



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 31, 1989

Honorable Michael J. Guarino
Criminal District Attorney
Galveston County, Texas
405 County Courthouse
Galveston, Texas 77550

Dear Mr. Guarino:

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# 6593; this decision is OR89-225.

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 Criminal District Attorney of Galveston County received an open records request from the Cataract Institute of Texas for a copy of a report on an investigation into possible violations of the Medical Practice Act, V.T.C.S. article 4495b, section 3.0. You indicate that the report was labelled "Confidential" and intended for use by your office pending a decision to prosecute. Copies of the report were sent to the State Board of Medical Examiners, the Consumer Protection Division of the Attorney General's Office, the Health Care Financing Administration (charged with the administration of Medicare), and to the Harris County Medical Society, a private professional association. A newspaper, the Houston Chronicle, also obtained a copy of the report and the report and its author were mentioned in a lengthy article in that newspaper, although you state that your office did not release it to any media source. You

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seek to withhold the report because you feel that potential civil or criminal litigation may occur, generated either by your office or one of the other agencies to which the report was given. Without specifically citing it, you claim that section 3(a)(8), known as the "law enforcement exception," protects the report from public disclosure. You also claim that there is a possibility of civil or criminal litigation concerning the subject of the report, thus raising section 3(a)(3) as an exception to disclosure. We disagree with your contention that the information is protected from disclosure by either of these exceptions, and conclude that since the information has not in fact been maintained as confidential, that part of it that is not protected from disclosure under section 3(a)(1) as information deemed confidential by law, may not be withheld. See Open Records Decision No. 162 (1977).

If a governmental body releases information to one member of the public, the act's exceptions to disclosure are waived, unless the information is deemed confidential under the act. See Open Records Decision No. 490 (1988). Selective disclosure of information is prohibited. Open Records Decision No. 463 (1987). If information does not fall within a specific exception, it must be disclosed to any person who requests it. Id.; see also Open Records Decision No. 192 (1978). Although transferring information from one government agency to another does not destroy the protected character of the information so long as each agency is authorized to have it, see Open Records Decision No. 272 (1981); Attorney General Opinion H-917, when the report requested here was disseminated to an organization outside the scope of the criminal investigation conducted by your office, you waived any claim that might be made under section 3(a)(8) that the information is excepted from disclosure. See Open Records Decision No. 400 (1983). Voluntary disclosure of records is not prohibited under the Open Records Act, unless disclosure is expressly prohibited; provided that once disclosure is made the records must then be available to anyone requesting them. See V.T.C.S. art. 6252-17a, § 14(a); Open Records Decision No. 490 (1988). The report was given by your office to two state agencies, a federal agency and a private professional association. Although you contend that each of these entities has a "legitimate jurisdictional claim" to the report, you cite no statutory authority supporting a limited disclosure of the report only to those entities. See Open Records Decision No. 490 (Board of Vocational Nurses authorized by statute to transfer complaint information without violating section 10(a) prohibition against release of information deemed confidential by law). We note that the Harris County

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Medical Society is not a governmental body, the disclosure to which might colorably be considered a transfer of information from one government agency to another which would not have destroyed the protected character of the information. As you have waived these exceptions to disclosure, all of the information not otherwise protected from disclosure must be released.

We conclude, however, that some of the information sought is protected under section 3(a)(1), as information deemed confidential by law, specifically the Medical Practice Act, V.T.C.S., article 4495b, section 5.08(b), which reads as follows:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

Certainly any letters from a physician to your office in connection with a patient falls within the protection of this section and may not be disclosed. We note that you have enclosed such a letter as information responsive to the request, though it was not necessarily requested. Likewise, information in the investigative report that identifies or might tend to identify a patient is protected and may not be disclosed. However, statements made by a patient directly to the investigating attorney rather than to a physician are not protected by this section. We have marked those sections of the report that should be withheld. With appropriate deletions, then, the report must 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 OR89-225.

Yours very truly,

*Open Government Section
of the Opinion Committee* 

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Prepared by David A. Newton
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DAN/bc

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Enclosure