



DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

April 17, 1991

Honorable Karren S. Price
District Attorney
123rd Judicial District
Shelby & Panola Counties
101 San Augustine St.
Center, Texas 75935

Open Records Decision No. 586

Re: Whether the interest of the Department of Public Safety in conducting a confidential investigation provides a compelling interest that overcomes a district attorney's failure to comply with the ten day deadline (RQ-45)

Dear Ms. Price:

Pursuant to section 7 of the Open Records Act, you ask whether certain information regarding the investigation of a district attorney's investigator is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was initially answered in a letter ruling numbered OR91-128.¹

Section 7(a) of the Open Records Act provides as follows:

If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten

¹The documents submitted for our inspection with your request for an open records decision consisted of (1) a statement of the subject of the investigation dated October 23, 1990, (2) a transcription of a tape recording between the subject of the investigation and another person, and (3) the statement of another person dated October 10, 1990. You advised that these documents were the only documents that your office possessed that are responsive to the request.

calendar days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

In Hancock v. State Bd. of Ins., 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ), the court explained the heightened presumption of openness which arises under section 7(a) of the Open Records Act when a request for a determination by the attorney general is not made within the time prescribed by that section:

Since the first Open Records Decision dealing with the effect of the openness presumption was issued in 1974, the Attorney General's office has interpreted the Act to mean that once the presumption has arisen, it can be overcome only by a compelling demonstration that the requested information should not be made public. The legislature, too, has expressly recognized the importance of having public information produced in a timely fashion. The Attorney General interprets the presumption as *legislative incentive* to agencies and other governmental bodies to comply with the duty to produce information promptly. Should the agency fail to comply within the 10-day period, the presumption arises, increasing the agency's burden to show why the information should not be released. This reasoning is sound and furthers public policy. We conclude, therefore, that an agency or other governmental body may not overcome the section 7(a) presumption of openness and prevent disclosure of requested information absent a compelling demonstration of reasons why the information should not be made public.

Id. at 381 (emphasis added, citations in original omitted.)

As discussed in OR91-128, your request for an open records decision under section 7 of the Open Records Act was not made within ten days of your receipt of the request for information, nor had you made a compelling demonstration sufficient to overcome the heightened presumption of openness that the information

should not be released. In OR91-128 we asked that we be advised of any compelling reasons why the information in question should be withheld.

To overcome the heightened presumption of openness, you have directed our attention to a letter from the Department of Public Safety, sent to us in response to your conversations with that agency regarding OR91-128. The Department of Public Safety advises that the requested information is also in its possession and that the requested information is part of an ongoing criminal investigation by state and federal authorities. The Department of Public Safety further advises that the release of the requested information would jeopardize not only its present investigation but other cases, confidential informants, and cooperation with the United States Attorney's office.

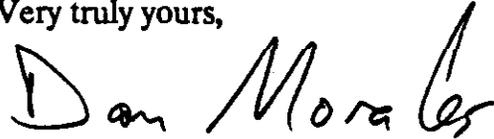
Had the Department of Public Safety received the initial request for information, it could have withheld the information under section 3(a)(8) of the Open Records Act. The Department of Public Safety is the agency primarily involved with the investigation, and has demonstrated its interest in withholding the information. As the Department of Public Safety has never received a request for the information in question and was not a party to the original open records request, the policy underlying the legislative incentive found in section 7(a) of the Open Records Act would not be furthered by requiring the release of information that would jeopardize an investigation of that agency. The need of a governmental body, other than the body that has failed to timely seek an open records decision, may, in appropriate circumstances, be a compelling reason for non-disclosure. In this instance, we find that the Department of Public Safety's assertion of its interest in having the requested information withheld constitutes a compelling demonstration, sufficient to overcome the heightened presumption of openness, that the information should be withheld under section 3(a)(8) of the Open Records Act.

SUMMARY

When a governmental body fails to request an open records decision within the time prescribed by section 7(a) of the Open Records Act, the information requested is presumed to be public, absent a compelling demonstration that the information should not be released. The need of a governmental body, other than the body that has failed to timely seek an open records

decision, may be a compelling reason for non-disclosure. In this instance, the heightened presumption of openness is rebutted by the Department of Public Safety's need to withhold information relating to a criminal investigation pursuant to Section 3(a)(8) of the Open Records Act.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, stylized initial "D".

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY (Ret.)
Special Assistant Attorney General

RENEA HICKS
Special Assistant Attorney General

MADELEINE B. JOHNSON
Chair, Opinion Committee

Prepared by John Steiner
Assistant Attorney General