



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

October 27, 1989

Mr. Jesus Toscano, Jr.
Assistant City Attorney
City Hall
Dallas, Texas 75201

Dear Mr. Toscano:

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# 5786; this decision is OR89-349.

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 Dallas Police Department (DPD) received an open records request for "all diaries, books and/or personal writings" of a murdered psychologist that were seized by the DPD, all photographs, sketches and/or drawings of the victim that were taken at the scene of the murder, and the autopsy report concerning the victim. You contend that subsections 3(a)(1), (a)(3), and (a)(8) of the Open Records Act protect the first two categories of documents from required public disclosure, and state that you referred the requestor to the Dallas County Medical Examiner for the autopsy report because "the Medical Examiner and not the City of Dallas is the official custodian of autopsy reports."

As a preliminary matter, the fact that a request for public records might be more appropriately directed to a different branch of a governmental body, or to a different governmental body, does not mean that it can be dismissed by the governmental body that received the request. Attorney General Opinion JM-266 (1984); Open Records Decision No. 497

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(1988). If the DPD receives an open records request for the report of an autopsy performed pursuant to Article 49.25 of the Code of Criminal Procedure and a copy of that report is in the DPD's possession, the department must release the report, which is a public record. See Code Crim. Proc. art. 49.25, § 11.

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime. Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 (1986). You contend that section 3(a)(8) protects photographs taken at the scene of the murder because the photographs depict the location and condition of the victim's body and other evidence that, if revealed, could alert the assailant of evidence in the hands of the police. You claim that such disclosure could create an opportunity for the murderer to either create an alibi, fabricate a story, or flee,¹ thus thwarting the investigation.

In this instance, this office believes your contentions regarding the photographs taken by police investigators are valid. In Open Records Decision No. 378 (1983), this office indicated that photographs taken by police at the scenes of crimes that are still under investigation may be withheld pursuant to section 3(a)(8) if release of the photographs would unduly interfere with the investigation. You may, therefore, withhold the photographs pursuant to section 3(a)(8). You may not, however, withhold photographs that are part of the autopsy.

Further, you may not withhold the notebooks and diaries seized from the victim's home simply because they contain personal notations about potential suspects. Section 3(a)(8) protects the records and notations of law enforcement agencies; it does not necessarily protect information collected as evidence by law enforcement agencies. Moreover, you have not shown that you are investigating any of the individuals mentioned in the books.

1. We note that it is likely the assailant already has sufficient motivation to flee or create an alibi.

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Portions of the diaries and notebooks may, however, be withheld pursuant to section 3(a)(1), which protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. Id. at 683-85. Although the victim's right of privacy lapsed upon her death, see Attorney General Opinion JM-229 (1984), the notebooks and diaries identify the victim's clients and contain highly intimate and embarrassing information about them and other individuals that should be withheld under the common-law privacy aspect of section 3(a)(1). See Open Records Decision No. 370 (1983). The portions of the personal logs that identify clients and living persons who had relationships with the victim may be withheld. The remainder must be released.

Finally, please note that the request at issue here was made by the family of the victim. The fact that the notebooks, or portions of them, are not public does not mean that the survivors of the victim may not have a property right in obtaining the notebooks.

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 OR89-349.

Yours very truly,

Open Government Section
of the Opinion Committee
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of the Opinion Committee
Approved by Jennifer S. Riggs
Chief, Open Government Section

JSR/RWP/le

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