



The Attorney General of Texas

September 16, 1980

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Honorable Raymond Frank
Travis County Sheriff
Courthouse
Austin, Texas

Open Records Decision No. 252

Re: Whether a closed investigation file in a murder case is available to the general public.

Dear Sheriff Frank:

You have asked us to decide whether material in three investigatory files must be made available to the general public. The first case concerns a corpse found decapitated and otherwise mutilated; the second concerns a young woman found dead in a car; and the third involves the deaths of two young men by gunshot wounds. Suicide figured in each case, either as an explanation of the victim's death or as a circumstance in the sequence of events investigated. No arrests or prosecutions have occurred, and there are none anticipated at present.

Having reached a resolution in each case, your office determined that the files should be administratively "closed." Subsequently, you received requests from different parties for access to the material in these files. You contend that most of the material in two of the files and some in the third is excepted from disclosure by section 3(a)(8) of the Open Records Act, which authorizes law enforcement agencies to withhold:

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

V.T.C.S. art. 6252-17a, §3(a)(8).

Upon receipt of your request for an opinion, this office, by letter, invited you to explain:

Whether the informer's privilege or the law enforcement agency's ability to obtain information would be compromised if this information were released (and) whether the safety of any witnesses might be endangered if portions of this information were released.

We asked for references to specific portions of documents that might raise these or any other issues. You responded that much of the material should be exempted from disclosure as "work product" or as statements of witnesses and informants, the disclosure of which would hamper efforts in the area of law enforcement.

Open Records Decision No. 216 (1978) considered the application of section 3(a)(8) to investigative files that are no longer active. There, this office, citing Ex parte Pruitt, 551 S.W. 2d 706 (Tex. 1977), observed that although "strong considerations exist for allowing access to investigatory materials, the better policy reason is to deny access to the materials if it will unduly interfere with law enforcement and crime prevention." The following were identified as legitimate, but not exclusive, reasons for withholding information under section 3(a)(8): (1) avoiding interference with the state's prosecution of a potential or pending criminal case; (2) preventing excess publicity which might deprive a defendant of a fair trial; (3) avoiding disclosure of the identity of informants; (4) preventing possible intimidation or harassment of witnesses; and (5) avoiding the unwarranted invasion of personal privacy. See 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., 536 S.W. 2d 559 (Tex. 1976). Whether these interests exist in an inactive investigatory file must be determined on a case by case basis. Open Records Decision No. 216 (1978).

While noting that the purpose of the section 3(a)(8) exception is to protect "valid interests such as maintaining as confidential the investigative techniques and procedures used in law enforcement and insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers," which interests exist "even though there is no prosecution in a particular case," Open Records Decision No. 216 also emphasized that "the [a] ct clearly places the burden on the governmental agency to establish how and why a particular exception applies to requested information." See also Attorney General Opinion H-436 (1974); Open Records Decision Nos. 150 (1977); 127 (1976); 124 (1976); 91 (1975). As Open Records Decision No. 150 (1977) observed, "A general claim that an exception applies to an entire file or report, when the exception clearly is not applicable to all of the information in the file or report, simply does not comport with the procedural requirements of the [a] ct." See also Open Records Decision No. 91 (1975). The question before us, therefore, is whether your office has adequately demonstrated that the section 3(a)(8) exception should apply to information in these three files.

We first consider the file involving the two gunshot victims. You were asked to produce the written file, photographs and physical evidence pertaining to it, and "rules of procedure. . . forms. . . and instructions as to the scope and contents of all training and instruction [manuals] and memoranda relating to the procedure for investigating incidents of this type." Except for the photographs, the physical evidence, investigative procedures and certain excerpts from the file regarding unrelated offenses, investigative techniques and criminal histories of persons, you have indicated no concern that disclosure of this file will interfere with law enforcement and crime prevention. It is within your discretion to make such determinations so long as that discretion is not abused. See Open Records Decision Nos. 216 (1978); 177 (1977). Accordingly, that part of the written file should be made public.

With respect to the photographs, physical evidence, procedures and excerpts that you desire to withhold, however, you have expressed the opinion that inspection thereof would unduly interfere with law enforcement and crime prevention. An agency is in the best position to know whether the disclosure of information pertaining to the detection and investigation of crime would hamper its efforts in the area of law enforcement. However, as we have indicated, the Open Records Act requires that the agency establish how and why a particular exception applies to requested information. Open Records Decision No. 216 (1978). In our opinion, you have failed adequately to establish how and why the section 3(a)(8) exception should apply so as to justify nondisclosure of information relating to investigative procedures and techniques. You have not indicated why the investigative procedures and techniques are any different from those that are commonly known, and we are therefore unable to determine how disclosure of this information or the physical evidence would hamper the investigation and prevention of crime in the context of this or any other case, especially after release of the balance of the file. Accordingly, we conclude that the requested information should be released.

