The Attorney General of Texas

December 21, 1978

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An Equal Opportunity/
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Honorable Raymond Frank
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Open Records Decision No. 216

Re: Whether a closed investigative report is public under the Open Records Act.

Gentlemen:

Each of you has requested our decision on the applicability of the section 3(a)(8) exception of the Texas Open Records Act, V.T.C.S. article 6252-17a, to information in an investigative report which is no longer active. Sheriff Frank's inquiry concerns a report of an explosion and fire in 1976 in which the property owner was fatally burned. The investigation resulted in the determination that the explosion and resulting death were accidental, and the file is closed. Mr. Rorschach's request concerns the city fire marshal's report of an investigation of an accident which occurred at Texas Stadium in which a football spectator's costume was ignited and he was burned. No prosecution in connection with the incident is anticipated. Colonel Speir's request involves a report of an investigation by a Texas Ranger into allegations of sexual misconduct between employees and students at the Giddings State School. The investigation was conducted at the request of the district attorney and a report was made to the grand jury. No formal accusation was made against any person, and none is anticipated.

In the cases of the fires, basic factual information about the incidents was made public, including the nature of the incident, the location, date and time of the occurrence, the premises involved, the extent of damage, name of the injured party, the nature of the injuries, the probable cause of the fire, and the status of the investigation. In the case of the investigation at the

Giddings State School, the fact that it was conducted and the fact that there was no formal accusation of criminal misconduct is known to the public.

Each of you contends that the information in the investigative files is excepted from required public disclosure under section 3(a)(8) which excepts

> records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement.

The information claimed to be excepted includes statements of, or notes of interviews with, witnesses, the identity of witnesses, the investigating officers' statements of opinions and conclusions regarding the witnesses and the incidents, and reports and results of laboratory or other tests performed or conducted during the investigation.

Mr. Rorschach asks whether disclosure of the investigative file is prohibited by section 10 of the Act which provides criminal penalties for distribution of "information deemed confidential under the terms of this Act." We have previously said that the Open Records Act does not in itself make anything secret or confidential, and that a custodian may voluntarily release information even though section 3(a)(8) might apply so as to except it from required disclosure. Open Records Decision Nos. 177 (1977); 22 (1974). This discretion to voluntarily disclose information exists absent some express statutory provision or other law making the information confidential and prohibiting its disclosure. See, e.g., Ins. Code § 5.46(D) (information obtained by fire marshal from insurance company is confidential).

The issue posed by these requests is whether and to what extent the section 3(a)(8) exception continues to apply to information in an investigative file even though it is inactive and closed.

The applicability of the section 3(a)(8) exception to records held by a police department was the issue in Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 187-188 (Tex. Civ. App. — Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976), annot., 82 A.L.R.3d 19 (1978).

The Texas Supreme Court has recently elaborated on its position in Houston Chronicle in a case involving an arson investigation file. In Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977), the court considered the question of what information in a county fire marshal's investigation of a fire must be made available for public inspection pursuant to V.T.C.S. article 1606c and the Texas Open Records Act.

The court held that article 1606c precluded disclosure of the material sought. In discussing the Open Records Act and Houston Chronicle the court said:

> This court recognized in Houston Chronicle that while strong considerations exist for allowing access to investigatory materials, the better policy reason is to deny access to the materials if it will unduly interfere with law enforcement and crime prevention.
>
> We conclude that the legislature in enacting article 1606c intended to allow public access to the material contained in the County Alarm and Fire Record but did not intend to allow access to active investigatory records of the county fire marshal. We also think the overriding public policy consideration is to preclude interference with the county fire marshal in the performance of his law enforcement duties.

Ex parte Pruitt, supra, at 710. See Open Records Decision No. 134 (1976).

In considering the legitimate law enforcement interests which might exist in information, the court in Houston Chronicle dismissed administrative inconvenience as a "relatively insignificant" factor, id. at 186. Expressly recognized as legitimate interests in withholding information under section 3(a)(8) were these: (1) avoiding interference with the state's prosecution of a potential or pending criminal case; (2) preventing excess publicity which might deprive a defendant of a fair trial; (3) avoiding disclosure of the identity of informants; (4) preventing possible intimidation or harrassment of witnesses; (5) avoiding the unwarranted invasion of personal privacy.

Whether these interests exist in an inactive investigatory file must be determined on a case by case basis. In Open Records Decision No. 127 at p. 7 (1976), we said in reference to the section 3(a)(8) exception:

> We do not believe that this exception was intended to be read so narrowly that it only applies to those investigative records which in fact lead to prosecution. We believe that it was also intended to protect other valid interests such as maintaining as confidential the investigative techniques and procedures used in law enforcement and insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers. These interests in non-disclosure remain even though there is no prosecution in a particular case.

