



Office of the Attorney General
State of Texas

November 23, 1992

DAN MORALES
ATTORNEY GENERAL

Ms. Melissa Winblood-Franco
Assistant City Attorney
Office of the City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79999

OR92-669

Dear Ms. Winblood-Franco:

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# 16967.

The El Paso Police Department (the department) received an open records request for all of its records pertaining to the 1977 arrest of an individual who was subsequently convicted in Arizona for murder; the individual in question is currently appealing the death sentence he received as the result of his conviction. You have submitted to this office for review an assortment of documents coming within the ambit of the request. You contend the documents come under the protection of sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.¹

You first contend that the department may withhold all of the requested documents pursuant to section 3(a)(3). Section 3(a)(3) of the Open Records Act excepts from required public disclosure "information relating to litigation of a civil or criminal nature and settlement negotiations, *to which the state or a political subdivision is, or may be, a party . . .*" (Emphasis added.) In this instance, neither the State of Texas nor any of its political subdivisions are a party to the Arizona conviction or appeal, nor have you demonstrated a likelihood of this occurring in the future. Section 3(a)(3) is inapplicable in this instance.

¹Although you initially also raised section 3(a)(7) as being applicable to some of the requested information, you have subsequently withdrawn this argument.

You next contend that section 3(a)(8), the "law enforcement" exception, protects the requested information. Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision Nos. 133, 127 (1976).

Citing Open Records Decision No. 408 (1984) as authority, you argue that the requested information comes under the protection of section 3(a)(8) because the reversal of the murder conviction would result in the reopening of the police investigation in Arizona. In Open Records Decision No. 408, this office held that where an unresolved murder investigation was in a "suspended" status but would be reopened upon the discovery of new evidence, the file would continue to be protected by section 3(a)(8) because the statute of limitations for murder would not expire during the intervening time. Your argument suggests, however, that the records of all law enforcement investigations should be withheld from the public pursuant to section 3(a)(8) until the criminal defendant has exhausted all post-conviction remedies.

The information at issue is distinguishable from that in Open Records Decision No. 408 because here the criminal investigation has been concluded; consequently, the release of the information would not unduly interfere with law enforcement efforts *at this time*. Your contention that the release of the information may unduly interfere with a future criminal investigation is too speculative to warrant consideration. You have not demonstrated how the release of the information would otherwise unduly interfere with law enforcement; accordingly, section 3(a)(8) does not protect the requested information.

You seek to withhold pursuant to the "informer's privilege" aspect of section 3(a)(1) the name of a confidential informant for the federal Drug Enforcement Agency (DEA) who assisted in the arrest of the criminal defendant. The informer's privilege protects the identity of persons who report violations of the law. *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957). The privilege does not, however, apply when the informant's identity is known to the party complained of. See Open Records Decision No. 208 (1978).

Although there is evidence in the records at issue that suggests that the confidential informant may have testified at the defendant's trial, you state that you have been unable to verify this fact. Further, even if the informant did testify at the criminal defendant's trial, there is no evidence that suggests that the informant was ever identified as an agent for the DEA; this office therefore cannot conclude that the DEA no longer has an interest in maintaining the confidentiality of the informant's identity. Accordingly, the department may withhold the informant's name until such time that it ascertains that the DEA no longer desires to have the informant's identity kept confidential.

You seek to withhold pursuant to section 3(a)(1) documents which appear to be print-outs of information transmitted through the National Law Enforcement Teletype Service (NLETS). You have not provided this office with sufficient statutory authority that would make the transmissions confidential *per se* for purposes of section 3(a)(1). We agree that the information you have marked in documents identified as Exhibits 2-A and 2-B contain confidential criminal history information obtained from the National Crime Information Center (NCIC) or from other states that the department must withhold. See Open Records Decision No. 565 (1990) at 10 - 12 (individual may obtain his own NCIC criminal history information only by applying directly to the federal Department of Justice or to the originating state). On the other hand, the information contained in Exhibit 2-C does not consist of confidential criminal history information; the department must release this record in its entirety.

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 OR92-669.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/RWP/lmm

Ref.: ID# 16967

Enclosures: Submitted documents

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