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OPINION COMMITTEE

September 16, 2016

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RQ-0129-KP

Honorable Ken Paxton  
Attention: Opinion Committee  
P. O. Box 12548  
Austin, Texas 78711

Re: Request for an Attorney General Opinion

Dear Attorney General Paxton:

I am the elected Criminal District Attorney of Victoria County, Texas. I am submitting this request to obtain a ruling on an important question of state law concerning the propriety of grand juries releasing their reports documenting their investigations into suspected official misconduct.

### Question

Since Article 2.03 of the Texas Code of Criminal Procedure establishes “it shall be the duty” of the County/District Attorney to investigate by court of inquiry (“present by information to a court having jurisdiction” see chapter 52 Tex. Code Crim. Proc.) or grand jury (“bring to the notice of the grand jury ... when such ...is not presented by information”) “any act of violation of law or neglect or failure of duty upon the part of any officer,” how is the grand jury to report its findings to the convening authority when conduct does not rise to criminal violation?

Specifically, I ask the Attorney General the following: when a grand jury conducts an Article 2.03 investigation does the grand jury; (1) generate a report memorializing findings of “any act of violation of law or neglect or failure of duty upon the part of any officer”; (2) if such a report is made how should the grand jury report its findings to its convening authority; (3) if the grand jury presents such a report to the district clerk must such a clerk of the court present it

to the convening authority; (4) would such a report if in the possession of the district clerk become a public record subject to disclosure.

### **State of the Law**

Texas law is currently ambiguous on the subject of whether a grand jury which has prepared a report pursuant to its power under Article 2.03 of the Texas Code of Criminal Procedure to investigate suspected official misconduct is to submitted the report to the convening court via the district clerk and whether such a report submitted to the district clerk is a public record subject to disclosure.

Attorney General Opinion M-1171 (1972) concluded that “the power of a grand jury is limited to investigating possible criminal offenses and delivering any resulting indictment to the district court when nine members of the jury vote to return an indictment.” The sweeping and absolute language of that ruling would seem to preclude issuing a grand jury report, contrary to historical practice (which reflects frequent release of such reports). See, Marissa Barnett, *Grand jury blasts, but doesn't indict, UT Regent Wallace Hall*, The Dallas Morning News, September 14, 2016; See generally, Richard Meyer, *Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions*, 7 St Mary's LJ 374 (1975); *The Propriety of a Breach of Grand Jury Secrecy When No Indictment is Returned*, 7 Hous. L. Rev. 341 (1970); J. Hadley Edgar, Jr., *The Propriety of the Grand Jury Report*, 34 Tex. L. Rev. 746 (1956). However, that ruling appears to be flawed as it did not take into account the grand jury's authority under Article 2.03 of the Texas Code of Criminal Procedure, as well as Transportation Code Section 251.005(c). Article 2.03 establishes within the grand jury clear authority to investigate neglect and failure of duty in public officials; “any act of violation of law or neglect or failure of duty upon the part of any officer.”

Attorney General Opinion JM-1119 (1989) accordingly seemed to back off from the holding of M-1171. In JM-1119 the Attorney General's Office noted there was a dispute over the propriety of grand jury reports but declined to definitively address whether such reports were permissible or not since that was not the question being asked. The Victoria County Criminal District Attorney's Office would therefore respectfully request that these questions be taken up.

When a grand jury investigating under Article 2.03 possible official misconduct (1) can it generate a report memorializing findings concerning "any act of violation of law or neglect or failure of duty upon the part of any officer"; (2) if such a report is made how should the grand jury report its findings to its convening authority (as in Article 20.21); (3) if the grand jury presents such a report to the district clerk must such a clerk of the court present it to the convening authority (as in Article 20.21); (4) would such a report if in the possession of the district clerk become a public record subject to disclosure.

The Victoria County Criminal District Attorney's Office would further suggest that the logic of Article 2.03 and sound consideration of the public policy issues involved strongly support a conclusion that the grand jury is authorized to make such a report and the filing of the report with the district clerk makes that report a disclosable public record.

## Argument

It is without question that Article 2.03 of the Texas Code of Criminal Procedure imposes a duty on the attorney representing the State to present to the grand jury any information of official misconduct by an officer. See also *Miller v. State*, 874 S.W. 2d 908, 916 (Tex. App.-Houston (1<sup>st</sup> Dist.) 1994, pet. ref'd). And logically, if there is a duty for the State to present evidence of possible officer misconduct to the grand jury, then the grand jury must have a duty to investigate such allegations. Furthermore, if the grand jury has a duty to investigate suspected official misconduct under Article 2.03, then it also logically follows that the grand jury needs to

document the results of their investigation by submitting their findings to the clerk of the convening court, the district clerk. (After all there is little point in having the grand jury conduct an investigation if the results of its investigation are not documented.) And the most logical way for the grand jury to present its investigatory findings is in the form of a grand jury report.

Historically, a grand jury report is an informal, written accusation, directed at either general conditions (such as unwholesome situations in the community) or at a specific public official from which no indictment is framed. See 7 Hous. L. Rev. 341 at 348. Traditionally the subject of such a report must relate to some aspect of general public interest, relate to some aspect of public affairs, or pertain to some public evil or condition in which, in the discretion of the grand jury, the attention of the community should be directed. *Id.* Certainly accusations of criminal conduct, neglect of duty, or failure of duty by government officials would qualify as a matter of general public interest that relates to public affairs and is a public evil that the attention of the community should be directed. Therefore, the results of a grand jury's investigation pursuant to Article 2.03 would seem to be an appropriate subject for a grand jury report to be issued.

