



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

January 13, 1989

Mr. John C. West, Jr.  
Texas Department of Public Safety  
5805 N. Lamar Blvd.  
Box 4087  
Austin, Texas 78773-0001

Dear Mr. West:

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# 4974; this decision is OR89-029.

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 "Freedom of Information Act" request for documents relating to named individuals and subjects. You stated that the information requested is directly related to a pending federal criminal case. You sent representative samples of the information at the request of this office. You assert that the information is exempt from disclosure under sections 3(a)(3), 3(a)(8), and 3(a)(1) in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure. This office believes that the information is exempt under section 3(a)(8); this decision does not address your other arguments.

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 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, crime prevention, or prosecution. The circumstances surrounding the collection and use of particular information determine whether release of the information will unduly interfere with law enforcement, crime prevention, and prosecution. A case-by-case approach applies.

Section 3(a)(8) applies to the records of law enforcement agencies, not agencies whose functions are essentially regulatory. Open Records Decision No. 199 (1978). However, records that otherwise qualify for the 3(a)(8) exception do not necessarily lose their exempt status while in the custody of an agency not directly involved in law enforcement. Open Records Decision Nos. 272 (1981); 183 (1978). It is evident from letters you supplied that federal authorities are investigating and prosecuting based on the requested records. This office has held that an ongoing federal investigation keeps alive the possibility of criminal charges. Open Records Decision No. 340 (1982). When a complaint is under active investigation, section 3(a)(8) allows material to be withheld during the pendency of the investigation and prosecution. Open Records Decision No. 350 (1982).

John West  
January 13, 1989  
Page 3

This office believes that under these authorities the information requested is exempt from disclosure under section 3(a)(8). 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 OR89-029.

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: Ms. Cheryl B. Wattlely  
970 North Tower, Lock Box 332  
Plaza of the Americas  
Dallas, Texas 75201

Ref.: ID# 4974  
ID# 4856