



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 14, 1989

Ms. Mary Ann Courter
Legal Counsel
Texas Department of Public Safety
5805 N. Lamar Blvd.
Austin, Texas 78773-0001

Dear Ms. Courter:

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# 7336; this decision is OR89-372.

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. Attorney General Opinion H-436 (1974). 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 Department of Public Safety received an open records request for information relating to a fatal automobile accident, including copies of drawings, diagrams, and notes taken at the scene of the accident, witness statements, toxicology reports, and other papers and writings in the department's file. Involuntary manslaughter charges were filed against the driver of one of the automobiles involved in the accident, and the case is to be presented to a grand jury.

You have submitted to this office as responsive to this request a "Texas Highway Patrol Major Accident Investigation" report. This report consists of documentation that will be presented to a grand jury. The report, which was prepared by a state trooper, includes a schematic hand-drawn diagram of the roadway and location of

the vehicles involved in the accident; completed forms describing each vehicle involved; notations as to the conditions of the vehicles and their various systems (windows, headlights, etc.), the persons involved, the odors detected, the condition of the vehicles as found, and the road conditions; notations as to physical evidence and descriptions of the physical and mental conditions of the drivers; trip information; names of witnesses; conclusions drawn by the investigator; and a speed computation sheet.

The requestor was given a copy of a peace officer's accident report that was prepared pursuant to section 47 of article 6701d, V.T.C.S., which makes such reports public reports open for inspection. The peace officer's report indicates the cause of the accident, conditions existing at the time of the accident, and the persons and vehicles involved. A diagram of the roadway and vehicles is also part of the peace officer's report, as is a narrative of the investigating officer's opinion about what happened, and an indication of factors and conditions in the accident. Both reports, the peace officer's report and the Texas Highway Patrol Major Accident Investigation, were prepared by the same person. A state trooper is a peace officer. See art. 2.12. Code Crim. Proc.

The department claims that the major accident investigation report is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts information deemed confidential by law, including statute and judicial decision. You claim that because the investigation report will be presented to a grand jury, it is deemed confidential by article 20.02 of the Code of Criminal Procedure. Article 20.02 provides as follows:

The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, and to imprisonment not exceeding thirty days.

The major accident investigation report does not fall within this statute, as it is not part of the deliberations of the grand jury, it has not been presented to a grand

jury, and it was not created at the direction of a grand jury. Cf. Open Records Decision No. 398 (1983) (audit report prepared at direction of grand jury for use in its deliberations not covered by Open Records Act). The Open Records Act does not apply to information within the actual or constructive possession of a grand jury. Open Records Decision No. 513 (1988). The fact that information is collected and prepared by a district attorney and is submitted to a grand jury, however, does not mean that it is within the constructive possession of the grand jury nor that it is part of the grand jury's deliberations, especially if the information is also held by the district attorney or, as here, by another governmental entity. Id.

Information not in the actual or constructive possession of the grand jury may be withheld if releasing the information would reveal the grand jury deliberations. Id. Such is not the case here, as the information is not in the actual or constructive possession of the grand jury, and release of it in any case would not tend to reveal their deliberations. Section 3(a)(1) does not protect this report.

As to your claim that the investigation report is protected by sections 3(a)(3), the litigation exception, and 3(a)(8), the law enforcement exception, your request is governed by Open Records Decision No. 43 (1974). In that decision, this office concluded that supplementary accident reports, which included photographs of the accident, the statements of two police officers who witnessed the accident, and a follow-up investigation, were not excepted from required public disclosure under sections 3(a)(3) or 3(a)(8) of the act, because the supplementary reports were part of the official accident report and public information under section 47 of article 6701d, V.T.C.S., just as was the standard "Texas Peace Officer's Report" that was provided to the requestor. When the information is developed as part of the preparation of an official report specifically made public by statute, neither section 3(a)(3) nor 3(a)(8) applies.

A toxicology report was also requested from the department, but was not available at the time of the request. A toxicology report prepared for the purpose of possible prosecution of a criminal offense is excepted from required public disclosure by section 3(a)(8). Attorney General Opinion No. H-861 (1976); Open Records Decision Nos. 478 (1987); 127 (1976). Once the criminal investigation is complete, the results of any blood alcohol test related to the investigation may no longer be withheld. Open Records

Ms. Mary Ann Courter
November 14, 1989
Page 4

Decision No. 478. You may not, however, withhold any intoxication test results from the test subject or the subject's authorized attorney, when the subject requests those results pursuant to the right of access granted by section 3(e) of article 67011-5, V.T.C.S., which provides that a person who has been so tested, or his attorney, may obtain full information concerning the results of such test. See V.T.C.S. art. 67011-5, § 3(e); Open Records Decision No. 478. It is not clear to this office whether the requestor here is the attorney for the person whose toxicology report is sought. If he is, the test results must be released to him.

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 OR89-372.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
Prepared by David A. Newton
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Enclosure: ORD-513
ORD-43

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