



## The Attorney General of Texas

December 30, 1983

JIM MATTOX  
Attorney General

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Honorable Stephen Davidchik  
Grayson County Attorney  
3rd Floor, Courthouse  
Sherman, Texas 75090

Open Records Decision No. 403

Re: Whether federal grand jury transcripts are public under the Open Records Act

714 Jackson, Suite 700  
Dallas, TX. 75202-4506  
214/742-8944

Dear Mr. Davidchik:

You have requested a decision under the Open Records Act, article 6252-17a, V.T.C.S., relating to public disclosure of a portion of the records of federal grand jury proceedings that were held concerning an attempted bank robbery. Two persons were convicted in your county of state violations of murder in connection with the attempted bank robbery.

4824 Alberta Ave., Suite 160  
El Paso, TX. 79905-2793  
915/533-3484

Evidence was introduced in the federal grand jury proceedings indicating that some of the witnesses who testified at one of the murder trials committed perjury. On March 4, 1983, the federal district judge of the district in which the grand jury was convened ordered portions of the federal grand jury testimony released for use in the state murder case which, at that time, was pending in the appellate court. On application to the court of appeals to abate the appeal, jurisdiction was restored to the trial court, a motion for new trial was granted, and on motion by your office, the indictment was dismissed as having been based on perjured testimony.

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Houston, TX. 77002-3111  
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806 Broadway, Suite 312  
Lubbock, TX. 79401-3479  
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McAllen, TX. 78501-1685  
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A new state grand jury indicted four persons who testified in the murder case for aggravated perjury and those cases are pending. In addition, there are current investigations by state authorities in the murder case and by federal authorities in the attempted bank robbery.

200 Main Plaza, Suite 400  
San Antonio, TX. 78205-2797  
512/225-4191

An Equal Opportunity/  
Affirmative Action Employer

A member of the news media has requested that, under the Freedom of Information Act and the Texas Open Records Act, you make available to it a copy of all the federal grand jury testimony released to you. This office recently stated that, for purposes of the Open Records Act, a grand jury must be treated as part of the judiciary, which is not subject to the Open Records Act. V.T.C.S. art. 6252-17a, §2(G); Open Records Decision No. 398 (1983). Also, the Freedom of Information Act does not affect the traditional rules of federal grand jury secrecy set forth in Rule 6(e) of the Federal Rules of Criminal Procedure. See Thomas v. United States, 597 F.2d 656 (8th Cir. (1979)). Rule 6(e) is a "statute" for purposes of the Freedom of Information Act and the rule's ban on disclosure is absolute for

purposes of the act. Wright, Fed. Practice & Procedure, Crim. 2d, §106, p. 253.

Rule 6(e), Federal Rules of Criminal Procedure, provides, in pertinent part:

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device . . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to --

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

. . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

. . . .  
If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Under this rule, disclosure of matters occurring before a grand jury can be made only as ordered by the court, except that disclosure can be made without a court order to government attorneys and personnel under subsection (e)(3)(A). The term "attorney for the government" in that exception refers only to attorneys for the federal government and does not include attorneys for state and local governments. In re 1979 Grand Jury Proceedings, 479 F.Supp. 93, 95 (E.D. New York 1979).

The order of the district court that allows disclosure of the grand jury proceedings in question provides, in pertinent part:

the need for disclosure herein is necessary to avoid a possible injustice in another judicial proceeding and outweighs any interest in continued Grand Jury secrecy, it is hereby ORDERED that the United States Attorney's Office make available Grand Jury material in the investigation of the attempted robbery . . . to the following persons:

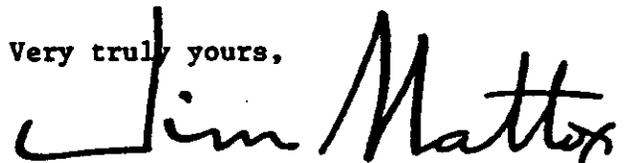
Stephen Davidchik, County Attorney  
Joe Joiner, Attorney at Law  
William Ralph Elliott, District Judge  
L.E. Driscoll, Sheriff.

In United States v. Young, the same federal district judge who ordered release of the grand jury testimony in question held that a showing that disclosure will be made preliminary to or in connection with a judicial proceeding to avoid injustice is a requirement of disclosure under Rule 6(e). 494 F.Supp. 57 (E.D. Tex. 1980). The United States Court of Appeals, Seventh Circuit, has suggested that, to avoid disclosure orders being overbroad, a preferable practice may be specification in the order of the individual recipients who are granted access to the material. United States v. Stanford, 589 F.2d 285, 292-293 (7th Cir. 1978).

Therefore, we believe that the order issued by the federal district judge on March 4, 1983, expressly and intentionally directs that grand jury material be released only to the persons named therein for the limited purpose of disclosure preliminary to or in connection with another judicial proceeding to avoid injustice. Rule 6(e) expressly provides that when a court orders disclosure of matters before a grand jury, the disclosure must be made in such manner, at such time, and under such conditions as the court directs.

Since Rule 6(e) prohibits disclosure of these materials to any person except as permitted by judicial order, and since the judicial order in this case permits disclosure only to particular persons for a particular purpose, we conclude that it is excepted from public disclosure under 3(a)(1) of the Open Records Act, as "information deemed confidential by law."

Very truly yours,



J I M M A T T O X  
Attorney General of Texas

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Prepared by Nancy Sutton  
Assistant Attorney General

APPROVED:  
OPINION COMMITTEE

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