



Office of the Attorney General

State of Texas

June 21, 1991

DAN MORALES
ATTORNEY GENERAL

Mr. John Schneider
Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501

OR91-303

Dear Mr. Schneider:

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# 11897.

The City of Pasadena received an open records request for all records pertaining to the custodial death of a particular individual. You contend that all of the requested records held by the city come under the protection of sections 3(a)(1) and 3(a)(11) of the Open Records Act.¹ You also state that the city has agreed with the decedent's family not to further publicize the details surrounding the death.

We note at the outset that information is not confidential under the Open Records Act simply because a party requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987) at 2. Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any agreement the city has made specifying otherwise.

Section 3(a)(11) of the Open Records Act excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's deliberative process. Open Records Decision No. 538 (1990). Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinion, and recommendation. Open Records Decision No. 450 (1986). This office previously

¹Although you originally contended that section 3(a)(3), the litigation exception, was also applicable to the requested information, you have failed to substantiate your reasons for raising this exception, despite a request from this office to do so. Consequently, we cannot consider your claims with regard to this exception.

requested in correspondence to you dated April 1, 1991, that you mark the specific portions of the requested documents that you believe come under the protection of section 3(a)(11). You have instead asserted that the entire Internal Affairs investigation of the circumstances surrounding the custodial death is protected by this section.

The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body fails to show how one of the act's discretionary exceptions applies to the records, that exception is deemed waived. See Attorney General Opinion JM-672 (1987). The Internal Affairs investigation file clearly does not consist solely of advice, opinion, or recommendation. You have made no effort to identify the specific portions of the investigation that come under the protection of section 3(a)(11). Consequently, you have waived the protection of this exception.

We next turn to your section 3(a)(1) claims. Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, *supra*. Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. You contend that the information is protected by common-law privacy because it contains details of the decedent's mental health.

Although this office has previously held that information that reveals or tends to reveal evidence of an individuals' emotional or mental distress is protected by common law privacy, *see, e.g.*, Open Records Decision Nos. 422 (1984); 370 (1983), we note that the right of privacy lapses upon death. Attorney General Opinions JM-229 (1984); H-917 (1976). This aspect of section 3(a)(1) is therefore inapplicable to the decedent. On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld under the common-law privacy aspect of section 3(a)(1). See Attorney General Opinion JM-229. We have identified and marked only a few sentences in the police reports that may implicate the privacy rights of third parties; these are the only portions that come under the protection of common-law privacy.

Section 3(a)(1) also protects information deemed confidential by statutory law. You indicate that because the actions taken by the Pasadena police officers were in the nature of mental health proceedings, the requested information comes

under the protection of V.T.C.S. articles 5547-26 through 5547-82. None of those statutes, however, provide for the confidentiality of the records at issue. *But see* V.T.C.S. art. 5547-87 (records of a *mental health facility* that reveal the identity of a proposed patient are confidential except where disclosure is permitted by other state law).

Other statutes do, however, act to protect some of the requested documents. You must withhold pursuant to section 5.08(b) of article 4495b, V.T.C.S., all "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." You must also withhold pursuant to article 49.18 of the Code of Criminal Procedure parts II through V of the Custodial Death Report submitted to the Office of the Attorney General. *See also* Open Records Decision No. 521 (1989). Finally, you must withhold all criminal history information of the deceased. *See* Open Records Decision No. 216 (1978) at 5. The remaining information must, however, 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 OR91-300.

Yours very truly,



Steve Aragon
Assistant Attorney General
Opinion Committee

SA/RWP/lb

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Enclosures: Marked documents

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