



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1993

Mr. Kenneth R. Stein
Matthews, Carlton & Stein, L.L.P.
Four Forest
12222 Merit Drive, Suite 800
Dallas, Texas 75251

OR93-354

Dear Mr. Stein:

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# 19867.

The Cherokee County Sheriff's Department (the "county") received an open records request for certain documents relating to a death that occurred in the county jail. Specifically, the requestor seeks "all investigative files in your custody pertaining to the death of . . . Michael Gene Garner." You contend that the information may be withheld from the public pursuant to section 3(a)(3) of the Open Records Act (the "act"). You also contend that sections II through IV of the "Custodial Death Report" is deemed confidential by law under section 3(a)(1) of the act in conjunction with article 49.18(b) of the Code of Criminal Procedure.

Section 3(a)(1) excepts information "deemed confidential by law, either Constitutional, statutory, or by judicial decision." Article 49.18(b) of the Code of Criminal Procedure provides in relevant part:

If a person dies . . . while confined in a jail or prison, the director of . . . the facility in which the prisoner was confined shall investigate the death and file a written report of the cause of death with the attorney general The attorney general shall make the report, with the exception of any portion of the report that the attorney general determines is privileged, available to any interested person.

In Open Records Decision No. 521 (1989), this office determined that sections two through five of a Custodial Death Report were prohibited from disclosure as

confidential information. Therefore, section 3(a)(1) of the act in conjunction with article 49.18(b) authorizes you to withhold sections two through five of the Custodial Death Report.

With respect to the rest of the request, you contend that section 3(a)(3) excepts the information from disclosure because the county may reasonably anticipate litigation. To secure the protection of section 3(a)(3), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance you have made the requisite showing that the requested records relate to reasonably anticipated litigation for purposes of section 3(a)(3); the requested information may therefore be withheld.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 3(a)(3). Finally, the applicability of section 3(a)(3) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Opinion Committee

LRD/TCC/jmn

Ref.: ID# 19867
ID# 19872

Enclosures: Submitted documents

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