



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 2, 1989

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

Open Records Decision No. 529

Re: Whether the Communicable
Disease Prevention and Control
Act, chapter 81 of the Health
and Safety Code, prohibits
public disclosure of AIDS
test results included in an
autopsy report (RQ-1515)

Dear Mr. Rodriguez:

The Bexar County Medical Examiner has received a request under the Open Records Act to inspect and copy an autopsy report and medical test results pertaining to a specific homicide victim, "including any tests made to determine whether the dead person had or did not have AIDS." Article 49.25, section 11, of the Code of Criminal Procedure provides that autopsy reports prepared by a medical examiner are public records. See Open Records Decision No. 21 (1974). However, the Communicable Disease Prevention and Control Act accords confidentiality to the results of tests for acquired immune deficiency syndrome (AIDS). Acts 1989, 71st Leg., ch. 678, § 1, at 2323.¹ You are concerned that this confidentiality provision applies to AIDS tests performed on a deceased person. If so, section 3(a)(1) of the Open Records Act protects the test results from disclosure as "information deemed confidential by law."

1. The Communicable Disease Prevention and Control Act, formerly codified as article 4419b-1, V.T.C.S., was recodified as chapter 81 of the Health and Safety Code in a nonsubstantive revision of health and safety statutes by the 71st Legislature. Acts 1989, 71st Leg., ch. 678, § 1, at 2308. The provisions on AIDS tests, formerly article 9 of article 4419b-1, V.T.C.S., are now found in sections 81.101 through 81.104, *id.* at 2321 (subchapter F of chapter 81), of the Health and Safety Code.

Article 49.25 of the Code of Criminal Procedure authorizes counties to establish the office of medical examiner. Code Crim. Proc. art. 49.25, § 1. A medical examiner is required to hold inquests to determine the cause of death under the circumstances set out in section 6 of article 49.25.² An inquest is required in the following cases:

1. . . . [death] within twenty-four hours after admission to a hospital or institution or in prison or in jail;
2. When any person is killed; or from any cause dies an unnatural death . . . ; or dies in the absence of one or more good witnesses;
3. When the body of a human being is found, and the circumstances of his death are unknown;
4. When the circumstances of the death of any person . . . lead to suspicion that he came to his death by unlawful means;
5. . . . [suicide, or circumstances of the death suggest suicide];
6. . . . [deceased was not attended by a physician, and local registrar does not know cause of death];
7. . . . [physician in attendance is unable to certify the cause of death].

Id. § 6.

The purpose of an inquest is to obtain information as to whether death was caused by a criminal act, to obtain

2. The inquest into a death occurring in a county that does not have a medical examiner or that is not part of a medical examiner's district is performed by the justice of the peace pursuant to articles 49.01 through 49.23 of the Code of Criminal Procedure. Laws pertaining to the duties of the justice of the peace in inquests also apply to the medical examiner to the extent not inconsistent with article 49.25 of the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 12.

evidence to prevent the escape of the guilty, and to furnish the foundation for a criminal prosecution in case the death was shown to be felonious. Parsons v. State, 271 S.W.2d 643, 651-52 (Tex. Crim. App.), cert. denied, 348 U.S. 837 (1954); Pierson v. Galveston County, 131 S.W.2d 27 (Tex. Civ. App. - Austin 1939, no writ); Code Crim. Proc. art. 49.01(3). The medical examiner shall perform an autopsy if in his opinion it is necessary to determine the cause of death, or if the local prosecutor requests an autopsy. Code Crim. Proc. art. 49.25, § 9; see also id. art. 49.01(1), (2) (defining "autopsy" and "inquest"). Permission of next of kin is not required. 34 Am. Jur. Proof of Facts 2d Adequacy of Consent to Autopsy § 2;³ see generally Aetna Casualty & Sur. Co. v. Love, 121 S.W.2d 986 (Tex. 1938) (statutory authority of justice of the peace to order an autopsy); Attorney General Opinion JM-808, at 7 (1987). If the medical examiner believes that a complete autopsy is not needed to determine the cause of death, he may perform a limited autopsy by taking blood samples or any other samples of body fluids, tissues or organs, "to ascertain the cause of death or whether a crime has been committed." Code Crim. Proc. art. 49.25, § 9.

