THE ATTORNEY GENERAL
OF TEXAS

June 13, 1989

JIM MATTOX
ATTORNEY GENERAL

Mr. Kirk Swinney
First Assistant City Attorney
The City of Midland, Texas
P. O. Box 1152
Midland, Texas 79702-1152

Dear Mr. Swinney:

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# 5446; this decision is OR89-176.

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 City of Midland received a request under the Open Records Act for several items of information compiled during a police investigation of a death caused by an apparently self-inflicted gunshot, including statements given by named individuals to the police and photographic evidence. Your office has supplied the requested information with the exception of a statement given by one of the named individuals and photographs of the deceased taken by the police. You contend that both items may be withheld from disclosure under section 3(a)(1) of the Open Records Act.

Section 3(a)(1) protects information deemed confidential by law, either constitutional, statutory, or by judicial decision. Two concepts incorporated into section 3(a)(1) and upon which you rely are common law privacy and constitutional disclosural privacy.

Texas courts recognize four forms of common law privacy. The form most relevant to this opinion is referred to as the public disclosure of private facts. The Texas

Supreme Court, in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), set forth a two-part test for this form of privacy under section 3(a)(1). To be excepted from disclosure under section 3(a)(1), the requested information must contain highly intimate or embarrassing facts the disclosure of which would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public.

In Open Records Decision No. 422 (1984), we said that information which reveals that a person was the victim of a self-inflicted wound does not satisfy this standard, since many self-inflicted wounds are accidental. We also concluded, however, that there is a presumption that the details of any instance of a self-inflicted wound, beyond the mere fact that a wound is self-inflicted, are excepted from disclosure by common law privacy. We determined that while the mere fact that a wound was self-inflicted was insufficient to meet the first criterion of the common law privacy test, any information beyond that would satisfy that criterion in that it would reveal highly intimate or embarrassing facts, the disclosure of which would be highly objectionable to a person of ordinary sensibilities. The presumption may be overcome if it is demonstrated that the public has a substantial interest in a particular incident. The request on that occasion was made by an claims adjuster for an insurance company.

Open Records Decision No. 422 is distinguishable on its facts from this request. In that decision, the fact that a self-inflicted wound was either accidental or intentional was relevant only to the right of privacy of the person who was wounded. Because the wound was not fatal, it was appropriate to consider this individual's interest in maintaining the confidentiality of that fact. Revealing an attempted suicide may implicate privacy rights. The death of the victim of the self-inflicted wound in this instance compels us to evaluate in an entirely different light the privacy rights of the third parties described in your letter.

The common law privacy test articulated by the supreme court reflects the acutely personal nature of that right. But it also imposes often harsh limitations on the availability of a cause of action for its invasion, particularly where third persons are concerned. When third persons who may not have been directly implicated in a matter involving a deceased person attempt to assert an

action for the invasion of the deceased's right of privacy or their own, the courts rarely grant relief.

Open Records Decision No. 432 (1985) concerned such a situation. At issue was the availability of photographs taken by police during the investigation of an automobile accident that resulted in a fatality. Some of the photographs showed the deceased person. Two of the asserted grounds for nondisclosure were constitutional and common law privacy. We observed that several decisions of Texas and federal courts conclude the family of a deceased person is not permitted under Texas law to maintain an action for the invasion of the common law right of privacy of the deceased because the right is personal and lapses upon death. Relatives of a deceased person may maintain an action for the invasion of <u>their</u> right of privacy, but such action will fail if the published information does not refer to them. In that instance, the photographs were not excepted from disclosure by section 3(a)(1) because they did not refer to the family of the deceased.

We believe Open Records Decision No. 432 governs this request for information. Since the photographs make no reference to the third parties you describe, we have no occasion to consider whether they may assert their rights of privacy with respect to the photographs. Consequently, the photographs must be disclosed to the requestor.

As for the statement of the person named in your letter, however, we believe the information contained in the statement is, under the circumstances, highly intimate and embarrassing. Disclosure of the statement would be highly objectionable to a reasonable person. Also, in the absence of any allegations of criminal wrongdoing, we are aware of no significant public interest that would warrant disclosure of the statement. Accordingly, the statement is excepted under section 3(a)(1) by the doctrine of common law privacy.

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 OR89-176.

Yours very truly,
Open Government Section
of the Opinion Committee

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Prepared by Steve Aragon
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SA/bc

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