



# The Attorney General of Texas

April 15, 1983

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Open Records Decision No. 372

Re: Availability under the  
Open Records Act of transcript  
of telephone conversation  
between persons discussing  
alleged participants in a  
criminal enterprise

Dear Mr. Chappell:

As attorney for the Fort Worth Independent School District, you inform us that the school district is in possession of a transcript of a telephone conversation between a former school district employee and a vendor with whom the school district previously dealt. The conversation concerned a criminal enterprise to misappropriate property and funds of the school district, and during its course a number of people are mentioned by the two speakers.

The school district has received a written request for access to the transcript from a local newspaper. The school district obtained the transcript from the Tarrant County criminal district attorney's office, which had secured a tape of the conversation from an unnamed informant. Neither the tape nor the transcript were introduced as evidence in a criminal trial although both parties to the conversation have been since convicted of crimes in connection with the matter.

A number of the people whose names appear in the transcript have not been charged with violation of the law, but others were convicted of various offenses connected with the criminal district attorney's investigation of the matter, which investigation is now closed. Those named were at the time either current or former officers or employees of the school district, persons doing business with the school district, members of the criminal district attorney's office, or relatives of such persons.

You suggest that the transcript is protected from required disclosure under the Open Records Act, article 6252-17a, V.T.C.S., by section 3(a)(1), thereof, which protects rights of privacy, by section 3(a)(8), which excepts certain records of law enforcement agencies, and by section 3(a)(11), which excepts certain inter-agency or intra-agency memorandums or letters.

In Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), the court addressed the issue of privacy. As discussed by the court, the section 3(a)(1) exception protects both constitutional and common law privacy interests, but constitutional rights of privacy are not implicated unless state action restricts a person's freedom in a sphere recognized to be within a constitutional zone of privacy (which is not the case here); and to be proscribed by a common law right in Texas, the invasion must either (1) unlawfully intrude upon a person's seclusion or solitude, or into his private affairs, (2) unlawfully disclose publicly embarrassing private facts about a person, (3) unlawfully publicize material that places a person in a false light in the public eye, or (4) unlawfully appropriate a person's name or likeness for the advantage of another. Industrial Foundation of the South v. Texas Industrial Accident Board, supra.

The first type of common law privacy invasion, "intrusion," was dealt with in Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973), a wiretap case. See also Gonzales v. Southwestern Bell Telephone Company, 555 S.W.2d 219 (Tex. Civ. App. - Corpus Christi 1977, no writ). The tape of the conversation here, however, was not the product of an unlawful wiretap, and no "intrusion" invasion of privacy is shown here.

The second type of common law privacy invasion, "disclosure," requires proof not only that publicity which would be highly offensive to a person of ordinary sensibilities has been given to matters regarding a person's private life, but that the matter publicized not be of legitimate public concern. Industrial Foundation of the South v. Texas Industrial Accident Board, supra. It is this type of privacy which has most often been addressed in prior open records decisions. See, e.g., Open Records Decision Nos. 351, 343, 339, 328, 318, 316 (1982); 294, 269 (1981); 262, 260, 258, 241 (1980). Accusations against officers, employees, and persons doing business with a public body are of legitimate public concern if, as here, dishonesty in dealing with the public body is charged. See Open Records Decision Nos. 269 (1981), 230 (1979).

The fourth type of common law privacy invasion, "appropriation," is obviously not applicable here; it is the third category, "false light publicity," that raises the most serious question. A "false light" privacy invasion is shown if the false light in which one is placed by publicity would be highly offensive to a reasonable person, and the person publicizing the information had knowledge of its falsity or acted in reckless disregard thereof. Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974). See Restatement (Second) of Torts §652E.

The "false light" privacy tort has been recognized in Texas, Moore v. Charles B. Pierce Film Enterprises, Inc., 589 S.W.2d 489, 490 (Tex. Civ. App. - Texarkana 1979, writ ref'd n.r.e.), as well as

numerous other jurisdictions. See, e.g., Rinsley v. Frydman, 221 Kan. 297, 559 P.2d 334, 339 (1977); McCormack v. Oklahoma Publishing Company, 613 P.2d 737, 739 (Okla. 1980); Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979); Dodrill v. Arkansas Democrat Company, 263 Ark. 628, 590 S.W.2d 840, 845 (1979); McCall v. Courier-Journal and Louisville Times Company, 623 S.W.2d 882, 887 (Ky. 1981). It protects interests similar to those protected by the law of defamation and, like defamation, must be reconciled with constitutional free press and free speech rights. Time, Inc. v. Hill, 385 U.S. 374 (1967). Generally, the tort occurs only if false matter is given publicity, and not if it is merely publicly disclosed, but in Industrial Foundation of the South v. Texas Industrial Accident Board, *supra*, at 540 S.W.2d 684, the Texas Supreme Court noted that the situation regarding "publicity" is changed when it is a governmental unit that makes information available:

In order to protect the individual's privacy interest in information compiled in government records, it must be assumed that for purposes of Section 3(a)(1) of the Act, when a governmental unit makes information in its files available for public inspection, the information is sufficiently 'publicized' to invoke the protection accorded such matters by the tort law.

