



**THE ATTORNEY GENERAL
OF TEXAS**

March 17, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Fred G. Rodriguez
Bexar County Criminal
District Attorney
Bexar County Courthouse
San Antonio, Texas 78205

Open Records Decision No. 521

Re: Whether certain custodial death reports are available to the public under article 49.18 of the Texas Code of Criminal Procedure and article 6252-17a, V.T.C.S., the Texas Open Records Act (RQ-1320)

Dear Mr. Rodriguez:

The Bexar County District Attorney's Office received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., "for a copy of the investigative report prepared by the Bexar County Sheriff's Department into the circumstances of the death of Willie Lee Hunter while in custody in the Bexar County Jail." Because an attorney made the request, you believe that he seeks the report in order to evaluate a possible legal claim against Bexar County. While your request for an open records decision on this matter was pending, you received two additional requests for custodial death reports. Both subsequent requests involve parents seeking reports regarding the deaths of their sons. You submitted the three custodial death reports and attachments to the reports for review and asked whether they are excepted from disclosure.

Article 49.18 of the Texas Code of Criminal Procedure provides in subsection (b):

If a person dies while in the custody of a peace officer or if a prisoner dies while confined in a jail or prison, the director of the law enforcement agency of which the officer is a member or of the facility in which the prisoner was confined shall investigate the death and file a written report of the cause of death with the attorney general no later than the 20th day after the date on which the person in custody

or the prisoner died. The director shall make a good faith effort to obtain all facts relevant to the death and include those facts in the report. The attorney general shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested person. (Emphasis added.)

Subsection (b) requires that law enforcement agencies, jails, and prisons prepare and file reports with the attorney general about prisoners who die while in custody. Failure to file the reports required by subsection (b) constitutes a Class B misdemeanor. Tex. Pen. Code § 39.022. Subsection (b) of article 49.18 of the Texas Code of Criminal Procedure directs that the attorney general "shall make the report, with the exception of any portion of the report that [he] determines is privileged, available to any interested person."

The phrase "any interested person" has been subject to judicial construction. In City of Abilene v. Shackelford, 572 S.W.2d 742 (Tex. Civ. App. - Eastland 1978), rev'd on other grounds, 585 S.W.2d 665 (Tex. 1979), the court of appeals interpreted the phrase "any interested person" in a provision of the Texas Open Meetings Act, article 6252-17, V.T.C.S., that governed standing to file suit over violations of the act. The court held that "any interested person" meant a person injured or damaged other than as a member of the general public. 572 S.W.2d at 746. The court followed the general interpretation of the phrase applied by Texas courts in cases involving the issue of standing to file a lawsuit. 572 S.W.2d at 746-47 (and cases cited therein). In Shackelford v. City of Abilene, 585 S.W.2d 665, 668 (Tex. 1979), the Texas Supreme Court reversed the court of appeal's decision on other grounds, holding that Abilene's City Charter gave citizens of the city the right to enjoin meetings closed in violation of the city charter.¹ In City of Fort Worth v. Groves, 746 S.W.2d 907, 913 (Tex. App. - Fort Worth 1988, no writ), however, the court of

1. The supreme court noted that the legislature responded to the court of appeal's decision by amending the provision of the Open Meetings Act in question to grant standing to "[a]ny interested person, including bona fide members of the news media." See Shackelford v. City of Abilene, 585 S.W.2d 665, 667 n. 4 (Tex. 1979).

appeals indicated that public standing to file suit under the Open Meetings Act is somewhat broader than the traditional concept limiting standing to a person with a "special interest" because of the act's purpose of opening meetings to the general public. Cf. City of Bells v. Greater Texoma Util. Auth., 744 S.W.2d 636 (Tex. App. - Dallas 1987, no writ).

These cases, moreover, interpret "any interested person" in the context of standing to file suit. The meaning of "any interested person" in a statute simply granting access to information presents a different question; the phrase in an access statute does not necessarily have the same purpose and meaning as the phrase in a statute authorizing a lawsuit. Authorizing a person to file a lawsuit, particularly against a governmental body, ordinarily carries more serious consequences than authorizing a person to obtain information.

