THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

May 14, 1990

Ms. Allene D. Evans
Assistant Attorney General
Chief, Antitrust Division
P.O. Box 12548
Austin, Texas 78711-2548

OR90-133

Dear Ms. Evans:

The Antitrust Division of the Attorney General's Office received a request under the Texas Open Records Act for Civil Investigative Demands issued to AT&T in connection with the award of the state telephone contract to AT&T on or about February 12, 1988, as well as documentary material produced, transcripts of oral testimony taken, and written interrogatories served and/or answered as a result of the Civil Investigative Demands. The requestor also asked for any information, correspondence, memos, or other documents in the possession or under the control of the Attorney General's office reflecting the status or results of the Civil Investigative Demands issued to AT&T in connection with this investigation. This request has been designated ID# 8973.

You inform us that the Antitrust Division has material relevant to AT&T in connection with this investigation that was not acquired through issuing a Civil Investigative Demand. However, in accordance with the decisions of this office finding it "incumbent upon the agency to made a good faith effort to attempt to identify such records as might fit the request and then to advise the requestor of the types of documents available," you have read the request letter as seeking the information that you have about AT&T, whether or not acquired pursuant to a Civil Investigative Demand. Open Records Decision Nos. 87 (1975), 31 (1974).

Since the records are voluminous, and since they are already in the custody of the Antitrust Division of this

office, we have asked you to keep them in the Antitrust Division until we need to inspect them.

You consider these materials to be included in their entirety within section 3(a)(1) of the Open Records Act based on (1) the informer's and work product privileges and (2) the Texas Antitrust Act of 1983, Tex. Bus. & Com. Code § 15.10(i). You also consider the records to be within section 3(a)(8), as records of a law enforcement agency.

Section 15.10(i) of the Texas Free Enterprise and Antitrust Act of 1983 provides in part:

> [N]o documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Tex. Bus. & Com. Code, § 15.10(i)(1). There are exceptions for specific circumstances, but they are not applicable to a request under the Open Records Act.

Section 3(a)(1) of the Open Records Act incorporates the "informer's privilege," which permits the government to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcing that law. Open Records Decision No. 156 (1977)(citing Roviaro v. United States, 353 U.S. 53 (1957)). See also Open Records Decisions Nos. 183 (1978), 176 (1977), 172 (1977). The informer's privilege applies to administrative officials with a duty of enforcing particular laws, including civil laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 391 (1983), 285 (1981).

The Attorney General's office has authority to file suit under section 15.20(a) of the Business and Commerce Code to collect a civil fine from any person who has violated any of the prohibitions in subsection (a),(b), or (c) of section 15.05 of the Texas Free Enterprise and Antitrust Act of 1983. Since the Antitrust Division of the Attorney General's office has the responsibility duty of enforcing this civil law, it may withhold information protected by the informer's privilege. This would include the complainant's name and other identifying information.

Section 3(a)(1) also incorporates the attorney-client privilege. See Open Records Decision No. 462 (1987). The attorney work-product doctrine protects information prepared by an attorney in anticipation of litigation. See Hickman v. Taylor, 329 U.S. 495 (1947); Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977); Open Records Decision No. 462 (1987). Thus, such information in your file may be withheld under section 3(a)(1).

Based on this information, please make a preliminary determination as to what records are and are not covered by section 3(a)(1) as discussed above, as well as those about which you are in doubt. A member of the Open Government Section of the Opinion Committee will then check representative samples among the records held by your division. If you have any questions about this matter, please refer to OR90-133.

Yours very truly,

Susan Garrison

Susan Garrison
Assistant Attorney General
Opinion Committee

Ref: ID# 8973, 8972

Enc: Attorney General Opinion MW-575; Open Records Decision Nos. 462, 183, 156, 87

cc: Mary Keller
First Assistant Attorney General

Mark Sanders
Rob Mossbacher Committee