A complete autopsy performed as part of an inquest involves a comprehensive external and internal examination of the body. 39 Am. Jur. Proof of Facts 2d Cause of Death as Determined from Autopsy § 7; see Code Crim. Proc. art. 49.01(1). Because of the comprehensive nature of the examination, the autopsy report will ordinarily include a great deal of unremarkable information. Id. Normal findings on an autopsy are important because they enable the medical examiner to exclude numerous possible causes of death. Id.

According to the Bexar County Medical Examiner, AIDS test results are routinely included in autopsy reports by medical examiners throughout the state. The medical examiner has informed you that an AIDS test is included in the autopsy to assist him in ascertaining the cause of death, since the test result may indicate a motivation for

3. Under certain circumstances, a relative's consent is not required for the removal for transplantation of certain body parts and tissues from the body of a decedent subject to an inquest by the medical examiner. See Health & Safety Code ch. 693, Acts 1989, 71st Leg., ch. 678, § 1, at 2997; see also Attorney General Opinion JM-356 (1985).

murder or suicide. He feels that he might miss relevant evidence if he did not include this test in the autopsy.

A detailed autopsy report must be filed with the local prosecutor. Code Crim. Proc. art. 49.25, § 9. In addition, the medical examiner is required to keep complete records of the inquest, which include the "full report and detailed findings of the autopsy, if any." Id. § 11. These records are expressly made public records. Id. Autopsy reports prepared by county medical examiners are admitted as evidence in criminal trials. See, e.g., Burleson v. State, 585 S.W.2d 711 (Tex. Crim. App. 1979); Whitfield v. State, 492 S.W.2d 502 (Tex. Crim. App. 1973).

The Communicable Disease Prevention and Control Act does not specifically address the inclusion of AIDS test results in the medical examiner's autopsy report.⁴ However, a study of the act's provisions on AIDS reveals many provisions that are entirely inapplicable to testing done in connection with an autopsy authorized by the Code of Criminal Procedure. For example, see the Health and Safety Code, sections 81.102(a)(3)(A) and 81.103(d). Acts 1989, 71st Leg., ch. 678, § 1, at 2322-23. We are persuaded that the act does not apply to AIDS test results included in the medical examiner's autopsy report.

Subchapter F of the Communicable Disease Prevention and Control Act, Health and Safety Code chapter 81, id. at 2321, limits the circumstances under which one person may require another person to have a test for AIDS. When AIDS tests are permitted, the results may not be disclosed except as expressly provided. Id. at 2322-23. But see Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557 (Tex. App. - Fort Worth 1988, no writ) (statute on confidentiality of AIDS test results does not apply to court actions). See also Acts 1989, 71st Leg., ch. 1195, § 21, at 4872 (adding section 3.12 to Communicable Disease Prevention and Control Act, authorizing mandatory AIDS tests for persons

4. Under section 81.045(c) of the Health and Safety Code, a justice of the peace acting as a coroner or a county medical examiner performing an inquest who finds that a person died from a reportable disease or other communicable disease that may be a threat to the public health must immediately notify the health authority of the jurisdiction or the Department of Health. The report is confidential under section 81.046 of the Health and Safety Code. Acts 1989, 71st Leg., ch. 678, § 1, at 2311-12.

who may have exposed public safety worker to AIDS). A person who requires a test in violation of section 81.102 commits a Class A misdemeanor, as does a person who discloses a test result in violation of section 81.103. Id. ch. 678, § 1, at 2322-23. An action may be brought to restrain a violation or threatened violation of section 81.102 or 81.103. Id.

Section 81.102(a) of the code provides that a "person may not require another person to undergo a medical procedure or test designed to determine or help determine if a person has AIDS or HIV infection," subject to several exceptions. Id. Section 81.102 implicitly gives an individual the right to consent to AIDS tests except where required testing is statutorily authorized. A recent amendment to the Communicable Disease and Prevention Act states this right expressly:

Except as otherwise provided by law, a person or entity may not perform a test designed to identify the human immunodeficiency virus . . . without first obtaining the informed consent of the person to be tested.

Id. ch. 1195, § 29, at 4876 (adding section 9.08 to article 4419b-1, V.T.C.S); see Gov't Code § 311.031(c) (saving provision for amendment to a statute that was repealed and recodified).

The performance of an AIDS test as part of an autopsy under article 49.25, Code of Criminal Procedure, is not subject to the implicit consent requirement of section 81.102 or the express consent requirement of the recent amendment. The AIDS test by the medical examiner is within an exception "otherwise provided by law." Consent of the deceased person is impossible, and consent of next of kin is not required. The performance of an AIDS test in connection with an inquest is outside of the circumstances covered by chapter 81, subchapter F, of the Health and Safety Code.

