



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 5, 1989

Ms. Anita O'Rourke
Assistant County Attorney
San Patricio County
Courthouse, Room 102
Sinton, Texas 78387

Dear Ms. O'Rourke:

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# 6013; this decision is OR89-154.

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. 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 sheriff of San Patricio County has received a request for inspection and duplication of a tape recording obtained by the sheriff's department in the course of a murder/suicide investigation. The recording contains statements made by a man whom you state shot two persons, one fatally, before killing himself. The surviving victim, through his attorney, has requested a copy of the tape recording.

You oppose disclosure of the contents of the tape recording on three grounds. First, you argue that a tape recording is not a "public record" as defined by section 2(2) of the Open Records Act. Second, you contend that even if it is found that the recording is a public record, it is excepted from disclosure by section 3(a)(8) of the act. Finally, you claim that the county has no authority to

release the tape recording because it is not the property of the county.

The term "public records" is defined as

the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information. (Emphasis added.)

V.T.C.S. art. 6252-17a, § 2(2). Section 3(a) gives meaning to the term "public information":

All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information (Emphasis added.)

The form in which public information is stored does not determine its availability under the Open Records Act. Attorney General Opinion JM-672(1987). Since the inception of the Open Records Act, tape recordings have been considered public records within the meaning of section 2(2). See, e.g., Open Records Decision No.32 (1974). This remains the rule even when the tape recording is not considered the property of the governmental body in custody of it. See Open Records Decision No. 519 (1989). Thus, the Open Records Act is not rendered inapplicable by the fact that the request in this instance is for information contained on a tape recording that is not the property of the county. We must therefore determine whether the information contained on the tape is excepted by section 3(a)(8) of the act.

Section 3(a)(8) excepts from public disclosure

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

The test for determining whether information may be withheld under this section is whether release of the information will unduly interfere with law enforcement and crime

prevention. Ex parte Pruitt, 551, S.W.2d 706 (Tex. 1977). When section 3(a)(8) is claimed as an exception, the agency claiming it must reasonably explain, if the information does not disclose an explanation on its face, how and why release of the information will unduly interfere with law enforcement. Open Records Decision No. 432 (1985). Decisions under this section are made on a case-by-case basis.

You suggest that the tape recording is much like the kinds of information held to be within the section 3(a)(8) exception in Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976). You also suggest that since no charges were filed in this matter, the tape recording is not public information. You rely on Open Records Decision No. 127 for this proposition.

Despite these contentions, however, you have failed to demonstrate how and why disclosure of the contents of the tape recording in this instance will unduly interfere with law enforcement and crime prevention. You state that the county sheriff has closed the investigation into this matter and suggest that no charges will be filed. This indicates that release of the requested information will not compromise law enforcement interests to the extent necessary to justify nondisclosure. See Open Records Decision No. 378 (1983) (availability of section 3(a)(8) greatly restricted when an investigative file is closed). Open Records Decision No. 127, meanwhile, did not hold that photographs taken by police during an investigation in which no charges were filed were not public information. Rather, it concluded such photographs were excepted from disclosure because their release might reveal investigative techniques or jeopardize the safety and cooperation of witnesses or, in other words, unduly interfere with law enforcement. Photographs taken by police during an investigation are public records that may be withheld pursuant to section 3(a)(8) only if the test for that section is met. See, e.g., Open Records Decision No. 432 (1985). Consequently, since you have failed to make the necessary showing, the tape recording is not excepted by section 3(a)(8).

At the outset of this letter we noted that the Open Records Act does not require this office to raise exceptions for a governmental body and that the failure of the governmental body to assert applicable exceptions constitutes a waiver of those exceptions unless the information is deemed confidential by law. Under section 3(a)(1) of the act,

information may be deemed confidential by the constitution, by statute, or by judicial decision. Incorporated into section 3(a)(1) are the doctrines of common law and constitutional privacy. Because the tape recording concerns matters that might be covered by the common law right of privacy, it is appropriate to consider whether the information contained on the tape recording is excepted by that doctrine.

Texas courts recognize four forms of common law privacy. The form most relevant to this ruling is known as the public disclosure of private facts. The Texas Supreme Court, in Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), set forth the test for this form of common law privacy under section 3(a)(1): information may be withheld under section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See 540 S.W.2d at 683-685.

The test articulated by the supreme court not only reflects the acutely personal nature of the right of privacy, but also imposes limitations on the availability of a cause of action for the invasion of that right, particularly where third persons are concerned. When third persons who may not have been directly implicated in a matter involving a deceased person attempt to assert an action for the invasion of the deceased person's right of privacy or their own, the courts severely curtail such actions.

Open Records Decision No. 432 considered such a situation. At issue was the availability of photographs taken by police at the scene of an automobile accident that resulted in a fatality. Some of the photographs showed the deceased person. Two of the asserted grounds for nondisclosure were constitutional and common law privacy. We observed that several decisions of Texas courts and federal courts conclude the family of a deceased person is not permitted under Texas law to maintain an action for the invasion of the common law right of privacy of the deceased because the right of privacy is personal and lapses upon death. Relatives of a deceased person may maintain an action for the invasion of their right of privacy, but such action will fail if the published information does not refer to them. On that occasion, the photographs were not

excepted from disclosure by section 3(a)(1) because they did not refer to the family of the deceased.

In this instance, the requested information does indeed refer to family members, and for that reason it might be argued that the information may be withheld under section 3(a)(1). It must be remembered, however, that in order for the information to be withheld it must satisfy the two-part test for common law privacy. We have reviewed the tape recording and conclude that while it refers to members of the deceased person's family, it does not communicate highly intimate and embarrassing facts about those family members such that disclosure would be highly objectionable to a reasonable person. Case law in this area, moreover, has uniformly held that the murder of an individual is a matter of legitimate public concern, and that the publication of information concerning the murder generally does not invade the the rights of relatives. See, e.g., Justice v. Belo Broadcasting Corp., 472 F.Supp. 145 (N.D. Tex. 1979); Moore v. Charles B. Pierce Film Enters., Inc., 589 S.W.2d 489 (Tex. Civ. App. - Texarkana 1979, writ ref'd n.r.e.); Waters v. Fleetwood, 91 S.E.2d 344 (Ga. 1956); Bremmer v. Journal - Tribune Publishing Co., 76 N.W.2d 762 (Iowa 1956). Accordingly, while we are not unsympathetic to the interests of the family of the deceased, we must conclude that the information contained on the tape recording submitted for our review is not excepted from disclosure under the Open Records Act by common law privacy. This office is not at liberty to expand the common law privacy right incorporated in section 3(a)(1) of the Open Records Act.

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 OR89-154.

Yours very truly,

Open Government Section
of the Opinion Committee

Prepared by Steve Aragon
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