



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 7, 1993

Mr. Lynn Ellison
District Attorney
Karnes County Courthouse
101 N. Panna Maria, Suite 14
Karnes City, Texas 78118-2928

OR93-238

Dear Mr. Ellison:

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# 19849.

The Karnes County District Attorney's Office (hereinafter "your office") received an open records request for the "trial and appellate files maintained by your office in the causes of the State of Texas v. Pedro Solis Sosa and the State of Texas v. Leroy Vargas Sosa." You contend that, except for records previously released during criminal discovery, the requested information constitutes information protected by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

This office generally agrees with your contention that many of the requested records come under the protection of section 3(a)(3) as attorney work product. To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). Because you have made this requisite showing, your office may withhold *drafts* of legal documents and attorney's handwritten notes as work product, but only to the extent that they reveal the attorneys' legal analyses, opinions, or strategies during or in anticipation of criminal litigation. You may also withhold pursuant to section 3(a)(3) correspondence from the Texas Department of Public Safety contained in file 6/1.

You may not, however, withhold as work product items such as telephone messages, correspondence with individuals outside of your office, reports from the San Antonio Police Department Laboratory, or notations containing purely factual information. For example, none of the information contained in file 5/2 constitutes protected work product. Nor may you withhold a billing statement for a psychological evaluation contained in file 1/3 as work product.

You contend that grand jury lists and documents pertaining to the grand jury are deemed confidential under article 20.02 of the Code of Criminal Procedure. A list of individuals subpoenaed to appear before a grand jury is constructively in the possession of the grand jury, since it was prepared by persons acting as their agents, and it is therefore excepted from disclosure because a grand jury is a part of the judiciary for purposes of the Open Records Act. Open Records Decision No. 434 (1986). Similarly, a list of names of prospective grand jurors is not subject to disclosure, because it is in the custody of persons who are part of the judiciary. Open Records Decision No. 433 (1986). However, a district attorney possessing a list of *impaneled* grand jurors is not acting as an agent of the judiciary or the grand jury, and in addition, the names are a matter of public record, since impaneling takes place in open court; therefore, your office may not withhold the names of *impaneled* grand jurors. *Id.*

You contend that "in-house memos and police reports pertaining to the identity and residence of informants" contained in file 1/2 come under the protection of the informer's privilege. Two reasons for withholding names and statements of witnesses are that disclosure might either (1) subject the witnesses to intimidation or harassment or (2) harm the prospects of future cooperation between witnesses and law enforcement authorities. Open Records Decision No. 252 (1980). When criminal investigations are closed, however, these two factors must be examined on a case by case basis before governmental bodies may withhold such information. Where it is apparent from an examination of the facts of a particular case that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement officers, the names and statements of witnesses may be withheld. *Id.*

Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the party complained of. *See* Open Records Decision No. 208 (1978). Assuming the criminal defendants have not been made aware of the identity of these witnesses who cooperated in the investigation, you may withhold those individuals' names and addresses. The remaining information contained in this file must, however, be released, except for the home address and telephone number of peace officers, which are deemed confidential under section 3(a)(17)(A) of the Open Records Act.

We note that several of the files contain reports from the Federal Bureau of Investigation that contain the caveat

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

Records with this type of warning are considered to be protected under the federal Freedom of Information Act and thus must be withheld pursuant to section 3(a)(1) of the Open Records Act, which protects "information deemed confidential by law, either

Constitutional, statutory, or by judicial decision." See Open Records Decision No. 561 (1990).

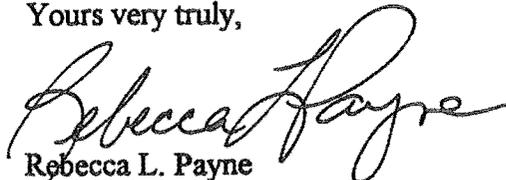
You contend that some of the information contained in file 5/2 reveals "confidential investigations." Whether section 3(a)(8), the "law enforcement" exception, applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision Nos. 133, 127 (1976). You have not explained, nor is it apparent to this office, how the release of these records would unduly interfere with law enforcement efforts. Consequently, section 3(a)(8) does not protect any of these records.

You also contend that certain records pertaining to a deceased individual come under the protection of common-law privacy. As noted above, section 3(a)(1) of the act protects "information deemed confidential by law, including the common-law right to privacy." *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The right of privacy, however, is purely personal and lapses upon death. See *Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ *ref'd n.r.e.*). See also Attorney General Opinions JM-229 (1984); H-917 (1976). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld under the common-law privacy aspect of section 3(a)(1). See Attorney General Opinion JM-229. In this instance, although the deceased individual has lost all right to privacy, we note that that individual had designated a beneficiary for his retirement benefits. You may withhold the name of the beneficiary; the remaining information you sought to withhold under privacy contained in files 5/2 and 6/2 must be released. We note, however, that the portions of photographs containing identifiable living police officers must be withheld pursuant to section 3(a)(19). See Open Records Decision No. 536 (1989).

Finally, you must release all records contained in the files that were made a part of the court record, including all briefs, waiver of rights forms, and all orders signed by either a judge, magistrate, or justice of the peace. The autopsy contained in the "Leroy Sosa File" is also public information. See Code Crim. Proc. art. 49.25, § 11.

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 our office.

Yours very truly,



Rebecca L. Payne
Section Chief
Open Government Section

RLP/RWP/lmm

Ref: ID# 19849
ID# 20162

Enclosures: Submitted documents

cc: Mr. Tom McNeely
Investigator
Texas Resource Center
1206 San Antonio
Austin, Texas 78701
(w/o enclosures)