In addition, almost all of the specific circumstances where section 81.102(3) permits a mandatory AIDS test can apply only to living persons. Mandatory testing is permitted when it is necessary:

(A) as a bona fide occupational qualification . . . ;

(B) to screen blood, blood products, body fluids, organs, or tissues to determine suitability for donation;

(C) in relation to a particular person under this chapter;⁵

(D) to manage accidental exposure to blood or other body fluids . . . ;

(E) to test residents and clients of residential facilities of the Texas Department of Mental Health and Mental Retardation

Acts 1989, 71st Leg., ch. 678, § 1, at 2322.

Mandatory tests are also permitted when required by article 21.31, Code of Criminal Procedure, of persons indicted for sexual assault; in the case of a person who will undergo a medical procedure that could expose health care personnel to AIDS; and in the case of applicants for insurance coverage authorized by article 21.21-4 of the Insurance Code, added by House Bill 2608. *Id.* chs. 1041, § 1, at 4235; 678, § 1, at 2322; 1041, § 2, at 4237 (insurance coverage for AIDS and HIV infection).

Only two of these exceptions could relate to tests involving deceased as well as living persons. These are the exceptions authorizing AIDS testing to manage accidental exposure to blood and bodily fluids and to screen "blood, blood products, body fluids, organs or tissues" for donation. The latter provision would be superfluous if applied to donations from deceased persons. Under the Anatomical Gift Act, *id.* ch. 678, § 1, at 2993, a gift of all or part of the body authorizes any examination necessary to assure medical acceptability of the gift. See also *id.* at 2998 (removal of certain body tissues and body parts from decedent who dies under circumstances requiring an inquest); Attorney General Opinion JM-356 (1985).

5. This provision might refer to the possibility that a person may be subject to testing under an order issued by the Health Department or a health authority under another provision of the Communicable Disease Prevention and Control Act. Acts 1989, 71st Leg., ch. 678, § 1, at 2315.

Provisions on the disclosure of test results are also expressed in language applicable to the living and not the deceased. The test result made confidential by section 81.103 is defined in section 81.101(5) as follows:

'Test result' means any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody. (Emphasis added.)

Id. at 2322. The definition describes an individual's condition with respect to AIDS in the present tense, suggesting that the legislature was concerned about the results of tests on living individuals.

The 71st Legislature added the following requirement for informing a person that he tested positive:

(b) A positive test result may not be revealed to the person tested without giving that person the immediate opportunity for individual, face-to-face counseling

Id. ch. 1195, § 29, at 4876 (adding section 9.08 to article 4419b-1, V.T.C.S.). This requirement is irrelevant to a positive result from a test performed as part of the autopsy.

Section 81.103, which provides for the confidentiality of AIDS test results, contains provisions that are inconsistent with the provisions establishing the medical examiner's duties in connection with an inquest. It prohibits a person with knowledge of a test result from disclosing it, subject to exceptions that include the following:

(5) . . . health care personnel who have a legitimate need to know the test result in order to provide for their protection and to provide for the patient's health and welfare;

(6) the person tested or a person legally authorized to consent to the test on the person's behalf;

. . . .

(8) the victim of an offense listed in Article 21.31, Code of Criminal Procedure, if the person tested allegedly committed the offense and the test was required under that article.

Id. ch. 678, § 1, at 2323; see also id. (voluntary disclosure of test results by person tested or person legally authorized to consent to the test on the person's behalf).

We conclude that chapter 81, subchapter F, does not control the performance or disclosure of an AIDS test done as part of an autopsy under article 49.25 of the Code of Criminal Procedure. The two provisions are therefore not in conflict with respect to the disclosure of AIDS test results in the autopsy report. Section 81.103 of the Health and Safety Code, which accords confidentiality to AIDS test results, does not apply to the results of an AIDS test included in the medical examiner's autopsy report. The autopsy report is open to the public under the express language of section 11, article 49.25, of the Code of Criminal Procedure. It should be made available to the requestor in its entirety.

S U M M A R Y

Subchapter F of chapter 81 of the Health and Safety Code, which makes the results of AIDS tests confidential, does not apply to AIDS test results included in an autopsy report prepared by a medical examiner in connection with an inquest. Accordingly, the autopsy report, including the AIDS test result, is accessible to the public under the express terms of article 49.25, section 11, of the Code of Criminal Procedure.

Very truly yours,



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