



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 23, 1993

Mr. William J. Delmore, III  
General Counsel  
Harris County District Attorney's Office  
201 Fannin, Suite 200  
Houston, Texas 77002-1901

OR93-213

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), article 6252-17a, V.T.C.S. Your request was assigned ID# 19904.

The Harris County District Attorney (the "district attorney") has received a request relating to Mr. Gary Graham, who is scheduled to be executed April 29, 1993. Specifically, the requestor seeks "all files, records, and any other documents in the possession of the Harris County District Attorney's Office pertaining to the arrest, investigation and trial of Gary Graham a.k.a. Kenneth Stokes in connection with the murder of Bobby Lambert on May 13, 1981 (Cause No. 335138)." In addition, the requestor seeks disclosure of the district attorney's files for Cause Nos. 335136 and 335137, in which Mr. Graham was convicted of aggravated robbery, and Cause No. 334642, in which Mr. Graham's indictment for auto theft was dismissed. You claim that the requested information is not subject to required public disclosure under the act.

As a threshold issue, we first address your contention that the district attorney's office does not constitute a "governmental body" within the meaning of section 2(1) of the act and is therefore not subject to the act. Section 2(1) of the act specifically excludes the judiciary from the definition of "governmental body" and provides, in part, that a "governmental body" is any "part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds." V.T.C.S. art. 6252-17a, § 2(1)(G). You argue that this definition is inapplicable to the district attorney because the district attorney's office is created under Article V of the Texas Constitution, which establishes the "Judicial Department", and is therefore a part of the judiciary.

This very issue was addressed in Attorney General Opinion JM-266 (1984), of which you here seek reconsideration. In that opinion, this office determined that a district

attorney was a part of the judicial department but did not fall within the judiciary exception to the Open Records Act. This office held that the intent of the legislature in enacting this statute was to exclude only courts from the scope of the act, rather than every part of the judicial department. Attorney General Opinion JM-266 at 2. The legislature's specific inclusion of commissioners courts in the act supports this view since commissioners courts, like district attorneys, are created in the judicial article of the Constitution. *Id.*; see also Open Records Decision No. 78 (1975) (holding that a county sheriff's office, although created under the judicial article of the Constitution, is not within the act's judiciary exception).

The purposes of the judiciary exception were discussed in *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.--San Antonio 1983, no writ), in which a member of the public wished to inspect applications for the position of juvenile probation officer submitted to a county juvenile board. The court determined that the juvenile board, although composed of judges, was not a part of the judiciary within the meaning of section 2(1)(H) of the act because it performed administrative, not judicial, functions and was not under the control or supervision of a court. Thus, whether an entity falls within section 2(1)(H) involves an analysis of that entity's function and whether it is controlled or supervised by a court. See also Attorney General Opinion JM-466 (1986); Open Records Decision Nos. 553 (1990); 417 (1984); compare with Open Records Decision No. 572 (1990) (county personal bond office does not fall within the judiciary exception except in conducting investigations and preparing reports under article 17.42, Code of Criminal Procedure, as the board in such cases functions as an arm of the court).

As Attorney General Opinion JM-266 makes clear, a district attorney's office does not fall within the judiciary exception because it is not a court and is not directly controlled or supervised by one. Moreover, its functions are primarily executive in that its primary duty is to enforce the law. Attorney General Opinion JM-266 at 3. Thus, under the *Benavides* test, the district attorney's office does not fall within the judiciary exception. Because a district attorney's office is not otherwise defined as a "governmental body" in section 2(1) of the act, whether it is subject to the act turns on whether it is supported by or expends public funds. V.T.C.S. art. 6252-17a, § 2(1)(G). The district attorney's office is clearly supported by and expends public funds. It is therefore a "governmental body" within the meaning of section 2(1). For the foregoing reasons, we decline to reconsider Attorney General Opinion JM-266 at this time. The district attorney must release the requested information unless it falls within one of the exceptions enumerated in section 3(a) of the act. You claim that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the act.

The requestor has submitted to us for review an affidavit dated August 25, 1987, in which Mr. Graham's trial attorney states that some or all of the requested information had been made available to him. He states, specifically, that "[t]he State has shown me their entire file, including the offense reports for the extraneous offenses." You do not dispute that this information has been previously disclosed; thus, we must assume that it has been. Thus, information made available to Mr. Graham's trial attorney as indicated in

the affidavit may not be withheld pursuant to section 3(a)(3) of the Open Records Act. *See* Open Records Decision No. 349 (1982).

With respect to section 3(a)(8), you argue that this exception should apply to all material in a closed law enforcement file. You also dispute our use of a standard that permits you to withhold from a closed file only that information the release of which would "unduly interfere with law enforcement." We have reviewed your argument and are not persuaded by it. Accordingly, we will apply the standard of undue interference with law enforcement. Since you do not claim any undue interference with law enforcement will be caused by releasing this information, you have waived this argument.

However, you still may withhold this information pursuant to section 3(a)(8) if doing so is prohibited by law or implicates third-party interests. *See generally* Open Records Decision No. 586 (1991) (law enforcement interests implicating third parties may overcome presumption of openness). Accordingly, we address your claim that this information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(8) of the act.<sup>1</sup>

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). Section 3(a)(1), however, does not encompass work product or discovery privileges. Open Records Decision No. 575 (1990). Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements. Because section 3(a)(3) has here been waived through prior disclosure of the information to Mr. Graham's trial attorney, the work product doctrine and "law enforcement privilege" are inapplicable here.<sup>2</sup> As you do not otherwise indicate that release of the information previously made available is prohibited by law or implicates third-party interests, we conclude that it may not be withheld from required public disclosure under sections 3(a)(1) and 3(a)(8) of the act.

Finally, we address the information not previously made available to Mr. Graham's trial attorney. Section 3(a)(3) excepts from required public disclosure:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is,

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<sup>1</sup>We need not address the applicability of section 3(a)(3) of the act with respect to information previously made available to Mr. Graham's attorney, as section 3(a)(3) is designed to protect the interests of governmental bodies and does not implicate third-party interests.

<sup>2</sup>Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990) at 4. Section 3(a)(3) requires parties to a lawsuit to seek relevant information through the normal process of discovery. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

We understand that the requestor intends to file writ of habeas corpus litigation on behalf of Mr. Graham. You claim that "litigation in this cause is a certainty." The requestor does not dispute your claim and concedes that "litigation is pending." Although we have no basis for concluding that litigation is pending in this matter, we conclude that it may be reasonably anticipated. Furthermore, we accept your determination that the requested information relates to the pending litigation. Accordingly, the information not previously made available to Mr. Graham's trial attorney may be withheld from required public disclosure under section 3(a)(3) of the act. The remaining information must be released 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 OR93-213.

Yours very truly,

  
Rebecca L. Payne  
Open Government Section Chief  
Opinion Committee

RLP/GCK/Imm

Ref.: ID# 19904

cc: Mr. Anthony S. Haughton  
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