



The Attorney General of Texas

July 29, 1983

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Mr. George H. Spencer
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1805 National Bank of Commerce Bldg.
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Open Records Decision No. 395

Re: Whether Bexar County
Hospital District records are
available to the public under
the Open Records Act

Dear Mr. Spencer:

The Bexar County Hospital District has been asked to disclose certain records of the Medical Center Hospital, which is one of two hospitals operated by the district. You have asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires the district to comply with this request.

The relevant facts, as stated in your request letter, are as follows:

[T]here has been an ongoing Grand Jury investigation in Bexar County concerning personnel of the hospital's pediatric intensive care unit, published threats of suits against the district and recently received written claims against the district asserting claims based upon the deaths of infants at the hospital's pediatric intensive care unit. This criminal investigation and prospective civil litigation is not based upon allegations of isolated or unrelated incidents, but upon the general allegations that an excessive number of deaths occurred in the pediatric intensive care unit over a period of several years caused by possible criminal acts or at least acts giving rise to civil liability on the part of the district. It, therefore, seems certain that the district will be subjected to multiple civil litigation and in view of the general nature of the claims that officers and employees of the district may likely be made parties to such civil litigation and possibly criminal action. Pursuant to subpoenas, extensive records have been produced by the hospital district to the Bexar County

district attorney for Grand Jury use and personnel of the hospital have been called as witnesses before the Grand Jury.

. . . .

In view of the nature of the potential criminal and civil litigation, it appears that the overall standard of care of the hospital in selection of personnel, supervision of personnel and practices, adequacy of studies of the pediatric intensive care unit, as well as its operation, are potentially at issue. The matters requested relate to those issues.

The following records were requested:

1. Personnel files on nurses and residents employed in the pediatrics department since January 1978, including resumes, application materials, and references;
2. personnel file on [name withheld], former director of the pediatric intensive care unit;
3. all internal memoranda and directives issued by [name withheld] concerning the pediatric intensive care unit between the time he assumed supervision of the unit and the time he left that position;
4. all daily, weekly, or monthly statements concerning mortality in pediatric ICU between January 1978 and today by whatever office routinely monitors such matters;
5. a copy of reports and supporting materials concerning pediatric ICU compiled by a group headed by [name withheld] in late 1981 or early 1982;
6. names, addresses and correspondence with consultants from Boston, Philadelphia and Toronto retained to study the pediatric ICU; copies of all vouchers and receipts they submitted and payments made to them;

7. a copy of reports and supporting materials compiled by [name withheld] concerning pediatric ICU;

8. a copy of reports and supporting materials compiled by [name withheld] concerning pediatric ICU. An accounting of all amounts and reimbursements paid to him for the study, and copies of all vouchers and receipts he submitted for the work;

9. hospital financial records on all patients treated in pediatric ICU between January 1978 and March 1, 1982. All non-doctor-generated medical records on patients treated in pediatric ICU during that period, including records generated by nurses;

10. the nurses' daily log of patients in the pediatric intensive care unit for the period of October 1, 1978, through March 15, 1982. This log is a running listing of patients in the unit, including date they are admitted and date they are transferred out of the unit or die. It is generated by nurses and kept in the nursing station;

11. copies of all formal complaints filed by doctors and nurses against [name withheld] during the time of her employment in the pediatric intensive care unit. A statement of the disposition of those complaints. These complaints were filed under a hospital procedure under which a doctor or nurse may 'write up' a hospital employee.

You contend that section 3(a)(3) of the Open Records Act applies to all of the requested information and that sections 3(a)(1) and 3(a)(11) apply to some of it. These sections except from required public disclosure:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

. . . .

(3) information relating to litigation of a criminal or civil nature and settlement

negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection;

. . . .

(11) 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.

Some of the requested information is clearly within the ambit of sections 3(a)(1) and 3(a)(11); however, because we believe that section 3(a)(3) covers virtually all of the requested information, we will base our decision upon it.

Information is within the purview of section 3(a)(3) if (1) litigation involving the governmental entity is either pending or reasonably anticipated; and (2) the information "relates" to that litigation. See, e.g., Open Records Decision No. 360 (1983). In this instance, litigation may reasonably be expected. The continuing Grand Jury investigation has already resulted in the indictment of one of the district's employees and may result in the indictment of other employees or officers. Moreover, the fact that the parents of several of the deceased children have retained attorneys, have filed health care claims alleging negligence on the part of the hospital's staff and doctors, and have publicly voiced their intent to file wrongful death suits, convinces us that civil litigation involving the hospital district or its officers or employees is reasonably likely. See, e.g., Open Records Decision No. 266 (1981) (litigation held to be reasonably probable where complaint had been filed with EEOC).

As to whether the second prong of the section 3(a)(3) test is satisfied, we note that it is far more difficult to decide whether information "relates" to litigation when the litigation is anticipated rather than pending. Where litigation is anticipated, one cannot confidently predict what legal issues will be litigated or what the precise scope of those issues will be. Therefore, it is virtually impossible to conclude with any degree of assurance that particular information will definitely not be implicated in the litigation if it does ensue.

In Open Records Decision No. 382 (1983), we held that certain records pertaining to a proposed sale of property by the Dallas

Housing Authority were excepted under section 3(a)(3). With respect to whether the records "related" to the forthcoming litigation, we said:

These complaints are numerous and cover a wide range of legal issues. We have considered each item of requested information in the light of these complaints and have reached two conclusions. First, most of the requested information concerns matters that will almost inevitably arise during the course of the lawsuit. Second, the remainder of the requested information deals with matters that are likely to arise during the suit. With respect to the latter information, we certainly cannot conclude that it concerns matters that will definitely not arise. Because we believe that it is highly likely that all of the requested information will be implicated in the forthcoming litigation, we conclude that it 'relates' to the litigation within the meaning of section 3(a)(3). You may therefore deny this request in its entirety.

We believe that the same approach should be followed here. The information available to this office supports your claim that an extremely broad range of legal issues may be litigated. As you observed in a letter to this office, civil and criminal litigation may be initiated which will be:

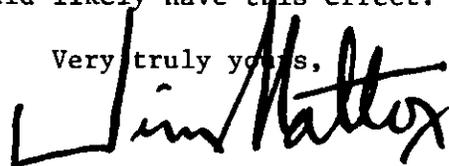
broadly addressed to the operation of the pediatric unit of the hospital over a period of years with claimed involvement of nurses, physician residents and supervision by the administration of the hospital in multiple cases during the time period questioned.

At this point, we conclude that most of the requested information concerns matters that will definitely arise if litigation ensues, and we cannot conclude that the remainder concerns matters that will definitely not arise. Because we believe that it is highly likely that this information will be implicated if litigation ensues, and because we also believe that if litigation is initiated, the release of this information could jeopardize the district's legal strategy or position, we conclude that all of the information other than that discussed below may be withheld under section 3(a)(3).

The only information that, in our opinion, is probably not protected from disclosure under sections 3(a)(1), 3(a)(3), or 3(a)(11) consists of the statements concerning mortality to which item number

four refers (assuming that these are figures); the names and addresses of the consultants to which item six refers; the vouchers and receipts to which items six and eight refer; and the nurses' daily log of patients to which item ten refers. This is purely factual information, the release of which, in our opinion, would not compromise the hospital district's legal strategy if civil or criminal litigation eventually ensues. We therefore conclude that this information must be made public, unless you can demonstrate to us, within 20 days, that its release would likely have this effect.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, sweeping initial "J".

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