event that litigation should ensue, and we have no reason to dispute the contention. Accordingly, the diagrams and reports would not, in our judgment, be discoverable under rule 167 of the Texas Rules of Civil Procedure and they may therefore be withheld under section 3(a)(11), article 6252-17a, V.T.C.S. Our conclusions render consideration of your section 3(a)(8) claim unnecessary.

Very truly yours,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

Prepared by Jon Bible
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

C. Robert Heath, Chairman
Jon Bible
Susan Bradshaw
Susan Garrison
Rick Gilpin
Bruce Youngblood