



**RQ-780**

Daniel C. Rice  
District Attorney  
9th Judicial District

301 N. Thompson, Suite 106  
Conroe, Texas 77301-2824

Conroe (409) 539-7800  
Fax (409) 760-6940

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**FILE #** ML-31657-95  
**I.D. #** 31657

January 26, 1995

The Hon. Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**RECEIVED**  
FEB 06 1995

Re: Open Records Request ID # 30987

**Opinion Committee**

Dear Attorney General Morales:

In our December 19, 1994, letter, we requested special consideration of the open file policy of a District Attorney's Office as it relates to the Open Records Act, because we have found no definitive ruling. We requested and received permission from your office to reply to the Texas Resource Center's January 9, 1995, response by January 26, 1995.

After speaking with your office, it appears that an opinion on this question pursuant to section 402.042 of the Government Code, rather than, or in addition to, an open records decision should be requested. We hereby so request and ask that our December 19, 1994, letter serve a dual purpose: to satisfy the requirements of the Open Records Act to exempt the records of this office under that Act and to request an opinion thereon.

The files at issue are available to Mr. Goodwin's attorney, for review, as Mr. Goodwin's attorney

While we take the position that the files at issue are not public records, we nonetheless have not precluded the party in interest, Mr. Goodwin, or his attorney, Mr. Lamberty, from reviewing our files. We should explicitly assure your office and Mr. Lamberty of the Texas Resource Center that it is not the intent of the Montgomery County District Attorney's office to impede or preclude Mr. Goodwin's attorneys from reviewing the requested files. As related by Mr. Lamberty in his December 8, 1994, letter to Gail McConnell, attached hereto as Exhibit A, this office has agreed to have Mr. Lamberty review the files. We are acutely aware that our primary duty as district attorney and assistant district attorneys is "not to convict, but to see that justice

is done." TEX. CODE CRIM. P. art. 2.01 (Vernon 1977). And that we shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused. Id.

Mr. Lamberty may, of course, make arrangements with this office to review the files. He should not hesitate to do so, even though he has already filed a second writ of habeas corpus on Mr. Goodwin's behalf. Perhaps, he anticipates federal habeas corpus proceedings. The State has a duty to timely attain the final imposition of Mr. Goodwin's jury-imposed sentence and has no desire to impede the disposition of his case. In fact, the State would prefer that Mr. Lamberty would arrange for such a review in the normal course of our business, rather than engaging this office in the involved questions and issues of the Open Records Act. We further note that Mr. Lamberty has not yet arranged to review the files, although he became Mr. Goodwin's attorney of record on November 4, 1994. The State should not be blamed later for delays, if any, in the investigation and filing of a writ in the federal courts.

The State's request was timely

Having established that this office has no interest in impeding the investigation of Mr. Goodwin's attorney's of our files, we address another preliminary issue raised in Mr. Goodwin's response to our Open Records Act request: whether the State's request for a decision on December 19, 1995, was timely. Mr. Lamberty raises this issue knowing full well that December 18, 1994, the 10th day after the Open Records Act request was filed, was a Sunday. Section 311.014 of the Code Construction Act provides in pertinent part:

- (a) In computing a period of days, the first day is excluded and the last day is included.
- (b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

TEX. GOV'T CODE ANN. § 311.014 (Vernon 1988).

The last day of the "reasonable time but not later than the 10th calendar day after the date of receiving the written request" was December 18, 1994, a Sunday. The next day that was not a Saturday, Sunday, or legal holiday was Monday, January 19, 1995. The State's request for an Attorney General Decision pursuant to Section 552.301 of the Open Records Act was timely. The information requested may not be presumed to be public information subject to disclosure.

There are special circumstances that exempt the files at issue under section 552.103(a) of the Act

In OR94-239, June 9, 1994, your office decided, in response to a decision on a request for certain records regarding the arrest, investigation, and trial of Wayne East for capital murder, that:

[I]nformation cannot be withheld under section 552.103(a) if the opposing party in the litigation has previously had access to it; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.

