



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

July 10, 1989

Mr. Richard L. Webb  
Office of General Counsel  
The University of Texas System  
201 West 7th Street  
Austin, Texas 78701

Dear Mr. Webb:

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# 6508; this decision is OR89-197.

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.

Your letter of May 19, 1989, requests an opinion concerning whether or not the University of Texas at El Paso must disclose certain information regarding the custodial death of a person arrested by university police. You assert that various Open Records Act exceptions apply to this information, specifically sections 3(a)(2), 3(a)(3), 3(a)(8) and 3(a)(11). Although you claim that these exceptions apply to the information, you do not indicate or explain the reasons or bases for your assertions.

A governmental body claiming that information is excepted from disclosure must shoulder the burden of proof and indicate the reasons for its claim, i.e., how the exception applies to the particular information. A mere assertion that the exception applies will not suffice. A claim that section 3(a)(3) of the act applies requires a showing that litigation is pending or reasonably anticipated

Mr. Richard L. Webb  
July 10, 1989  
Page 2

and that the information at issue relates to the litigation such that withholding the information is necessary to preserve the governmental body's legal strategy or interests in the litigation. Open Records Decision Nos. 511 (1988); 478 (1987). The documents you have submitted in support of your 3(a)(3) claim, consisting only of a newspaper report of the death and an attorney's request for the information, do not fulfill this requirement. Section 3(a)(3), therefore, does not apply.

Similarly, the test for determining whether specific information is protected by section 3(a)(8) is whether release of the information would unduly interfere with law enforcement and crime prevention. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). When section 3(a)(8) is claimed as a basis for withholding information from the public, the government body claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of it would unduly interfere with law enforcement. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 287 (1981); 252 (1980). Your letter does not indicate, nor is it clear from the face of the documents, how or why withholding the requested information would interfere with law enforcement activity; you merely assert that the materials "deal with active detection and investigation efforts by law enforcement agencies," which is not the test for excepting the information. Section 3(a)(8), therefore, does not apply.

Your claim regarding the applicability of section 3(a)(2) is unclear. Section 3(a)(2) exempts from disclosure information in personnel files when that information is protected by a right of privacy. The requested information relates to the arrest and custodial death of a person who was not an employee of the governmental body. The records you enclose are not investigation reports concerning the arresting officer(s) of the kind dealt with in Open Records Decision No. 106 (1975), which you cite.

Similar considerations apply to your claim that section 3(a)(11), dealing with inter-agency and intra-agency memoranda applies. This section excepts from required disclosure inter-agency or intra-agency information that consists of advice, opinion, or recommendation that is used in the deliberative process. You have not shown that the information requested deals in any way with an administrative agency's deliberative process, i.e., in the formulation of policy. Section 3(a)(11), therefore, does not apply.

Mr. Richard L. Webb  
July 10, 1989  
Page 3

At this time, without a showing of compelling reasons why the information at issue should not be released, the information must be released. 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 OR89-197.

Yours very truly,

*Open Government Section  
of the Opinion Committee* DN  
Open Government Section  
of the Opinion Committee  
Prepared by David A. Newton  
Assistant Attorney General

DAN/bc

Ref.: ID# 6508

cc: Federico Soforo  
Attorney at Law  
3116 Montana Avenue  
El Paso, Texas 79903