In Open Records Decision No. 308 (1982), this office applied the law of "false light" privacy to a situation (1) where scurrilous information about a particular individual that was put in an agency's file had been communicated to the public body by an anonymous source, (2) where the agency made a determination that the information was not true, and (3) where we judged the public interest favoring disclosure to be minimal. Under those circumstances, a release of the information would have been in reckless disregard of its truth. The opinion was careful, however, to note that the attorney general is not equipped to determine the truth or falsity of particular information in the manner of a trial court.

Manifestly, we cannot determine the "truth" or "falsity" of the information at issue here, but it is our duty -- as it would be the duty of an appellate court if the question were presented to it -- to declare whether the evidence presented to us for the purpose of justifying non-disclosure of material is sufficient to show that release of information that might place persons in a false light would be in reckless disregard of its truth. In such contexts, reckless conduct is not measured by whether a reasonably prudent man would publish the information, or would investigate before publishing it. There must be sufficient evidence to permit the conclusion that the custodian of the information in fact entertains serious doubts as to the truth of the information. See St. Amant v. Thompson, 390 U.S. 727 (1968). See also V.T.C.S. art. 6252-17a, §10(a), (e) (wrongful distribution of confidential information). In the St. Amant case,

supra, the United States Supreme Court said that a court is likely to find recklessness "where a story is fabricated. . . , is the product of. . . imagination, or is based wholly on an unverified, anonymous telephone call," and also where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. 390 U.S. 732.

In Open Records Act cases, the balance between constitutional rights of free speech and free press, on the one hand, and common law privacy rights, on the other, are affected by the statutory policy of the act, which is to open government records unless they fall clearly within a statutory exception. See Industrial Foundation of the South v. Industrial Accident Board, supra. We do not think a custodian of public records can be convicted of "reckless conduct" if he releases information about individuals found in governmental records, so long as there is an adequate public interest in its disclosure and he entertains no serious doubt about its truth -- particularly, if the subject of the information has been given an opportunity to refute it. Mere doubts will not suffice to justify its suppression, however, unless such doubt is supported by sufficient evidence. See V.T.C.S. art. 6252-17a, §10. Cf. White v. State, 17 Cal. App. 3d 621, 95 Cal. Rptr. 175 (1971); Annot. 87 A.L.R.3d 146 (1978). We hold that, a governmental body may withhold information on the basis of false light privacy, only if it finds, based upon the weight of evidence demonstrable to this office, that there is serious doubt about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal.

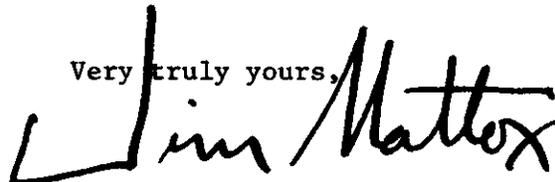
Given the obvious public interest in the matter here and the absence of sufficient evidence indicating that the release of the information would be in reckless disregard of the truth, we are unable to say that this transcript is protected by "false light" privacy from disclosure by the school district. We conclude on the basis of the information you have provided us that the transcript is not excepted from required disclosure by section 3(a)(1) of the Open Records Act. This decision, however, represents the first occasion on which the standard for false light privacy has been fully articulated. Therefore, in this instance, if you have additional information about the falsity of statements concerning specific incidents, you may resubmit these matters for our reconsideration.

Nor are we persuaded, that the section 3(a)(8) "law enforcement" exception applies. Although the school district is not a law enforcement agency, we have previously indicated that, where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 3(a)(8) may be invoked by any proper custodian of information relevant to the incident. Open Records Decision No. 286 (1981). Even if a matter has been closed, whether by conviction, acquittal or administrative decision, the names of witnesses may be withheld under certain circumstances. Open

Records Decision No. 297 (1981). With regard to the transcript at issue here, however, we do not believe that a showing can be made that its release at this time would be reasonably likely to "unduly interfere with law enforcement and crime prevention," nor has such a showing been made. See Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). We conclude that it is not excepted from disclosure by section 3(a)(8).

Section 3(a)(11), which excepts "inter-agency and intra-agency memorandums or letters," is also inapplicable, for the reason that the conversation reflected by the transcript does not represent the advice, opinions, or recommendations of school district employees or consultants on matters of official policy. It is also not excepted by the "discovery" aspect of section 3(a)(11). See Open Records Decision Nos. 308 (1982); 251 (1980). It reflects the personal concerns of the participants with respect to the transaction in question. In our opinion, the transcript is not excepted from disclosure by section 3(a)(11).

Very truly yours,



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