OR94-239, dated June 9, 1994 (emphasis added).

There are special circumstances in criminal litigation for which the litigation exception of section 552.103(a) should continue to apply, even though the file has been discovered by the defendant's attorney in the trial of the case. Rule 3.07 of the State Bar Rules provides in pertinent part:

- (a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.
- (b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:
  - (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
  - (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person's refusal or failure to make a statement;
  - (3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
  - (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

TEX. DISCIPLINARY R. PROF. CONDUCT 3.07 (1994), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. A (Vernon Supp. 1995) (STATE BAR RULES art. 10, § 9).

These rules are in direct contradiction with the prior decisions regarding the application of Section 552.103, which provides:

- (a) Information is excepted from the requirements of Section 552.021 if it is information:
- (1) relating to litigation of a civil or criminal nature or 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 a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
  - (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

TEX. GOV'T CODE ANN. § 552.103 (Vernon 1994).

In addition, Article 2.03 of the Code of Criminal Procedure provides in pertinent part:

- (b) It is the duty of the trial court, the attorney representing the accused, the attorney representing the state and all peace officers to so conduct themselves as to insure a fair trial for both the state and the defendant, not impair the presumption of innocence, and at the same time afford the public the benefits of a free press.

TEX. CODE CRIM. P. art. 2.03(b) (Vernon 1977).

Prior decisions appear to override these legal and ethical duties by holding that "once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information." OR94-239, dated June 9, 1994; OR-94-111, dated February 28, 1994; Open Records Decision Nos. 349, 320 (1982). However, when the government entity is the district attorney's office, prosecuting a criminal case, this construction of the Open Records Act directly conflicts with Rule 3.07, prohibiting the release of the kinds of information that would have been discovered by defense counsel. The legislature could not have intended this result. Section 552.103 litigation exception either means what it says or it has no meaning at all.

#### Due process considerations

The Code of Criminal Procedure was enacted to seek in pertinent part:

3. To insure a trial with as little delay as is consistent with the ends of justice;
4. To bring to the investigation of each offense on the trial all the evidence tending to produce conviction or acquittal;
5. To insure a fair and impartial trial.

TEX. CODE CRIM. P. art 1.03 (Vernon 1994).

The limited open file policy of this office serves these due process interests by insuring that all Brady concerns, however tangential, are satisfied; that the defendant has the information necessary to thoroughly prepare his or her defense, and that our cases are speedily resolved. However, we withhold from review work product and other similarly appropriate material.

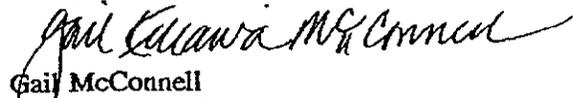
Justice would indeed be hampered and imperiled were the general public allowed to mill about in our criminal files while the litigation was pending. It is not at all unusual for important evidentiary items to be held in the file. Moreover, should we be forced to await an order from the court before we decided to share certain information with a defense attorney, our local court system would grind to a halt.

The foregoing concerns prompt us to request an opinion. We recognize that prior decisions have not excepted prosecuting offices from the general holding that information seen by all parties to the litigation are available to the public. However, this holding conflicts, in significant respects, with the mandates of the statutes that prescribe our duties. We therefore ask your opinion and counsel in harmonizing the application of the Open Records Act with the statutes proscribing criminal litigation.

Sincerely,



Daniel C. Rice  
District Attorney  
Montgomery County, Texas



Gail McConnell  
Assistant District Attorney  
Montgomery County, Texas  
301 N. Thompson, Suite 106  
Conroe, Texas 77301  
(409) 539-7800  
(409) 760-6940 (fax)  
SBOT 11395400

cc: Mr. Lynn Lamberty  
Texas Resource Center  
Counsel for Mr. Goodwin