



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

November 20, 1989

Mr. W. Kent Johnson
Director, Legal Services
Texas Department of Mental
Health & Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

Dear Mr. Johnson:

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# 7885; this decision is OR89-384.

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 Texas Department of Mental Health and Mental Retardation received a request for quality assurance reports on the outpatient centers of eight state hospitals. In informal ruling OR89-321, this office ruled that similar reports on county mental health facilities were public records. You state, however, that section 3(a)(3) of the Open Records Act, the "litigation exception," protects the records at issue here. You note that the records may be relevant to litigation styled RAJ v. Jones, pending in federal court. This issue was not addressed in informal decision OR89-321.

As a preliminary matter, we note that the requestor here is the staff attorney for the plaintiffs in RAJ v. Jones. It is not clear whether the requestor sought

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the records at issue through civil discovery or the Open Records Act. The Open Records Act does not create privileges from civil discovery. V.T.C.S. art. 6252-17a, § 14(f); Attorney General Opinion JM-1048 (1989). Consequently, if a party to a lawsuit involving the department submits a request for production, the request should be opposed, if at all, through the rules of civil procedure. See Attorney General Opinion H-231 (1974).

In this regard, we understand that the judge in RAJ v. Jones has ordered the release of the reports at issue. Even if the litigation exception protects information, once the information has been discovered in litigation, it cannot be withheld from public disclosure. Open Records Decision Nos. 511 (1988); 349 (1982). The court has ruled that the reports are public under the Open Records Act.

Moreover, to claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or reasonably anticipated, and 2) that 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). See Open Records Decision Nos. 416 (1984); 180 (1977); 135 (1976). The department has not shown how section 3(a)(3) applies to the information at issue.

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 OR89-384.

Yours very truly,

Open Government Section
of the Opinion Committee

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Prepared by Jennifer S. Riggs
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