The next file to be considered concerns a woman whose body was found under circumstances that could conceivably suggest homicide. It contains reports detailing the offense, the law enforcement steps taken, evidence gathered, witnesses questioned, investigative techniques employed and information collected about suspects, witnesses, the victim, and about their families and acquaintances. The file was closed after the death was officially ruled a suicide.

The same duty to justify withholding information under section 3(a)(8) exists here. An agency must indicate how and why disclosure of specific material would unduly hamper law enforcement. Because you have neither identified specific material to be withheld nor shown how and why the release of that material might adversely affect your efforts at law enforcement, we conclude that material pertaining to the procedures and investigative techniques employed in this case must be released.

In addition to concerns about investigative techniques and procedures and physical evidence, however, you have voiced particular concern that the identities of informants and witnesses, or information that might lead to them, not be disclosed. While you do not believe that any informants or witnesses are necessarily in danger, you assert that these individuals come forward with the expectation of confidentiality and that unless such confidentiality can be maintained by law enforcement agencies until the time of trial, voluntary citizen cooperation with law enforcement officers will be adversely affected.

In Open Records Decision No. 156 (1977), this office discussed section 3(a)(1), of the Open Records Act which exempts from disclosure "information deemed confidential by law, either Constitutional, statutory or by judicial decision," including the informer's privilege. The informer's privilege, as we observed, is:

in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that

law. . . . The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Quoting Roviaro v. United States, 353 U.S. 53, 59 (1957), Emphasis added).

This privilege, which has long been recognized by Texas courts, see e.g., Agular v. State, 444 S.W. 2d 935 (Tex. Crim. App. 1969), normally applies only to the identity of an informant and not to the content of his communications. However, the content itself is protected when its disclosure would tend to identify the informant. See Open Records Decision No. 216 (1978). In our opinion, this privilege affords a sufficient basis for you to withhold the names and statements of informants.

You also seek to withhold the names and statements of witnesses in these cases. Two reasons for withholding names and statements of witnesses under section 3(a)(8) are that disclosure might either subject the witnesses to intimidation or harrassment or harm the prospects of future cooperation between witnesses and law enforcement authorities. Other reasons may also exist. See Open Records Decision Nos. 216 (1978); 127 (1976).

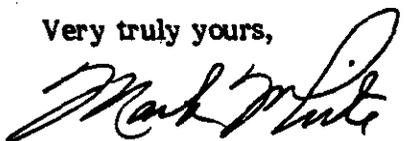
Open Records Decision No. 127 discussed the legitimate section 3(a)(8) interest in "insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers" and noted that this interest exists "even though there is no prosecution in a particular case." Open Records Decision No. 216 recognized the valid interest in protecting witnesses from intimidation and harrassment. There, this office noted that nothing in the fire reports involved therein suggested that the witnesses had been assured of confidentiality or that "disclosure of the identity of the persons interviewed would subject them to intimidation or harrassment by any person." A legitimate inference is that a different set of facts might well have compelled the conclusion that the requested information should be withheld. The decision also emphasized that:

. . . a promise of confidentiality made by a law enforcement officer in the course of an investigation into possible criminal conduct is an important factor in determining whether the section 3(a)(8) exception continues to apply to the information so obtained. (Emphasis added).

We think Open Records Decision No. 216 clearly indicates that the names and statements of witnesses may be withheld, in an appropriate case, even though an express promise of confidentiality has not been given. Where it is apparent from an examination of the facts of the particular case that disclosure might either subject the witnesses to possible intimidation or harrassment or harm the prospects of future cooperation between witnesses and law enforcement officers, the names and statements of witnesses may be withheld. Applying these considerations to this case, we conclude that the names and statements of the witnesses should be released, since the witnesses were not given assurances of confidentiality and it does not appear that disclosure might subject them to intimidation or harrassment or reduce the chances of future cooperation between witnesses and law enforcement authorities.

The last file to be considered concerns the decapitated corpse. The same considerations applicable to the other files are applicable to this one; accordingly, information pertaining to law enforcement procedures and investigative techniques must be disclosed. Information that would reveal the prior criminal histories of various persons, including the decedent, may be withheld. See Open Records Decision No. 216 (1978). However, unlike the previous case, we think the names and statements of witnesses in this case may be withheld. Given the drug-related aspects of this case, it is apparent that disclosure of the names and statements of the witnesses might subject them to harrassment or intimidation.

Very truly yours,



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