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ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

January 9, 1991

Ms. Mary Ann Courter  
General Counsel  
Texas Department of Public Safety  
Box 4087  
Austin, Texas 78773-0001

OR91-025

Dear Ms. Courter:

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# 9309.

You have requested our decision as to the confidentiality of investigative reports of the Department of Public Safety which contain information obtained by means of a pen register authorized pursuant to article 18.21 of the Texas Code of Criminal Procedure.

A "pen register" is defined in section 1(9) of article 18.21 as

a mechanical or electronic device that attaches to a telephone line and is capable of recording outgoing numbers dialed from that line but is not capable of recording the origin of an incoming communication to that line or the content of a communication carried between that line and another line.

The investigative reports attached to your request reveal the telephone numbers and the names of subscribers which the subjects of calls dialed from particular numbers, listed in code, and the time each call was placed. They also contain information identifying the dialed subscribers, as well as information indicating surveillance of particular individuals.

In order to install and use a pen register, a peace officer or a prosecutor is required to file an application with a district court pursuant to section 2 of article 18.21. Section 2(g) thereof requires the district court to

seal an application and order for the installation and utilization of a pen register or trap and trace device granted under this article. The contents of an application or order may not be disclosed except in the course of a judicial proceeding and an unauthorized disclosure is punishable as contempt of court.

Under certain circumstances, a pen register may be installed prior to obtaining a court order, but an order approving its installation and use must be obtained within 48 hours. Id. art. 18.21, § 3.

Under the terms of article 18.20 of the Code of Criminal Procedure, an individual who is the subject of a wiretap must be notified within 90 days of "the date an application for an order is denied or after the date an order or the last extension, if any, expired." Id. at § 13. In Open Records Decision No. 553 (1990), this office held that,

[u]ntil notice is given to the individual pursuant to section 13 of article 18.20, the judge's and prosecutor's reports are excepted from disclosure in their entirety by section 3(a)(8) of the Open Records Act.

Article 18.21 provides no comparable mechanism for notification to persons who are the subject of an order to obtain a pen register. The statute's provision in section 2(g) that "the contents of an application or order may not be disclosed except in the course of a judicial proceeding" indicates, however, that the legislature did not, under ordinary circumstances, contemplate that the subject of the order would be notified.

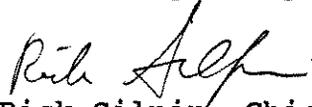
In our opinion, the lack of a notification requirement in article 18.21, coupled with the legislature's clear intent in section 2(g) to protect the confidentiality of the pen register application and order, demonstrate that the contents of the investigative reports at issue here should be withheld from disclosure. This office has consistently held that, under section 3(a)(8) of the Open Records Act, information held by a law enforcement agency may be withheld if its release "will unduly interfere with law enforcement and crime prevention." See Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 553 (1990). So long as the Department of Public Safety makes a determination that release of the investigative reports would "unduly

interfere with law enforcement and crime prevention," it is our opinion that they may be withheld from disclosure under section 3(a)(8) of the Open Records Act.

You also contend that the information contained in your request letter to us should be withheld from disclosure. In Open Records Decision No. 459 (1987), this office said that "when we had held information to be within a Section 3(a) exception, that exception authorized the governmental body to withhold the portion(s) of its request letter that would disclose this information." We have marked those portions of your request letter which may be withheld from disclosure.

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 OR91-025.

Yours very truly,

  
Rick Gilpin, Chief  
Opinion Committee

RG/le

Ref.: ID# 9307, 9309

Enclosure: Marked Documents

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