



# The Attorney General of Texas

February 21, 1986

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Honorable John B. Holmes, Jr.  
District Attorney  
201 Fannin, Suite 200  
Houston, Texas 77002

Open Records Decision No. 434

Re: Whether information in investigative files may be withheld under the Open Records Act

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Dear Mr. Holmes:

Your office has asked whether the Open Records Act, article 6252-17a, V.T.C.S., requires you to release a copy of an investigative file concerning an investigation into alleged wrongful use of computers for political purposes in a commissioner's precinct in Harris County, and a copy of a written statement allegedly given to an investigator of the district attorney's office in the course of that investigation.

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You suggest that both sections 3(a)(1) and 3(a)(8) of the Open Records Act permit you to withhold these records from public disclosure. Section 3(a)(1) of the Open Records Act authorizes governmental bodies to withhold "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." And as recently amended, with the underscorings indicating new language, section 3(a)(8) excepts from required disclosure:

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

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The "informer's privilege" aspect of section 3(a)(1) authorizes a governmental body to withhold information which would reveal the identity of persons who report possible violations of law to officials charged with the enforcement of that law. See, e.g., Open Records Decision No. 156 (1977). The rationale underlying this privilege was explained in Roviaro v. United States, 353 U.S. 53, 59 (1957):

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The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. 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.

If these interests are to be protected, the informer's privilege must extend to information which would tend to reveal an informant's identity as well as to information which would directly do so. In some circumstances, e.g., where the number of people who could have made a particular statement is so small that the actual informant could be identified by examining the statement, or where an oral statement is captured on tape and the voice of the informant is recognizable, it may be necessary to withhold the entire statement to protect the informant's identity.

Here, the district attorney may withhold, under section 3(a)(1), any information in an informant's statement which would tend to reveal the informant's identity, including the entire statement if necessary. However, information in an informant's statement which does not tend to reveal the informant's identity, or which is not excepted from disclosure for some other reason, must be made available to the public.

Of course, information in an informer's statement may be withheld — without regard to its tendency (or lack of tendency) to reveal the informant's identity — if it is excepted from disclosure under section 3(a)(8) of the Open Records Act. In the past, this office has interpreted the 3(a)(8) exception in the light of Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977), which held that

while 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. (Emphasis added).

Id. at 710. Obviously, the circumstances of each case must be examined to determine whether the release of particular investigative materials will "unduly interfere" with law enforcement or crime prevention.

When a governmental body claims section 3(a)(8), therefore, the relevant question is now whether the release of the information would undermine a legitimate interest relating to law enforcement or prosecution. A case-by-case approach is consistent with the admonition in section one of the Open Records Act that the act's provisions are to be liberally construed in favor of carrying out the policy of openness which underlies the act. For that reason, as said in Open Records Decision No. 287 (1981),

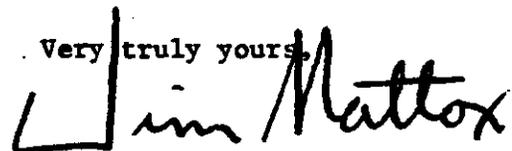
[w]hen the 'law enforcement' exception is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release of it would unduly interfere with law enforcement.

As noted, section 3(a)(8) now explicitly covers prosecutors' records as well as "law enforcement" records. Cf. Attorney General Opinion JM-266 (1984) (holding district attorneys' records subject to the Open Records Act). In Open Records Decision No. 287, this office observed that the best judge of whether the release of a law enforcement agency's records and notations would unduly interfere with law enforcement was ordinarily the law enforcement agency in possession of it, but that the agency could not arbitrarily relegate information to that category. The same is true for the records and notations of prosecutors protected by section 3(a)(8), in our opinion.

For the most part, the explanations you have made for withholding material have been generalized and not addressed to particular records or portions thereof. Unless the records show on their face that public disclosure would unduly interfere with law enforcement or prosecution, it is necessary to identify the particular records (or parts thereof) which will do so, and the particular explanation applicable to them. Because this is the first occasion for construing the newly amended section 3(a)(8) provision, we will afford you an additional ten days to furnish the needed particulars.

You have also argued that information you hold about the identities of individuals who testified before the grand jury in answer to subpoenas need not be disclosed. Open Records Decision No. 411 (1984) held that the district attorney of Hidalgo County need not disclose the names of individuals subpoenaed to appear before the grand jury to testify about the disappearance of county funds. It held that in preparing the list of these names, the district attorney acted as an agent of the grand jury; the list, therefore, was held to be in the constructive possession of the grand jury and, accordingly, outside the scope of the Open Records Act, because the grand jury is considered to be part of the judiciary for purposes of the act. This decision supports the conclusion that you need not release this information.

Very truly yours,



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