



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

July 24, 1997

Ms. Judy Ponder
General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

Open Records Decision No. 657

Re: Whether telephone records of the Texas Supreme Court held by the General Services Commission are subject to the Texas Open Records Act, Government Code Chapter 552, and related questions regarding Attorney General Opinion JM-446 (1986) (ORQ-23)

Dear Ms. Ponder:

The General Services Commission (the "commission") received a request for the telephone billing records of the Texas Supreme Court. You ask whether the billing records are subject to required public disclosure under the Texas Open Records Act (the "act").

In Attorney General Opinion JM-446 (1986), this office concluded that the commission holds telephone records of the supreme court as an agent of the court, and therefore, because the telephone records are those of the judiciary, they are not subject to the act. We also determined in Open Records Decision No. 535 (1989) that the contract for computer assisted legal research executed by the Texas Court of Criminal Appeals was not available under the act pursuant to the judiciary exception. You now ask whether the commission may deny the instant request for telephone records based on Attorney General Opinion JM-446 (1986). We conclude that the supreme court's telephone records held by the commission are not records of the judiciary for purposes of the act and overrule Attorney General Opinion JM-446 (1986) and Open Records Decision No. 535 (1989) to the extent that they conflict with this opinion.

The act generally requires the public disclosure of information maintained by a "governmental body." The act defines a "governmental body" to include, among other things,

(x) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(B) does not include the judiciary.

Gov't Code § 552.003(1). The supreme court is "supported in whole or in part by public funds," under section 552.003(A)(x). However, section 552.003(B) of the Government Code exempts the judiciary from the provisions of the act. This office must, therefore, determine whether telephone records that are maintained by the commission on behalf of the supreme court are records of the judiciary which are not subject to the act. Such an analysis requires us to examine what the legislature meant when using the term "judiciary" to exclude from the act's provisions an entity entirely supported by public funds.

Though we have found no legislative history discussing the precise scope of the term "judiciary," several courts have examined the judiciary exception. In *Holmes*, the supreme court held that the Harris County District Attorney's office was not included in the word "judiciary" as used in the act. *Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996). The court reasoned that the Texas Constitution invested no judicial power in the district attorney; therefore, the district attorney could not be considered a part of the judiciary. *Id.*; Tex. Const. Art. V, § 1. The court described judicial power as "the powers to hear facts, to decide issues of fact made by pleadings, to decide questions of law involved, to render and enter judgment on the facts in accordance with law as determined by the court, and to execute judgment or sentence." *Id.*; *Kelly v. State*, 676 S.W.2d 104 (Tex. Crim. App. 1984); *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933). Furthermore, the intermediate appellate court in the same case found that "the word 'judiciary' carries the same meaning in both ordinary and legal usage: the branch of government in which the *judicial power* is vested." *Holmes v. Morales*, 906 S.W.2d 570, 572-573 (Tex. App.—Austin 1995), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996) (emphasis in original). That court defined judicial power as "the power to *award legal remedies* that are traditional in courts of justice, in controversies between disputing parties who are properly before the court, based ordinarily upon past or present facts and according to rights, duties, and liabilities laid down in pre-existing rules of constitutional, statutory, or common law." *Id.* at 573 n. 4 (emphasis in original).

Similarly, in *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ), the court construed the purpose of the judiciary exception. *Benavides* held that the Webb County Juvenile Board was not part of the judiciary for purposes of the act, despite the fact that the board consisted of members of the judiciary and the county judge. The court explained the purpose of the judiciary exception as follows:

The judiciary exception . . . is important to safeguard judicial proceedings and maintain the independence of the judicial branch of government, preserving statutory and case law already governing access to judicial records. But it must not be extended to every governmental entity having any connection with the judiciary.

Benavides, 665 S.W.2d at 152; *see also* Open Records Decision No. 572 (1990) at 3 (concluding that “analysis of the judiciary exception should focus on the governmental body itself *and* the kind of information requested” (emphasis added)) (citing *Benavides*, 665 S.W.2d at 151).

The records at issue in *Benavides* were resumes of applicants for the position of juvenile probation officer. The records were in the hands of a juvenile board composed of members of the judiciary and the county judge. The court held that the board’s selection of a probation officer “is simply part of the Board’s administration of the juvenile probation system, not a judicial act by a judicial body,” and that the board is a governmental body subject to the Open Records Act, thus requiring public release of the requested records. *Id.* at 152; *see also, e.g.*, Open Records Decision Nos. 527 (1989) at 2-3 (relying on *Benavides*), 417 (1984) at 1.

This office has also examined the nature of the judiciary exception on several occasions. In Open Records Decision No. 646 (1996), the attorney general concluded that although district judges perform statutory administrative oversight duties over community supervision and corrections departments, personnel records of those departments are not records of the judiciary for purposes of the act. The attorney general stated that

[t]he function that a governmental entity performs determines whether the entity falls within the judiciary exception to the Open Records Act. If the entity, comprised of judges, performs primarily administrative functions, the entity is not judicial in nature and is thus subject to the Open Records Act. In this case, the role of district judges in the oversight of a supervision and corrections department is purely administrative in nature.... The judges’ oversight of a department does not determine whether the departments’ records are records of the judiciary. The judges connected with a department do not act in a judicial capacity regarding these administrative matters nor are such records prepared for the use of a court in its judicial capacity.

