



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1993

Honorable Tim Curry
Criminal District Attorney
Tarrant County
401 West Belknap Street
Fort Worth, Texas 76196-0201

OR93-055

Dear Mr. Curry:

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# 17787.

The Tarrant County Criminal District Attorney's Office (the "criminal district attorney") and the Tarrant County Sheriff's Department (the "sheriff") have received several requests for information relating to Troy Dale Farris, an inmate of the Texas Department of Criminal Justice currently under sentence of death, and four other individuals involved in the investigation culminating in Mr. Farris' conviction for capital murder. Generally, the requestor seeks all information in the possession of the criminal district attorney and the sheriff relating to Mr. Farris, to three witnesses, and to the deputy sheriff who investigated Mr. Farris' case. The requestor seeks essentially the same information for each of the five individuals: all files and documents relating to the investigation of criminal incidents, arrests, and detention in any Tarrant County facility, "including but not limited to visitation and interview logs, placement, disciplinary records, psychological and mental records." In addition, the requestor seeks 16 other specified categories of information relating to the investigation resulting in Mr. Farris' conviction. The requestor has obtained authorizations for release of records from two of the individuals to whom the requested information relates. You claim that the requested information is excepted from required public disclosure under sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(8), and 3(a)(11) of the Open Records Act.

We address first your claim that the requested information is excepted from required public disclosure under section 3(a)(3) of the act. Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). In Open Records Decision No. 597 (1991) (copy enclosed), this office held that section 3(a)(3) cannot be invoked to withhold from disclosure first page offense report information held to be open 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) from a defendant who has been indicted, because that information has already been made available to the defendant in the course of his charge and indictment.

You advise us that the requestor on behalf of Mr. Farris has filed an application for post-conviction writ of habeas corpus with the District Clerk of Tarrant County, Texas, which is styled *Ex parte Farris*, No. C-3-1802-0244282-A, (Crim. Dist. Ct. No. 3 of Tarrant County, Sept. 8, 1992). Accordingly, we conclude that litigation is pending. See V.T.C.S. art. 6252-17a, § 3(e) ("the state or a political subdivision is considered to be a party to litigation . . . until . . . the defendant has exhausted all appellate and postconviction remedies in state and federal court"). Moreover, we accept your determination that the requested information relates to the pending litigation. Accordingly, unless already released to the requestor through disclosure, court order, or other means, the requested information may be withheld from required public disclosure under section 3(a)(3) of the Open Records Act with the exception of front page offense report information.

We need also address whether two statutory provisions authorizing special rights of access override the exceptions to required public disclosure enumerated in section 3(a) of the act, including section 3(a)(3). Exceptions in the Open Records Act cannot authorize a governmental body to withhold information where statutes aside from the Open Records Act grant specific entities or individuals access to specific information. See, e.g., Open Records Decision Nos. 598 (1991); 500 (1988); 478 (1987); 451 (1986). Section 5.08 of the Medical Practice Act, article 4495b, V.T.C.S., generally makes records of the treatment of a patient created by or under the supervision of a physician confidential, but also provides, in pertinent part:

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

.....

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section.

V.T.C.S. art. 4495b, § 5.08. Subsection (j) provides, in pertinent part:

(1) Consent for the release of confidential information must be in writing and signed by the patient . . . provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

V.T.C.S. art. 4495b, § 5.08(j).¹ In Open Records Decision No. 546 (1990), this office held that all information protected from public disclosure by section 5.08 of the Medical Practice Act must be withheld absent a valid consent for release, concluding that the requestor was not entitled to medical records on the basis of a release which did not state the reasons or purposes for the release of the records. We come to the same conclusion here. Neither of the releases submitted to us for review states reasons or purposes for release of the medical records. Accordingly, the consents are not in compliance with section 5.08(j)(1)(B), and any medical records may not be released in accordance with section 5.08 of the Medical Practice Act.

Sections 611.002 and 611.003 of the Health and Safety Code make confidential information created by a person licensed or certified by the state to treat any mental or emotional condition or disorder. Records made confidential by section 611.002 include:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional

Health & Safety Code § 611.002. The privilege of confidentiality may be claimed by the patient, a person representing the patient, and the professional on behalf of the patient. Health & Safety Code § 611.003. Section 611.004 provides, in pertinent part:

(a) A professional may disclose confidential information only:

. . . .

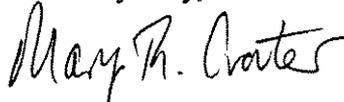
(4) to a person who has the written consent of the patient

¹You raise this statute and appear to concede that it would apply to any requested medical records. As you have not submitted any medical records to us for review, we shall assume that this is the case.

Health & Safety Code § 611.004; *see also* Open Records Decision Nos. 316, 314 (1982).² Mr. Farris' release permits, *inter alia*, release of "all medical and psychiatric or mental health records." We conclude that this consent meets the standards set forth in section 611.004. Accordingly, requested records made confidential by sections 611.002 and 611.003 of the Health and Safety Code that relate to Mr. Farris must be made available to the requestor. Mr. Elisher's consent runs to "all records, case files, and court files in the possession of any city, county, state, or federal law enforcement agency," including, "any and all information and records or any other type of report or record maintained by any of the above agencies." Mr. Elisher's broad consent cannot reasonably be construed to waive his right of confidentiality under chapter 611.

As we resolve this request under sections 3(a)(1) and 3(a)(3) of the Open Records Act, we need not address the applicability of sections 3(a)(7), 3(a)(8), and 3(a)(11) at this time.³ 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 OR93-055.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/mc

Ref.: ID# 17787

cc: Ms. Cecelia A. Ackels
Baker & McKenzie
4500 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

Enclosure: Open Records Decision No. 597

²You raise this statute and appear to concede that it would apply to any such information requested. Because you have not submitted any such information to us for review, we shall assume that this is the case.

³We note that some of the requested information may include records generated by the National Crime Information Center (NCIC). Such information may be released only in accordance with title 28, part 20 of the Code of Federal Regulations, which governs the release of criminal history record information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990).