



**THE ATTORNEY GENERAL
OF TEXAS**

January 25, 1989

**JIM MATTOX
ATTORNEY GENERAL**

The Honorable Patrick O. Hardy Open Records Decision No. 518
Criminal District Attorney
Tyler County
Room 201 Courthouse
Woodville, Texas 75979

Re: Whether section 10(a)
of the Open Records Act,
article 6252-17a, V.T.C.S.,
prohibits the release of
information related to "bad
check" fund administered by
the Criminal District
Attorney. (RQ-1489)

Dear Mr. Hardy:

The Criminal District Attorney's Office in Tyler County received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information about the "bad check" funds administered by your office. The requestor seeks:

1. A record of all deposits to any funds relating to the Hot Check Fund since Jan. 1, 1985.
2. A list of fees collected and persons who have paid these fees since Jan. 1, 1985.
3. A list of all accounts along with account numbers for all banking accounts where fees from Hot Checks are collected or deposited since Jan. 1, 1985.
4. The names of persons in your office or elsewhere who have signatory authority on the accounts identified in #3.
5. A record of all expenses from your hot check fund since Jan. 1, 1987. Note: we do not want the names of informants, but we do want to know the amounts spent on such informants and the cases to which these amounts relate.

6. Photocopies of all bank statements relating to #3.

Section 32.41 of the Texas Penal Code, titled "Issuance of Bad Checks," provides in part:

(e) A person charged with an offense under this section may make restitution for bad checks. Restitution shall be made through the prosecutor's office if collection and processing were initiated through that office. In other cases restitution may, with the approval of the court in which the offense is filed, be made through the court, by certified checks, cashiers checks, or money order only, payable to the person that received the bad checks. .

(f) An offense under this section is a Class C misdemeanor. (Emphasis added.)

Article 102.007, of the Code of Criminal Procedure, (formerly, Code Crim. Proc. art. 53.08), grants the district attorney authority to collect fees in connection with the processing of checks issued or passed in a manner that makes the issuance or passing a violation of law. Attorney General Opinion MW-188 (1980). The fees that are collected are deposited in the county treasury in a fund administered by the district attorney. Code Crim. Proc. art. 102.007(e).

Regarding requested items 1, 3, 4 and 6, above, you advise that your office cannot fully comply with the request because this information is maintained by the county auditor. You have agreed to provide the information in these items that is in your possession.

Section 3(a) of the act provides:

information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information. . . .

The Open Records Act does not require a governmental body to obtain information that is not in its possession.

See Open Records Decision Nos. 467 (1987); 445 (1986). On the other hand, if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to section 3(a). See Open Records Decision Nos. 445, 437 (1986); 317 (1982); see also Open Records Decision No. 462 (1987) citing the test applicable under section 3(a). In the present situation, however, there is no evidence that the county auditor acts as an agent to perform a task ordinarily performed by the criminal district attorney. The auditor is fulfilling his or her own statutory duties in collecting the information at issue. The request for the information about account numbers and procedures should be directed to the auditor. It may be withheld by the auditor only if one of the Open Records Act's exceptions protects it.

You advise that item 5 has been released to the requestor. Section 14(a) of the act provides that the "[a]ct does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person" (emphasis added). Because you have released item 5, and because its release is not expressly prohibited by law, this information cannot be withheld from further disclosure. See also V.T.C.S. art. 6252-17a, § 6(3) (expenditure of public funds is the type of information expressly described as open).

Only the information regarding the names of persons who have paid the "bad check" fees to the county remains in dispute. You suggest that sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(8), 3(a)(11) and 3(e) protect the information from disclosure.

Section 3(a)(1) of the act protects from required public disclosure:

information deemed confidential by law,
either Constitutional, statutory, or by
judicial decision.

Section 3(a)(1) protects information made confidential by common-law privacy. See generally Open Records Decision Nos. 438 (1986); 372 (1983). Two aspects of common-law privacy that may be relevant here are "public disclosure of private facts" and "false light" privacy. Release of information constitutes public disclosure of private facts if the information reveals highly intimate or embarrassing

facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if its release is of no legitimate concern to the public. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

The disputed information amounts to the county's action on a complaint filed by creditors alleging that checks drawn by the issuers were dishonored at the time of presentment. In Texas, an offense is committed if the issuer of a check passes the check for payment knowing that there are insufficient funds in or on deposit with the bank or other drawee for the full payment of the check. See 20 Tex. Jur. 3d, §1037; see also Penal Code § 32.41(a). The public has a legitimate interest in knowing about criminal offenses. On the other hand, the fact that a person submits payment and a fee to the county for "bad checks" is not the equivalent of a conviction. Releasing the names of individuals who pay the county for checks turned over to the county for collection is not the equivalent of labelling these persons criminals. You contend, however, that disclosure of the names of persons who have made restitution is tantamount to disclosure of the names of persons who have been unjustly accused of a crime.

