



Office of the Attorney General
State of Texas

September 23, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
Institutional Division
P. O. Box 99
Huntsville, Texas 77342-0099

OR92-561

Dear Mr. Peck:

The Texas Department of Criminal Justice (TDCJ) asks whether certain information is excepted from required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID # 15967. (Your file reference TDCJ OR92-0501-0240.)

Pursuant to the Open Records Act, TDCJ has received a request for all records maintained by TDCJ relating or referring to a former prisoner, Jesus Romero, Jr. Mr. Romero has since been executed. TDCJ has submitted for our review certain documents responsive to the request. TDCJ claims that the requested information is excepted by Open Records Act sections 3(a)(1), 3(a)(7), 3(a)(8), and 3(a)(11).¹

Open Records Act section 3(a) states that all information maintained by a governmental body is public information, subject to the following relevant exceptions:

- (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

¹ In its original request to this office for an Open Records Act ruling, TDCJ claimed that the requested information was excepted pursuant to section 3(a)(3), the Act's "litigation exception", because of Romero's pending habeas corpus petition. TDCJ has since advised this office that TDCJ agrees that because of Romero's death his habeas corpus petition is moot, and therefore section 3(a)(3) does not apply.

....

- (7) matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure;
- (8) records of law enforcement agencies and prosecutors that dealt 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; [and]

....

- (11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

The records submitted for our review include a Presentence Investigative Report, Exhibit 1, which describes Romero's prior conviction for attempted sexual assault. We assume, without deciding, that the presentence report in the possession of TDCJ is no longer a record of the judiciary; however, we conclude it is excepted from required public disclosure by section 3(a)(1).

Code of Criminal Procedure article 42.12, section 9(j), states in relevant part: "The [presentence] report and all information obtained in connection with the presentence investigation are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), and (g) of this section and as directed by the court for the effective supervision of the defendant." Section 9(j) deems the presentence report confidential. The exceptions to this confidentiality requirement - sections 9(d) through 9(g) - are not applicable in this situation.² Therefore, we rule that the presentence report, Exhibit

² Code of Criminal Procedure article 42.12, section 9, states in relevant part:

1, is deemed confidential and is excepted from required public disclosure pursuant to section 3(a)(1).

Some of the documents furnished for our review describe Romero's murder victim and the circumstances of the victim's murder. You claim that public disclosure of the requested information would invade the privacy of the murder victim and therefore these documents should be excepted by section 3(a)(1). This office has previously held that privacy rights expire with the death of the subject of the right. *See* Open Records Decision No. 432 (1985); Attorney General Opinion JM-229 (1984); Open Records Decision Nos. 272 (1981); Open Records Decision No. 216 (1978); Attorney General Opinion H-917 1976). Moreover, we note that the identity of the murder victim and the circumstances of her death are already a matter of public record because of Romero's public trial. *See Romero v. Texas*, 884 F.2d 871 (5th Cir. 1989) (affirming the denial of Romero's habeas corpus petition and describing in detail the trial evidence). Therefore the documents cannot be withheld under section 3(a)(1) because of concern for the victim's privacy.

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- (c) The court may not inspect a [presentence] report and the contents of the report may not be disclosed to any person unless:
 - (1) the defendant pleads guilty or nolo contendere or is convicted of the offense; or
 - (2) the defendant, in writing, authorizes the judge to inspect the report.
 - (d) Before sentencing a defendant, the court shall permit the defendant or his counsel to read the presentence report.
 - (e) The court shall allow the defendant or his attorney to comment on the report and, with the approval of the court, introduce testimony or other information alleging a factual inaccuracy in the report.
 - (f) The court shall allow the attorney representing the state access to any information made available to the defendant under this section.
 - (g) The probation officer making a report under this section shall send a copy of the report to an institution to which the defendant is committed.

You also claim that the requested information should be withheld as records of the Board of Pardons and Paroles. Code of Criminal Procedure article 42.18, section 18, provides that the records of the Board of Pardons and Paroles are deemed confidential. However, only one of the documents furnished for our review is identified as a record of the Board of Pardons and Paroles; this record, Exhibit 8, may be withheld from required public disclosure pursuant to section 3(a)(1).

You claim that the Romero records as a whole are excepted from required public disclosure by section 3(a)(7) because the decree in *Ruiz v. Estelle* deems these records confidential. *See Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982). Section VIIA(18) of the Stipulated Modification of the *Ruiz* Amended Decree prohibits TDCJ from releasing "sensitive information" concerning prison inmates. 679 F.2d at 1178 (the Stipulated Modification of the *Ruiz* Decree appears as Appendix C); *see also* Stipulated Modification of the *Ruiz* Decree § 1G(2) (defining "sensitive" information). In Open Records Decision No. 560 at 3 (1990), this office ruled:

It is not a proper function of the opinion process to attempt to determine the court's intent in the [*Ruiz*] Stipulated Modification. Because the Ruiz lawsuit is ongoing, the proper authority to determine access to "sensitive information" is the forum court.

(footnote and citations omitted). Therefore, if TDCJ wishes to pursue this issue, TDCJ should refer this issue for decision to the *Ruiz* court or special master.

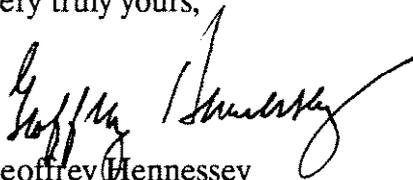
You contend that the TDCJ internal memorandum, Exhibit 2, which describes the discovery of certain weapons at Huntsville and which refers to Romero is excepted from public disclosure by section 3(a)(8). This memorandum describes the type of weapons and describes in detail the place and manner in which the weapons were hidden. The memorandum also refers to another inmate. We agree that disclosure of this memorandum would create potential security risks. If the memorandum were edited to redact the sensitive information the remaining portions of the brief memo would be incomprehensible. Accordingly, this memorandum may be withheld in its entirety.

You also claim that section 3(a)(11) protects various advice, opinion, and recommendations found in the documents furnished for our review. However, the documents are not marked to identify which portions of the documents you claim this exception applies to. Because the documents have not been marked as required

by section 7 of the act and as previously requested, we deem the section 3(a)(11) claim unsubstantiated and waived.

We conclude that your claim that the documents are deemed confidential pursuant to the *Ruiz* decree will have to be addressed to the *Ruiz* Court or the special master. Unless the *Ruiz* Court rules to the contrary, the requested information, with the exceptions noted above, are public records and may not be withheld pursuant to the Open Records Act. 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 OR92-561.

Very truly yours,



Geoffrey Hennessey
Assistant Attorney General
Opinion Committee

GH/lmm

Ref.: ID# 15967
ID# 16054

cc: Ms. Elizabeth Cohen
Staff Attorney
Texas Resource Center
1206 San Antonio
Austin, Texas 78701