



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

April 12, 1989

Honorable James W. Smith, Jr.
Frio County Attorney
P. O. Box V
Pearsall, Texas 78061-1138

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5485; this decision is OR89-109.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Frio County Sheriff received a request from Mr. Patrick Peranteau, an attorney, for information concerning the medical treatment of an inmate at the Frio County Jail. The requestor asked for manuals detailing procedures used in medical treatment of inmates; names, qualifications and work schedules of medical personnel at the jail; and all records relating to the inmate, including records of medical treatment. A previous letter from the attorney to the county advised the sheriff that the attorney had been retained by a relative of the deceased inmate in relation to damages allegedly suffered from medical treatment at the jail. You claim that this information is protected from public disclosure by section 3(a)(3) and 3(a)(1) of the Open Records Act.

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Section 3(a)(3) of the Open Records Act protects information relating to pending or "reasonably anticipated" litigation involving a governmental entity or its officers or employees. Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App.- Houston [1st Dist.] 1984, writ ref'd n.r.e.). The purpose of the exception is to protect the litigation interests of the governmental entity by requiring that this type of information be sought through the judicial discovery process. Open Records Decision No. 108 (1975).

The test for withholding information under section 3(a)(3) is whether litigation is actually pending or reasonably anticipated; and if so, whether the information in question relates to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). You have submitted a letter from the law firm which demonstrates that litigation is reasonably anticipated. In addition, the information requested obviously relates to the potential litigation. Therefore, this information may be withheld under section 3(a)(3). We note, however, that section 3(a)(3) is a permissive exception, and that, at its discretion, the governmental entity may release the information.

We do not address your 3(a)(1) argument because the information concerned may be withheld under section 3(a)(3). However, section 3(a)(1) would not prevent your releasing the record of the inmate's medical treatment permissively under section 3(a)(3). We enclose a copy of Open Records Decision No. 370 (1983), which discusses the applicability of section 3(a)(1) to medical records.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-109.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
Prepared by Steve Aragon
Assistant Attorney General

JSR/BLS/bc

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cc: Patrick T. Peranteau
Goldstein, Goldstein and Hilley
29th Floor Tower Life Building
San Antonio, Texas 78205

Enclosure: ORD-370

Ref.: ID# 5485