Id. at 3; *but see* Act of May 26, 1997, H.B. 1667, § 1, 75th Leg., R.S. (to be codified at Gov’t Code § 76.006(f)) (making documents that evaluate the performance of community supervision and corrections officers who supervise defendants placed on community supervision confidential) (act effective September 1, 1997).

In Open Records Decision No. 204 (1978), this office concluded that files of a county judge containing congratulatory, birthday, and sympathy letters to constituents are subject to the act. That decision found that the dual responsibilities of a county judge, who as a judge of the county court is a part of the judiciary, and as a presiding officer of the commissioner's court is a member of a governmental body subject to the Open Records Act, provided "a useful dividing line between the judge's judicial functions and his other duties." Open Records Decision No. 204 (1978) at 2. The attorney general concluded that "information held by the county judge is subject to the Open Records Act except to the extent it pertains to cases and proceedings before the county court." *Id.* at 3.

As these examples reveal, the term "judiciary" as used in the act does not apply to all records held by entities with judicial power. The judiciary exception applies only to those records which relate to the exercise of judicial powers as defined above. We believe that the intent of the judiciary exception was to relieve the judiciary from having to divulge information pertaining to judicial acts, such as opinion drafts, transcripts of judges' conferences, pleadings and other records filed with a court. *Cf. Mustard v. State*, 711 S.W.2d 71, 77 (Tex. App.—Dallas 1986, pet. ref'd), *cert. denied*, 484 U.S. 916 (1987) (municipal court's computer access codes not subject to act based on judiciary exception). These records all relate to the court's exercise of judicial power and are generally subject to common-law rights of access. Attorney General Opinions DM-166 (1992) at 3 (public has general right to inspect and copy judicial records), H-826 (1976) at 3; Open Records Decision No. 25 (1974); *see Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public). We do not believe that the legislature intended to remove from public scrutiny the type of administrative records at issue in this request. Specifically, the records regarding the expenditure of public funds or which directly implicate the fiduciary responsibilities of public employees should be subject to required public disclosure pursuant to the Open Records Act. Such records are not the kinds of information that relate to the exercise of judicial powers.

An entity may, therefore, be part of the judiciary, but if its records do not relate to its exercise of judicial power, such as records pertaining to the day-to-day routine administration of a court, these records should be subject to the Open Records Act. To fall within the judiciary exception, the document must contain information that directly pertains to the exercise of judicial powers. *Holmes*, 924 S.W.2d at 923; *see* Open Records Decision Nos. 527 (1989) (Court Reporters Certification Board not part of judiciary because its records do not pertain to judicial proceedings), 204 (1978) (information held by county judge that does not pertain to cases and proceedings before county court subject to Open Records Act). All other records are subject to the provisions of the act; however, one or more of the act's enumerated exceptions may protect the information from disclosure. Thus, other statutes and exceptions may allow an entity to withhold the information from public disclosure. *See* Gov't Code §§ 552.101-.124. In this case, the telephone billing records are purely administrative in nature and do not relate to the exercise of judicial power.

Accordingly, telephone billing records are not "records of the judiciary" for purposes of the Open Records Act.

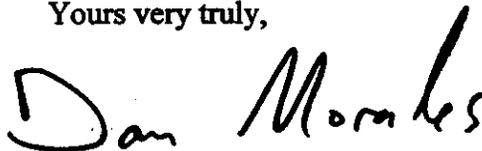
Although we have found that the telephone billing records are subject to the act, we continue to believe that the commission is to be considered the agent of the supreme court in collecting and maintaining these records. Attorney General Opinion JM-446 (1986); *see* Gov't Code § 2170.006 (commission shall maintain records relating to telecommunications system); Gov't Code § 2170.051 (commission shall manage telecommunications services for all state agencies); Gov't Code § 2170.057 (commission shall develop system of billings and charges for telecommunications system); *see also* Open Records Decision No. 576 (1990). Thus, the telephone billing information maintained by the commission in accomplishing its statutory purposes are records of the entity served, not the commission. Attorney General Opinion JM-446 at 4 (1986); Open Records Decision No. 617 (1993). The commission merely maintains the telephone billing records on behalf of other governmental entities. It is not in a position to review such requested records to determine the applicability of a confidentiality statute or to raise any possible exceptions to public disclosure that the entity which generated the record may want to raise. Open Records Decision No. 617 (1993). Consequently, requests for information which are held by one entity as the agent of another, such as the telephone billing records here, should be directed to the entity on whose behalf the records are held. *Id.* As a courtesy, the commission should direct the requestor to the proper agency or entity.

SUMMARY

The judiciary exception applies only to those records which relate to the exercise of judicial powers. Records regarding the expenditure of public funds, including records which directly implicate the fiduciary responsibilities of public employees or otherwise pertain to the day-to-day routine administration of a court, are subject to the Open Records Act. Telephone billing records of the Texas Supreme Court are not "records of the judiciary" for purposes of the Open Records Act; however, one or more of the act's enumerated exceptions may protect the information from public disclosure. Attorney General Opinion JM-446 (1986) and Open Records Decision No. 535 (1989) are overruled to the extent that they conflict with this opinion.

We affirm Attorney General Opinion JM-446 (1986) to the extent that it finds that telephone billing information maintained by the General Services Commission in accomplishing its statutory purposes are records of the entity served, not the commission. Requests for telephone billing records should be directed to the entity on whose behalf the records are held.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DAVID A. TALBOT, JR.
Office of General Counsel

SANDRA L. COAXUM
Chief, Open Records Division