



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 2, 1993

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

OR93-407

Dear Mr. Delmore:

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# 20226.

The District Attorney's Office for Harris County (the "district attorney") has received a request for a closed investigative file concerning a burglary offense. Specifically, the requestor seeks "a copy of . . . offense report that was entered into the pretrial motion hearing Nov. 30, 1990 and . . . [the] lineup Report." You contend the requested information is excepted from public disclosure under sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.¹

Section 3(a)(1) excepts "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," citing *Owens-Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749 (Tex. 1991), and is subject to the "law enforcement privilege," citing *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). Section 3(a)(1) does not encompass work product or discovery privileges. Open Records Decision No. 575 (1990). Work product is properly raised under section 3(a)(3) not section 3(a)(1). Open Records Decision No. 429 (1985). Section 3(a)(3) must

¹We note that you also request reconsideration of the Attorney General Opinion JM-266 (1984) ruling that the district attorney's office is subject to the Open Records Act. Because we have already addressed and dismissed your arguments in Open Records Ruling No. 93-213 (1993), we decline to readdress this matter.

apply before this office will consider work product claims. Open Records Decision No. 574 (1990).²

Section 3(a)(3) excepts

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

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You argue that "subsection 3(e) provides that the State is considered a 'party to litigation of a criminal nature,' for purposes of subsection 3(a)(3), 'until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.'" You also contend that "investigatory materials created in anticipation of litigation at any time prior to the running of the statute of limitations or the exhaustion of post-conviction remedies would be accorded a work product privilege of unlimited duration."

Section 3(e) is not a separate exception to disclosure. It merely provides a time frame for the section 3(a)(3) exception. Open Records Decision No. 518 (1989) at 5. Unless a governmental body has met its burden of showing that litigation is pending or reasonably anticipated under section 3(a)(3), section 3(e) is not applicable. You state that the defendant in the investigation at issue "entered a plea of guilty . . . on November 30, 1990, and was sentenced to confinement in prison for a period of 29 years." Unless the defendant has appealed the plea or attacked it by writ of habeas corpus or there is evidence that he intends to do so, there is no pending or reasonably anticipated litigation between the state and the defendant. *See generally* Tex. R. App. P. 40(b)(1), 44. You have not demonstrated that an appeal or writ of habeas corpus is pending or reasonably anticipated. Because you have not met your burden showing that litigation is pending or reasonably anticipated, you may not withhold any information under section 3(a)(3).

²As previously stated in Open Records Letter 93-213 (1993), section 14(f) of the act added in 1989 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Acts 1989, 71st Leg., ch. 1248, § 18, at 5029. Accordingly, the use of section 3(a)(8) as a basis for the "law enforcement privilege" is no longer valid.

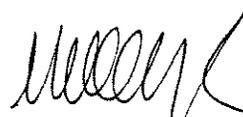
Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal 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.

After a file has been closed, either by prosecution or by administrative decision, the availability of section 3(a)(8) is greatly restricted. Open Records Decision No. 320 (1982). The test for determining whether information regarding closed investigations is excepted from public disclosure under section 3(a)(8) is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3. You do not claim that the release of this information would unduly interfere with law enforcement.³ Accordingly, none of the information may be withheld from required public disclosure under section 3(a)(8) of 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 contact this office.

Yours very truly,


Madeleine B. Johnson
Chair, Opinion Committee

MBJ/LBC/jmn

Ref.: ID# 20226

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³As stated in Open Records Letter 93-213 (1993), this office is not persuaded by your contention that our long-standing application of section 3(a)(8) to closed criminal files is incorrect.