For this reason, cases interpreting or applying the phrase "interested person" in the context of access to information are more helpful than cases interpreting the phrase in the context of standing. In Open Records Decision No. 25 (1974), the attorney general determined that a statute allowing inspection of records by "any interested party" must be read in light of the common-law right of inspection of public records. That decision relied, in part, on Palacios v. Corbett, 172 S.W. 777 (Tex. Civ. App. - San Antonio 1915, writ ref'd w.o.m.). In Palacios v. Corbett, the court noted that the common-law rule is that the public has a theoretically absolute right to inspect government records; the right is subject only to the practical limits of a mandamus action to enforce the right. 172 S.W. at 781-82. The public right of access is not limited to cases involving a special interest when the case involves an important public interest for general examination of the information at issue. Open Records Decision No. 25 (citing Palacios v. Corbett, supra). Consequently, the phrase "any interested person" in article 49.18 of the Texas Code of Criminal Procedure is not limited to persons who show a special interest apart from the general public within the meaning of standing cases. See Open Records Decision No. 300 (1981) (interpreting "interested party" to mean the public in the context of the availability of certain franchise tax information).

Whether the custodial death reports required by article 49.18 of the Texas Code of Criminal Procedure must be released depends on the extent to which article 49.18 affirmatively protects information from public disclosure.

Subsection (b) of article 49.18 indicates that the attorney general shall not make available "any portion of the report that [he] determines is privileged." The legislative history to subsection (b) reveals concern that the custodial death reporting requirements would open law enforcement agencies and prisons to greater civil liability. The addition of protection for "privileged" information reflects a compromise. The legislature did not intend subsection (b) to open law enforcement agencies and prisons to greater civil liability simply because they investigate custodial deaths. Providing protection for such investigations also encourages greater forthrightness on the part of entities submitting the reports. The concern over reporting entities' civil liability suggests that subsection (b) protects information that would be "privileged" from discovery in civil litigation against the entities submitting the reports.

Subsection (b) of article 49.18 refers to "privileged" information rather than to "confidential" information. Most statutes that make information exempt from public disclosure as confidential include the term "confidential," see, e.g., Open Records Decision Nos. 351, 347 (1982); 276 (1981), and expressly state that specific information should not be released to the public. See, e.g., Open Records Decision No. 190 (1978). On the other hand, although "privileged" and "confidential" are not automatically synonymous, they both ordinarily refer to information that is not subject to public disclosure. Open Records Decision No. 290 (1981); see Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399-400 (5th Cir.), cert. denied, 471 U.S. 1137 (1985); cf. Artesian Indus. v. Department of Health and Human Services, 646 F.Supp. 1004, 1008 (D.D.C. 1986). The legislative history of article 49.18, moreover, indicates that the term "privileged" in article 49.18 means confidential. The bill analysis for the bill that added subsection (b) to article 49.18 provides that the "[c]ontents of such reports that is [sic] deemed confidential shall be privileged information."² Bill Analysis, H.B. 1954, 68th Leg. (1983).

The term "privileged" as used in subsection (b) does not designate specific information confidential. Compare

2. Because section 3(a)(1) of article 6252-17a, V.T.C.S., protects information deemed confidential by statute, article 49.18 of the Code of Criminal Procedure is not inconsistent with the Open Records Act.

Open Records Decision Nos. 351, 347 (1982); 276 (1981). Subsection (b) simply directs the attorney general to withhold information that "the attorney general determines is privileged." This language implies that the attorney general must determine what existing privileges or other confidentiality laws apply to specific information; it does not create a new privilege. See Florida Medical Ass'n, Inc. v. Department of Health, Education and Welfare, 479 F.Supp. 1291, 1301-02 (M.D. Fla. 1979) (interpreting similar provision under the federal Freedom of Information Act, 5 U.S.C. § 552). Consequently, subsection (b) of article 49.18 of the Code of Criminal Procedure, in conjunction with section 3(a)(1) of the Open Records Act, authorizes withholding information that is ordinarily privileged from discovery and information otherwise deemed confidential by law.

Shortly after subsection (b) became effective, this office issued a directive about custodial death reports to the directors of jails, correctional facilities, and law enforcement agencies. This directive provides, in part:

Our office encourages full compliance with this law, and we have attempted to devise reasonable forms to obtain the necessary information. After consultation with various law enforcement personnel we have devised a reporting form. Part I of the form will be available to the public and Parts II to V will be classified as privileged. The privileged information will be made available to authorized representatives of the Attorney General's Office.

Part I of the form includes the name, sex, ethnicity, date and time of arrest of the deceased; the criminal charge against the deceased; the exact location of the deceased at the time of death; the nature, date, and time of death; the medical cause of death; and a specific description of how the death occurred. This information is routinely made public and is not at issue here.

