



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

September 12, 1977

Honorable Dolph Briscoe
Governor of the State of Texas
411 West 13th Street
Austin, Texas 78701

Open Records Decision No. 177

Re: Whether an audit report
on electronic eavesdropping
equipment may be publicly
disclosed.

Attention: Robert C. Flowers
Executive Director
Criminal Justice Division

Dear Governor Briscoe:

Your office has received a request for audit reports on the purchase of electronic eavesdropping equipment approved by the Southeast Texas Regional Planning Commission. The Criminal Justice Division of your office conducted an audit of such purchases and the report has been completed. The Division requests our decision concerning the release of this information under the Open Records Act, article 6252-17a, V.T.C.S.

Your office has no objection to the disclosure of this information, and it is not contended that making it public would be detrimental to law enforcement operations for the investigation or detection of crime. The question is whether you are required to withhold the information in light of Open Records Decision No. 143 (1976), which held that certain information concerning electronic eavesdropping equipment was excepted from required public disclosure under the law enforcement records exception in section 3(a)(8) of the Act. Your question poses the issue of whether a custodian of records has discretion to disclose information even though a valid claim as to the applicability of the section 3(a)(8) exception might be made.

Section 3 of the Open Records Act makes all information collected, assembled, or maintained by governmental bodies public information with certain exceptions "only," and then lists sixteen exceptions, including section 3(a)(8), which except certain records of law enforcement agencies. The Act commands a liberal construction of its provisions toward the

purpose of openness and in favor of granting requests for information. Secs. 1; 3(b); 14(b), (c). Section 14(a) provides that the "Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless prohibited by law. . . ." This provision would resolve the issue of your discretion to release information were it not for apparently contradictory provisions in section 10 and section 3(c). Section 10 purports to make it a misdemeanor offense to distribute "[i]nformation deemed confidential under the terms of this Act," and the language of section 3(c) can be read as impliedly limiting discretion to release information in exceptions other than those specified. Section 3(c) expressly provides for discretion to release information in section 3(a) (6), (9), (11), and (15).

In the first opinion issued by this office concerning the Act, we noted in reference to section 10 that "information which is or is not confidential is nowhere defined in the Act." Attorney General Opinion H-90 (1973). Thereafter, in Open Records Decision No. 22 (1974), an inquiry was made as to whether the failure to assert that information was exempted under the 3(a)(8) exception would have adverse precedential effect on other law enforcement agencies. We said "[t]he Act does not in itself make anything secret or confidential." Id. at 2. (Emphasis in original). We then said that

[t]he voluntary release of the materials cannot prejudice other Texas law enforcement agencies which do not choose to voluntarily disclose similar information and which instead rely upon the "law enforcement" exception from required disclosure under § 3(a)(8). . . .

Id. at 2.

However, in Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App. -- Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976), the court quoted section 3(c) and said:

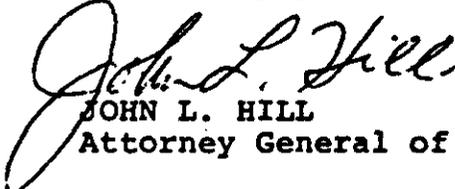
The significance of this latter portion of the statute is that it does not vest the custodian with discretion to release the matters contained in section 3(a)(8).

Id. at 184. (Emphasis in original).

This possible conflict in interpretations has been noted in Comment, The Texas Open Records Act: A Section-By-Section Analysis, 14 Houston L. Rev. 398, 422-23 (1977). See also Searcy, Background Paper on Privacy and Public Records (Texas Advisory Commission on Intergovernmental Relations 1977) at 37. The Chronicle court's remark concerning section 3(c) was in a description of several provisions of the Act which were relevant to the issues faced by the court. Although the court's remark has been interpreted by some commentators as holding that a custodian may not release information which falls within one of the twelve exceptions which are not listed in section 3(c), the court did not directly address the relationship between sections 3(c) and 14(a).

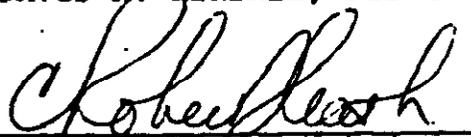
We believe the context indicates that the reference to section 3(c) is nothing more than a summary of the language of the statute rather than a construction of that section. The previous interpretation of the Act by this office has been that a custodian has discretion to make public information even though section 3(a)(8) might except it from required public disclosure. Open Records Decision No. 22 (1974). No judicial decision has ruled directly to the contrary. We believe that the Open Records Act does not prohibit you from releasing the information about which you inquire.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:


DAVID M. KENDALL, First Assistant


C. ROBERT HEATH, Chairman
Opinion Committee

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