



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 24, 1997

Mr. Kevin O'Hanlon  
O'Hanlon & Associates  
1200 Lorrain  
Austin, Texas 78703

OR97-0422

Dear Mr. O'Hanlon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 104005.

The Progreso Independent School District (the "district"), which you represent, received a request for a copy of the autopsy report resulting from the district-financed autopsy of a deceased student. You contend that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Initially, we note that in light of the facts presented this particular autopsy report is not public under section 11, article 49.25 of the Code of Criminal Procedure. That section provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. Such records shall be public records.

Code Crim. Proc. art. 49.25, § 11. The autopsy was not performed as part of a criminal investigation. The district, with the consent of the deceased student's parents, retained the services of a private physician to perform an autopsy on the student. Thus, section 11, article 49.25 of the Code of Criminal Procedure is not applicable here.

You assert that the autopsy report is a "student record" and is, therefore, excepted from disclosure under sections 552.026 and 552.114 of the Government Code. Section 552.026 states

that the Open Record Act does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), Title 20, section 1232g of the United States Code. Section 552.114 excepts from disclosure information in a student record at an educational institution funded wholly or partly by state revenue. However, the confidentiality accorded student records by section 552.114 and FERPA terminates upon the death of the student. Open Records Decision No. 524 (1989) at 4. Therefore, the autopsy report is not excepted from disclosure under FERPA or section 552.114 of the Government Code.

Next, we consider whether the autopsy report is excepted from disclosure under section 552.101 of the Government Code in conjunction with the doctrines of common-law and constitutional privacy. Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.101 also excepts information that is confidential under constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently, and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.*

First, Texas law does not permit the family of a deceased person to maintain an action for the deceased's right of privacy because that right is personal, and a deceased person has no right of privacy. Open Records Decision No. 432 (1985), citing *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); see *Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (Texas does not recognize relational or derivative right of privacy). Second, we do not believe that disclosure of the autopsy report infringes upon the common-law or constitutional privacy rights of the deceased's family members. Third, we find that there is a legitimate public interest in the autopsy report. Therefore, the district may not withhold the autopsy report from disclosure under section 552.101 of the Government Code.

Finally, you contend that the autopsy report is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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. You have not established that the district reasonably anticipates litigation relating to the death of the student. Furthermore, because the deceased student's family has been provided with a copy of the autopsy report, the district no longer has a section 552.103(a) interest in the autopsy report. *See* Open Records Decision No. 551 (1990) (section 552.103(a) not applicable to information to which opposing party in litigation has access). Thus, we conclude that the district may not withhold the autopsy report from disclosure under section 552.103(a) of the Government Code.

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 regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 104005

Enclosures: Submitted documents

cc: Ms. Jeanne Russell  
The Monitor  
615 S. Texas Blvd.  
Weslaco, Texas 78596  
(w/o enclosures)

Mr. Richard G. Roth  
Attorney at Law  
P.O. Box 5267  
Brownsville, Texas 78520  
(w/o enclosures)

