



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 20, 1995

Ms. Tamara Armstrong
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR95-1103

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35225.

Travis County (the "county") received a request for:

1. A copy of all internal affairs investigation notes, witness statements, photographs, incident reports, memos, letters or other investigating documents relating to the investigation of [the death of Andrew Burgamy McNair]; and
2. A complete copy of the Travis County Sheriff's Office file relating to this matter.

You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

You claim that sections II through V and the attachments to the custodial death report are excepted from disclosure pursuant to article 49.18 of the Code of Criminal Procedure and Open Records Decision No. 521 (1989).¹ Section 552.101 excepts from

¹You state that you have made section I of the custodial death report available to the requestor.

disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We conclude that, pursuant to article 49.18 of the Code of Criminal Procedure, as applied through section 552.101 of the Government Code, you may withhold sections II through V of the custodial death report. *See* Open Records Decision No. 521 (1989). Similarly, the documents compiled and attached to the custodial death report as attachments may be withheld. *Id.* at 7.

You claim that "all other documents relating to the death of Andrew McNair are also privileged from discovery under Rule 166b 3" and are therefore protected under article 49.18(b) of the Code of Criminal Procedure. We disagree. In Open Records Decision No. 521 (1989) at 6, this office concluded that although article 49.18 authorized the withholding of sections II through IV of the custodial death report and the attachments to that report:

This does not mean that the specific pieces of information contained in the form cannot be obtained through an open records request when the information exists in other forms; it simply means that the investigative report required by subsection (b) need not be released to the public.

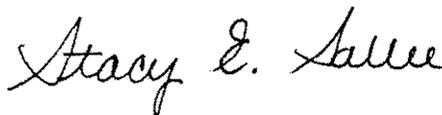
In that opinion, we concluded that if a governmental body receives a request for information maintained as part of its ordinary responsibilities, the documents may be withheld only if one of the Open Record Act's exceptions or another specific law protects them. *Id.* at 7. As the documents are not otherwise excepted from disclosure under the Open Records Act and appear to have been collected as part of the county's ordinary responsibilities, article 49.18 does not except the documents in Exhibit "B" from disclosure. *See* Open Records Decision No. 138 (1976) (statute protecting information regarding nursing homes from disclosure does not apply to same information gathered for governmental body's own purposes in regular course of its activities).

You next claim that section 552.103(a) excepts the documents in Exhibit "B" from disclosure. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The county must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). You claim that litigation is anticipated because of the severity of the incident at issue. However, you offer no evidence of any threat of litigation. Therefore, we conclude that you have not established that litigation is reasonably anticipated. Therefore, the county may not withhold the documents in Exhibit "B" from required public disclosure. We note that the autopsy report contained in Exhibit "B" must be disclosed. It is expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 35225

Enclosures: Submitted documents

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(w/o enclosures)