Parts II through IV of the form contain personal information about the deceased: in the event death occurred within 72 hours of incarceration, whether any unusual actions were noted, the times at which the deceased's cell was checked, the name of the officer who discovered the deceased, witnesses to the incident whether any statements were taken, information about the physical capacity of the facility at issue and about the deceased's cell, and

information about peace officers involved in the deaths of persons while in the custody of peace officers. Much of this information is the type of information that would be sought by an individual attempting to impose civil liability on the agency in question for the custodial death.

Rule 166b of the Texas Rules of Civil Procedure governs the scope of civil discovery. Paragraph 3 of rule 166b sets forth the matters that are protected from discovery by privilege. Subparagraph 3a incorporates the attorney work product doctrine and the attorney-client privilege. Subparagraph 3c protects witness statements made subsequent to the occurrence of the event in question and made in anticipation of the defense of claims arising from the event. Subparagraph 3d protects party communications made subsequent to the occurrence of the event in question and made in anticipation of the defense of claims arising from the event.

Subparagraph 3d, however, applies in the civil discovery context only to information obtained by a party after there is good cause to believe a suit will be filed or after the institution of a lawsuit. Stringer v. Eleventh Court of Appeals, 720 S.W.2d 801, 802 (Tex. 1986); Turbodine Corp. v. Heard, 720 S.W.2d 802, 804 (Tex. 1986). Not all custodial deaths result in litigation and not all investigations of custodial deaths are made with good cause within the meaning of subparagraph 3d as applied by the Texas Supreme Court.

On the other hand, subsection (b) of article 49.18 does not govern the scope of discovery, it simply attempts to incorporate privileges from discovery into the context of general releases of information. For this reason, the most reasonable construction of the provision is that it protects information of the type that would not ordinarily be disclosed through discovery. See generally Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19, 26-27 (1983) (similar exception under the federal Freedom of Information Act protects information of the type ordinarily protected from civil discovery). Consequently, the collection of information in parts II through IV of the form required by the attorney general under subsection (b) may be withheld. This does not mean that the specific pieces of information contained in the form cannot be obtained through an open records request when the information exists in other forms; it simply means that the investigative report required by subsection (b) need not be released to the public.

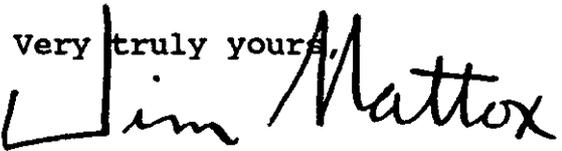
Part V of the custodial death report provides for the compilation and submission of supplementary information, including autopsy reports, medical records, visitor lists, inquest records, inmate history records, copies of photographs of the scene of the death and of the deceased, witness statements, statements from inmates in adjoining cells, the offense report, and "other documents." When these attachments are compiled and attached to the custodial death report submitted to the attorney general, the compilation becomes part of the report and may be withheld as part of the report.

Subsection (b) of article 49.18 was not intended, however, to close to the public all information held by a governmental entity simply because the information is also attached to custodial death reports submitted to the attorney general. For example, Open Records Decision No. 138 (1976) determined that a statute protecting from disclosure certain information regarding nursing homes submitted to the state for licensing purposes does not apply to the same or similar information gathered by a city for its own purposes in the regular course of its activities and requested independently from the city.

In this instance, the Bexar County Criminal District Attorney received a request for the custodial death report for three specified individuals. The district attorney's office did not receive a direct, independent request for all documents related simply to the arrest and/or incarceration of the individuals. If a governmental body receives a request for information maintained as part of its ordinary responsibilities, the documents may be withheld only if one of the Open Record Act's exceptions or another specific law protects them. See Open Records Decision No. 138 (1976). For example, some of the documents attached to the reports submitted for review are expressly made public by statute. See, e.g., Code Crim. Proc. art. 49.25, § 11 (autopsy prepared by county medical examiner is public record). On the other hand, some of the documents attached to the three reports you submitted for review are expressly deemed confidential by specific statutes. For example, section 5.08 of the Medical Practices Act, article 4495b, V.T.C.S., protects from public disclosure medical records prepared by a physician or by someone under her direct supervision. See Open Records Decision No. 487 (1988). This decision determines only that the custodial death report, including its compilation of attachments, is not public.

S U M M A R Y

Subsection (b) of article 49.18 of the Texas Code of Criminal Procedure requires that law enforcement agencies, jails, and prisons prepare and file reports with the attorney general about prisoners who die while in custody. These reports are not public information.

Very truly yours,


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