Making restitution for "bad checks" neither negates nor affirms that an offense has been committed. Attorney General Opinion JM-472 (1986) concluded that "[a]n offer to pay the amount of a dishonored check does not necessarily preclude a conviction of theft or of issuance of a bad check under the Penal Code." Similarly, disclosure that a person has made restitution for a dishonored check does not necessarily create a false impression about the original issuance of the check. Further, payment to the county of the amount of "bad checks" and collection fees relates to one of the county's official duties and is of legitimate public concern. Consequently, as a general rule, you may not withhold under section 3(a)(1) of the act the names of persons who have submitted payment to the county for "bad checks" and for fees charged by the county for the collection of those checks.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or

political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the exception. Open Records Decision No. 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Id. Further, the governmental body's attorney must show that the requested information is relevant to the litigation, see Open Records Decision No. 323 (1982), and that disclosure of the information would adversely affect the governmental body's litigation interests. See Open Records Decision No. 478 (1987). You have not shown that the requested information meets these tests. In fact, once a person has made restitution, litigation against the person by your office is not likely. Consequently, you may not withhold this information pursuant to section 3(a)(3).

Section 3(e) of the act does not apply as an exception to disclosure. Section 3(e) provides:

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 post conviction remedies in state and federal court.

The governmental body must reasonably anticipate or be involved in litigation of a criminal nature for section 3(e) to be applicable. Section 3(e) simply provides a time frame for section 3(a)(3); it is not a separate exception.

You also raise sections 3(a)(7), 3(a)(8) and 3(a)(11) of the act. Section 3(a)(7) excepts information concerning

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Cannons of Ethics of the State Bar of Texas are prohibited from disclosure.

The attorney-client privilege applies to confidential communications between client and attorney made in the rendition of legal services and to any other fact which came to the knowledge of such attorney by reason of the attorney-client relationship. See Open Records Decision No. 462 (1987) (quoting Texas Rules of Criminal Evidence, Rule 503). Here, the communications are not those of a client and his attorney. The communications are those of a criminal district attorney and the persons he may prosecute. The duty of the criminal district attorney is to represent the state in all criminal cases in the district courts in his district, see Code of Criminal Procedure article 2.01, not to represent the persons he may prosecute. There is no attorney-client relationship between the criminal district attorney and the writers of "bad checks" in the present situation. Section 3(a)(7) does not apply.

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure:

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.

This section exempts from disclosure information that would unduly interfere with law enforcement if it were disclosed. Open Records Decision No. 287 (1981). The governmental body asserting section 3(a)(8) has the burden of explaining how release of the information would unduly interfere with law enforcement if the information does not reveal that on its face. See id. You have not explained how the information you submitted falls within the scope of section 3(a)(8). Consequently this information is not exempt from disclosure under section 3(a)(8).

Section 3(a)(11) protects

inter-agency or intra-agency memorandums or letters which would not be available by law

to a party other than one in litigation with the agency.

Section 3(a)(11) protects from public disclosure advice and opinions on policy matters to encourage frank and open discussion within the governmental body. Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. Civ. App. - San Antonio 1982, writ ref'd n.r.e.); see Open Records Decision Nos. 464 (1987); 222 (1979). The information you submitted is not inter-agency or intra-agency materials. It is not information generated within a governmental body, nor is it information transferred from one governmental body to another governmental body. It is information your office created from creditors' complaints that checks issued to satisfy debts were dishonored upon presentment. Further, the information is not advice, opinion or recommendation that is used in the deliberative process. The names of the persons who have made restitution for "bad checks" and all of the related information requested may not be withheld from disclosure under section 3(a)(11).

Finally, section 6(3) of the Open Records Act expressly describes as public

information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law.

The requested information relates to the receipt of public funds in an account held by a governmental body. Section 6(3) does not diminish the effect of the section 3 exceptions to disclosure. 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. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 280 (1981). Nevertheless, section 6 reflects the legislature's intent that information concerning the receipt or expenditure of public funds ordinarily will be available for public inspection. See Open Records Decision No. 233 (1980). At the least, section 6 heightens a governmental body's burden of showing that specific exceptions protect information. See Open Records Decision No. 514 (1988).

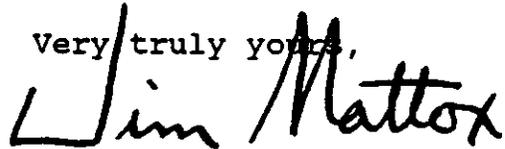
S U M M A R Y

The names of persons who have made restitution to the county for "bad checks" turned over to the county for collection and

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related information about the "bad check" funds held by the criminal district attorney must be released to the public. Requests for information about the funds that is held by the county auditor and not the criminal district attorney must be directed to the county auditor rather than the criminal district attorney.

Very truly yours,



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