



Office of the Attorney General
State of Texas

May 28, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Rod Boyles
Assistant Attorney General
Medicaid Fraud Control Unit
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR93-270

Dear Mr. Boyles:

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# 17582.

The Medicaid Fraud Control Unit (the "unit") of the Office of the Attorney General has received a request for information relating to two closed criminal investigation files. Specifically, the requestor seeks investigation file numbers N-1084-161 and N-0585-174. You state that the bulk of the files has been released. You have submitted for our review Exhibit A consisting of long lists of names and ledger entries indicating weekly payments; Exhibit B consisting of the reports, notes, and findings of the unit's investigator as well as witness statements; and Exhibit C consisting of interagency and intra-agency memorandums and communiques concerning the investigation. You claim the documents submitted for our review are excepted under sections 3(a)(1), 3(a)(8) and 3(a)(11) of the Open Records Act.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the names of Medicaid recipients contained in Exhibit A are confidential under section 12.003 of the Human Resources Code which provides as follows:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Texas Department of Human Services] or acquired by employees of the [Texas

Department of Human Services] in the performance of their official duties.

(b) an offense under this section is a Class A misdemeanor.

Medicaid is an assistance program administered by the Texas Department of Human Services. V.T.C.S. art. 695j-2; Hum. Res. Code § 32.030 et seq. Any of the names or entries in Exhibit A (or any of the other documents) that relate to Medicaid recipients *must* be withheld under section 12.003 of the Human Resources Code in conjunction with section 3(a)(1) of the Open Records Act.¹

You also raise the informer's privilege as incorporated into section 3(a)(1) for the witness statements contained in Exhibit B and references to a confidential source contained in Exhibits B and C. The informer's privilege has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege encourages citizens to report the commission of crimes to law enforcement officials by keeping their identity anonymous. *Roviaro v. United States*, 353 U.S. 53 (1957). The privilege is also a well established exception under the Open Records Act. Open Records Decision No. 549 (1990) at 4. The informer's privilege protects the identity of persons who report violations of the law to officials having the duty of enforcing particular laws. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5. However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202.

Exhibit B contains several statements by witnesses and Exhibit C contains a memorandum stating the information provided by an informant in the case. The statements and information reveal possible violations of the law. As stated above, the informer's privilege excepts a statement itself only to the extent necessary to protect the informer's identity. *See supra*. Therefore, you may withhold the statements and memorandum under section 3(a)(1) only to the extent they identify the informants.²

¹There is no information in Exhibit A that identifies whether or not the names are those of Medicaid recipients. We note that Exhibit A also contains documents entitled "PREVOCATIONAL WORKSHOP PAYROLL." We are unable to determine which of the names and entries relate to Medicaid recipients. It is your duty to do so.

²Open Records Decision Nos. 515 (1988) (informer's privilege protects not only the identities of those who report violations of the law, but also the identities of those who merely cooperate in law enforcement investigations); 391 (1983) (information which identifies persons who complain to the Air Control Board regarding pollution is excepted by the informer's privilege), 376 (1983) (name of a complainant to the Department of Human Resources about a nursing home is excepted under the

Furthermore, we note that you state that the files resulted in the conviction of an individual for a misdemeanor offense in Travis County and another conviction of an individual in a related offense in Louisiana. If any of the informers testified and their identities are known by these individuals, there is no basis for withholding this information under the informer's privilege. Open Records Decision No. 202 (1978).

You claim that all of Exhibit B is excepted from disclosure under section 3(a)(8). 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.

The test for determining whether records in closed files are 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 state that although the case is closed, "public disclosure [of Exhibit B] would subject the thoughts, plans and strategies of this office and its investigators to public viewing so as to interfere with law enforcement and crime prevention." We have reviewed Exhibit B. The file does not reveal any techniques or procedures other than routine investigative procedures and techniques that are generally known. You have not indicated how the disclosure of this file would unduly interfere with law enforcement. See Open Records Decision No. 216 (1978) at 4. You have not made the requisite showing. Accordingly, you may not withhold the information under section 3(a)(8) of the Open Records Act.

You claim that Exhibit C is excepted from disclosure by section 3(a)(11). Section 3(a)(11) excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath*, 842 S.W.2d at 413. The court has since denied a motion for rehearing this case.

(footnote continued)

informer's privilege); see also Open Records Decision No. 434 (1986) (entire statement of an informant may be withheld where it would tend to identify him).

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review Exhibit C, containing reports and memorandums discussing the case, and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11) or any other exception that you have previously raised. You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

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,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/LBC/le

Ref: ID# 17582

Enclosures: submitted documents

cc: Mr. Joseph F. McConley
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(w/o enclosures)