



The Attorney General of Texas

February 21, 1986

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Honorable Arthur C. (Cappy) Eads
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Open Records Decision No.433

Re: Whether an indigent is entitled to an exemption from the cost provisions of the Open Records Act, article 6252-17a, V.T.C.S., whether the names of grand jurors are subject to required disclosure under the act, and related questions

Dear Mr. Eads:

You have informed us that your office

has received a request for copies of documents contained in a criminal case file. . . . The person requesting the information is apparently the person convicted in the criminal cause. The criminal cause itself involved an aggravated rape with the use of a deadly weapon which was affirmed on appeal.

You responded to this request, which was submitted under the Open Records Act, article 6252-17a, V.T.C.S., by advising the requestor that you would release some information and by asking us whether you may withhold the remainder. You have also asked whether the requestor's claim that he is impoverished entitles him to a waiver of the cost provisions of the act. V.T.C.S. art. 6252-17a, §9.

Your letter to the requestor stated that you would withhold

(1) 'The Police Report Copy' (your request no. 2); (2) 'The Investigator Report Copy' (your request no. 4); (3) 'The information filed by the prosecutor copy' (your request no. 8); (4) The names of the persons serving on the Grand Jury (your request no. 7).

You argue that sections 3(a)(1), 3(a)(8), and 3(a)(11) of the act embrace parts of the first three items. We have examined these items, and we agree. You also assert that section 3(a)(3) of the act applies

to these three items in their entirety. Again, we agree. Section 3(e) of the act states:

For purposes of Subsection (a)(3) of [section 3], the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

All such remedies have not been exhausted in this instance.

Item four involves the names of grand jurors. In Open Records Decision No. 411 (1984), we held that a list of the names of witnesses subpoenaed to appear before a grand jury was not subject to required disclosure under the Open Records Act, even though it was in the custody of a district attorney, who is subject to the act. Attorney General Opinion JM-266 (1984). We reasoned that, given the provisions of articles 20.10 and 20.13 of the Code of Criminal Procedure, the district attorney must be deemed to have acted as an agent of the grand jury when he prepared the list. Because the list was held to have been in the constructive possession of the grand jury while in the physical custody of the district attorney, and because the grand jury is part of the judiciary for purposes of the act and is therefore not amenable to the act, V.T.C.S. art. 6252-17a, §2(1)(C), the list was held to be outside the scope of the act.

Prospective grand jurors are selected either by grand jury commissioners appointed by the district judges or, at the direction of the judges, in the same manner that jurors are selected for the trial of civil cases in the district courts. Code Crim. Proc. arts. 19.01, 19.06. When jury commissioners select prospective grand jurors, they compile a list of the jurors' names and submit it to the district judge, who delivers it to the court clerk, who holds it until the statutorily prescribed time. Code Crim. Proc. arts. 19.09-19.13. When that time arrives, the clerk sends a copy of the list to the sheriff, who, after using it to summon the jurors for service, returns it to the clerk. Code Crim. Proc. arts. 19.13-19.15. The same procedure is followed when the prospective jurors are selected in the alternative manner provided by article 19.01(b). After the court interrogates the prospective jurors to determine that they are qualified, the judge impanels the grand jury. Code Crim. Proc. arts. 19.21-19.26.

The list of prospective grand jurors' names is not subject to required disclosure. This list is compiled, and at virtually all times is maintained, by the jury commissioners, the district judges, or the court clerk, all of whom are part of the judiciary or agents

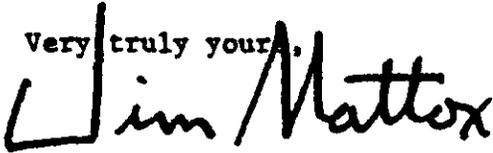
thereof. The only time the list leaves their possession is when the sheriff uses it to summon the jurors for service. In this instance, however, the list does not become a "public record" within section 2(2) of the act. Just as a district attorney is an agent of the grand jury when he possesses a list of subpoenaed witnesses to use in issuing the subpoenas, Open Records Decision No. 411 (1984), a sheriff must be regarded as an agent of the judiciary when he uses a list of prospective grand jurors' names to summon the jurors for service. And just as the list of witnesses is constructively possessed by the grand jury even when it is physically possessed by the district attorney, the list of prospective grand jurors' names must be deemed to be constructively possessed by the judiciary even when it is physically held by the sheriff. Because this list is, therefore, at all times either actually or constructively in the possession of the judiciary, it is not subject to required disclosure under the act.

A list of the names of grand jurors who are actually impaneled during a particular term of court, however, is another matter. If the district attorney has such a list, we do not believe the Open Records Act allows him to withhold it. Unlike a sheriff who temporarily possesses a list of prospective grand jurors, a district attorney possessing a list of impaneled jurors is not acting as an agent of the judiciary or the grand jury, since he has no task to perform with that list. Thus, this situation is different from the ones involving the lists of subpoenaed witnesses and of prospective grand jurors. As a practical matter, moreover, the names of the impaneled grand jurors will already have been publicly divulged, since the impaneling will have taken place in open court. Because the names will already be a matter of public record, we can perceive no reason why the district attorney should be permitted to withhold a list of those names.

You may, therefore, withhold the first three items of information. Because it has not been suggested that any of this information has already been publicly disclosed, e.g., in open court during the trial of this case, we need not address the question of whether the Open Records Act allows a governmental body to withhold information relating to litigation once it has been released. You may not withhold a list of the names of grand jurors impaneled during a particular term of court.

As for the issue of costs, section 9 of the act discusses "costs of copies of public records." See Attorney General Opinions JM-292 (1984); JM-114 (1983). It exempts only legislators from its terms. In some circumstances, indigent defendants are constitutionally entitled to certain documents at state expense. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (transcripts); Long v. District Court, 385 U.S. 192 (1966) (transcript of habeas proceeding to be used on appeal from denial of habeas relief); United States v. MacCollom, 426 U.S. 317 (1976) (trial transcript to be used in collateral attack upon

conviction). Whether an indigent defendant is generally entitled to a free copy of a document, however, is a different question from whether requests for documents filed under the Open Records Act must in some instances be granted without charge. The request in this instance stipulates that it was filed under the Open Records Act, and the legislature has not provided for a waiver of costs to any member of the public. We do not reach the question whether the defendant in this case is otherwise entitled to receive documents free of charge, as this question is not before us.

Very truly yours,

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