We believe the most reasonable approach to application of the section 3(a)(8) exception to inactive files is that taken by the court of appeals of Oregon when faced with the same question. The court held that the Oregon open records act exception for "investigatory information compiled for criminal law purposes" requires identification and consideration of the various purposes for secrecy, such as those stated in the analogous federal statute. Jensen v. Schiffman, 544 P.2d 1048, 1051 (Ore. App. 1976). The list of purposes which would permit information to be withheld includes (1) interference with enforcement proceedings, (2) deprivation of a fair trial, (3) unwarranted invasion of personal privacy, (4) revelation of the identity of a confidential source, (5) disclosure of investigative techniques, and (6) endangering the life or physical safety of law enforcement personnel. See 5 U.S.C. § 552(b)(7). The court stated that the federal exemption "constitutes a persuasive catalog of the principal purposes to be served by our comparable statute. . . ." Id. The court made it clear that the purposes listed in the federal statute were not to be regarded as exclusive and that situations might occur that would illuminate additional purposes for withholding information. Id. at n. 6. See also Houston v. Rutledge, 229 S.E.2d 624 (Ga. 1976) (information in concluded investigation should be public); Westchester Rockland Newspapers, Inc. v. Moscydlowski, 396 N.Y.S.2d 857 (N.Y. App. Div. 1977) (factual information in concluded investigation public). We believe that such an approach is suggested by the Texas courts in Houston Chronicle and Ex parte Pruitt and can be implemented on a case by case basis.

The Act clearly places the burden on the governmental agency to establish how and why a particular exception applies to requested information. Attorney General Opinion H-436 (1974); Open Records Decision Nos. 150 (1977); 124 (1976); 91 (1975). In none of the requests here under consideration is it shown that an enforcement proceeding is pending or contemplated. Thus possible interference with the state's case or denial of a fair trial to a defendant do not, therefore, serve as a basis for continuing to withhold information.

Nothing in the reports reveals other than routine investigative procedures and techniques that are commonly known. Nothing submitted, and nothing in the reports themselves indicates that disclosure would endanger law enforcement personnel. We note that the names of investigating officers are public under the Houston Chronicle case.

In the fire investigation reports, it is not contended, nor does it appear from anything in the reports that the witnesses submitted the information in confidentiality. Nor does anything in the fire reports suggest the possibility that disclosure of the identity of the persons interviewed would subject them to intimidation or harrassment by any person. On the other hand, we are advised that the officer who conducted the investigation at the Giddings State School told the persons interviewed that any information they gave him was given in confidence and that

he would not disclose its source or nature. The Texas Supreme Court has held that an agency may not circumvent the purposes of the Open Records Act by promulgating a rule designating information confidential so as to bring it within the 3(a)(1) exception. However, we believe that a promise of confidentiality made by a law enforcement officer in the course of an investigation into possible criminal conduct is an important factor in determining whether the section 3(a)(8) exception continues to apply to the information so obtained. In the Giddings State School investigation, the nature of the information supports the contention that it was given in confidence. See Nix v. United States, 572 F.2d 998 (4th Cir. 1978); Flower v. FBI, 448 F. Supp. 567, 571 (W.D. Tex. 1978); Shaver v. Bell, 433 F. Supp. 438, 441 (N.D. Ga. 1977). It is also relevant that the privacy interests of juveniles are expressly protected by statutory provisions which make records concerning them confidential. V.T.C.S. art. 5143d, § 33; Family Code § 51.14. It is our decision that the Giddings State School investigation report is excepted under section 3(a)(8) because it would disclose law enforcement information obtained under a promise of confidentiality.

The material submitted by Sheriff Frank does contain an inquiry and response concerning the criminal history of the deceased victim. Such information is excepted from required public disclosure under section 3(a)(8) under the holding of the court in Houston Chronicle. The general rule is that the right of privacy lapses with the death of the person who enjoyed it. See Attorney General Opinion H-917 (1976), and authorities discussed therein. However, public disclosure of criminal history record information would be contrary to federal regulations governing participation in a Department of Justice criminal history record information system, and would subject the agency to cancellation of participation in such an information exchange system. See 28 C.F.R. §§ 20.30; 20.33(b); 20.38. We believe that to require public disclosure of criminal history record information which would subject the agency to termination of participation in inter-state information exchange systems would "unduly interfere with law enforcement and crime prevention." See Ex parte Pruitt, supra, at 710; Houston Chronicle Publishing Co. v. City of Houston, supra, at 188.

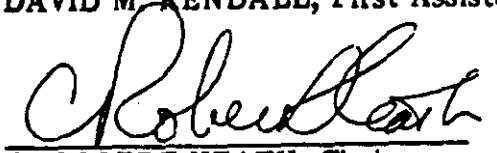
It is our decision that information in Sheriff Frank's report concerning inquiries and responses about the criminal history record of the deceased victim is excepted from required public disclosure under section 3(a)(8). The other information in this report is public. The fire report about which Mr. Rorschach inquired is public.

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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