



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

January 13, 1989

Ms. Rose Ann Reeser  
Attorney General's Office  
Charitable Trusts Division  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78711-2548

Dear Ms. Reeser:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5104; this decision is OR89-025.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

You received a request for "all records retained by your office regarding the estate of Mr. H. H. Coffield." In your original letter requesting an open records decision, you asserted that the requested information was exempt from disclosure under sections 3(a)(1), 3(a)(3), 3(a)(8), and 3(a)(11) of the act. In a memorandum dated December 15, 1988, you withdrew your argument under section 3(a)(3), and that section will not be addressed. This office agrees that the information requested is exempt in part from required disclosure for the reasons discussed below.

You asserted that the common law informer's privilege as incorporated into section 3(a)(1) exempts information contained in your exhibits A-1 through A-4 and B. The informer's privilege protects communications that reveal the informant's identity. Roviaro v. United States, 353 U.S.

53, 60 (1957). Texas has recognized this privilege. See Aguilar v. State, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). Because part of the purpose of the informer's privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the party complained of. See Open Records Decision No. 208 (1978).

You may withhold the portions of exhibits A-1 through A-4 and B that would reveal the informant's identity. See Open Records Decision No. 515 (1988). This office has marked the portions of the documents that may be withheld. If, however, the party complained of knows the informant's identity, the material will not be exempt from disclosure under section 3(a)(1).

These exhibits contain largely factual information. Section 3(a)(11) permits withholding of advice, opinion, and recommendation contained in inter- and intra-agency communications. See Open Records Decision No. 462 (1987). Factual information that can be severed from advice, opinion, and recommendation is not protected from disclosure by this section. Id.

The investigator's reports contain factual information, or information that the investigator believes to be the facts. Some of this information is exempt under the informer's privilege and has been marked. The remainder of the information is not the type covered by section 3(a)(11) and must be disclosed.

You raised section 3(a)(11) as the exception applicable to exhibits B-1 through B-32, the investigator's reports. You also raised section 3(a)(11) for exhibits B-33 and B-34 to the extent these documents contain an assistant attorney general's handwritten notes, and for the legal advice and opinion contained in exhibit B-35.

These exhibits do contain advice, opinion, and recommendation. However, the handwritten notes appear on documents that do not fall within the scope of section 3(a)(11). The handwritten notes may be deleted, but the underlying documents must be disclosed. Exhibit B-35, which contains the advice, opinion, and recommendations of an assistant attorney general to the attorney general, may be withheld in its entirety.

You asserted that section 3(a)(8) permitted withholding of all of the requested information. Section 3(a)(8) 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.

Information is excepted from disclosure by section 3(a)(8) if release of the information will unduly interfere with law enforcement and crime prevention. Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977).

The purpose for this exception is clear. If a law enforcement agency's law enforcement and crime prevention techniques were readily available to the public, those techniques would usually be rendered ineffective. Release of certain law enforcement information would enable suspects and criminals to evade detection and capture more easily.

The test for determining whether specific information is protected by section 3(a)(8) is whether release of the information will unduly interfere with law enforcement and crime prevention. The circumstances surrounding the collection and use of particular information determine whether release of the information will unduly interfere with law enforcement and crime prevention. A case-by-case approach applies.

The information you submitted does not meet the applicable tests. The information submitted consists of the results of an investigation, and not investigative techniques. It cannot logically be said that the information would interfere with law enforcement and crime prevention if released. This office recognizes that future investigation efforts could be impaired by the disclosure of informant's identities, but the informer's privilege should adequately protect the agency's interests on this point. Section 3(a)(8) does not except the requested material from disclosure.

Rose Ann Reeser  
January 13, 1989  
Page 4

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-025.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*

Open Government Section  
of the Opinion Committee

Prepared by Patricia Barnhard  
Assistant Attorney General

PB/bra

Copy to: H. H. Coffield Estate

Ref.: ID# 5104  
ID# 5201