There are also obvious compelling public policy reasons for having the grand jury submit its essential findings following any investigation pursuant to Article 2.03 in the form of a grand jury report to the appropriate district clerk so that the public can have access to the grand jury report, and these benefits apply with equal force whether the grand jury substantiated the allegations of official misconduct or whether the grand jury exonerated the suspected official.

The most important benefit to having the grand jury submit a grand jury report at the end of any Article 2.03 investigation is governmental transparency. If the grand jury found official misconduct then the demands of accountable, democratic government necessitate that the public

be made aware of the grand jury's findings. Democratic government requires an informed electorate, and the electorate can hardly be properly informed if they are not given access to the results of grand jury investigations into official misconduct. Therefore limiting the right of the public to grand jury reports documenting official misconduct frustrates the entire purpose of Article 2.03 in having the grand jury investigate such suspected misconduct and by doing so reduces governmental accountability and undermines the very foundations of accountable government and thereby democratic government.

Transparency is equally important if the grand jury concluded an Article 2.03 investigation and found there was no official misconduct. For just as the public has a right and need to know when its officials have committed misconduct, so to should the public know when public officials have been exonerated from such accusations. Public confidence in the government cannot last when government officials remain under a cloud of suspicion and thus when those officials who have been suspected of misconduct are cleared of any wrong doing, it is important for that information to be made available to the public, so the public knows it can have confidence in its public servants. Allowing the grand jury reports to be made public is also important for the good of public servants who have been falsely accused of official misconduct as it establishes unambiguously that they have been cleared of any wrong doing and thus provides an answer to former Secretary of Labor Raymond Donovan's famous question, "Which office do I go to get my reputation back?"

It is also critical in cases where a grand jury found no misconduct that the public understands exactly how the grand jury came to that conclusion. Confidence in the fairness and impartiality of investigations of public officials is inevitably eroded when public officials are cleared of alleged wrong doing in a closed hearing to which the public is not permitted to

observe the proceedings or know what information was presented. Permitting the public to have access to the grand jury report will help alleviate this problem by pulling back the curtain on the grand jury's investigation to a degree sufficient to show the public what the grand jury considered and thus will confirm that a proper, thorough investigation was conducted and a just result determined. As such having the grand jury submit its report explaining their critical findings on any Article 2.03 investigation is an important tool for insuring public confidence in the integrity of the grand jury's investigation which is obviously of the utmost importance since if the public does not understand how the grand jury reached the conclusion it did then the public has little reason to trust the grand jury's ultimate determination.

Filing the grand jury report documenting any Article 2.03 investigation with the district clerk also insures there is a clear written record establishing that the attorney representing the State and the grand jury complied with their legal obligations under Article 2.03 to investigate suspected public official misconduct. This is essential because the various District, County, and Criminal District Attorney's are the public's first line of defense against corrupt and incompetent public officials, and as such the public needs to know that they are fulfilling their legal obligation by presenting such allegations to the grand jury when required to do so by Article 2.03. If grand jury reports are not made available then the public will have no way of knowing that the attorneys representing the State are fulfilling this critical function and thus one of the biggest safeguards against official misconduct will be eroded.

Submitting grand jury reports documenting Article 2.03 investigations with the district clerk can also potentially help deter future law suits against governmental entities and agents in those cases where the grand jury found no misconduct. For while a grand jury finding of no misconduct would not be an absolute bar to civil litigation, plaintiff's lawyers are certainly much

less likely to pursue law suits against government agencies or personnel if they have documented proof that a grand jury already looked at the alleged misconduct, conducted a thorough investigation, and found nothing improper. And by the same token if the grand jury did find misconduct in the governmental official, having a written grand jury report on file makes it less likely the official who was found to have committed the misconduct will want to pursue legal action against the government agency if he is dismissed or subject to some sort of disciplinary action.

Having the grand jury report documenting the results of an Article 2.03 investigation on file can also help to protect the State from accusations of selective prosecution should the State end up pursuing criminal action against the official who was found by the grand jury to have committed some kind of official misconduct. See *Miller*, 874 S.W. 2d at 916 (where the fact that the district attorney had a duty to present to the grand jury any information of official misconduct by an officer helped refute a defendant's claim of selective prosecution.)

And of course the prospect of having the grand jury report documenting the results of an Article 2.03 investigation on file with the applicable district clerk is also a powerful deterrent against evil, incompetent, or corrupt government for as Justice Brandeis once noted, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

Thus there are obviously enormous benefits in allowing grand jury reports documenting the results of Article 2.03 investigations to be submitted to district clerks. And having the grand jury report be filed with the appropriate district clerk is also consistent with grand jury procedure in other matters. Certainly when a grand jury makes a determination to indict or to no bill a criminal case against a suspected offender, the grand jury's conclusion is documented in writing

and is a matter of public record (A no-bill is recorded in the minutes and available after the term of the grand jury for review. The grand jury minutes typically reflect the subject “Style of Cause”, “Names of the Witnesses”; “Party Injured”; “Time, Circumstances and Place”; “Findings of the Grand Jury”). Likewise when a grand jury receives the Commissioner’s Road Report required by Section 251.005(c) of the Texas Transportation Code, those reports are also publically filed. Thus requiring grand juries to memorialize (and district clerks to file) their Article 2.03 grand jury reports would not be a radical change in grand jury procedure or an undue burden on the grand jury or the district clerk. Submitting written findings to the district clerk would merely bring grand jury practice in official misconduct investigations conducted in accordance with Article 2.03 into accord with grand jury procedure in regards to its other investigatory responsibilities and thus it is an appropriate and reasoned requirement.

It should also be remembered that the first half of Article 2.03 establishes a “Court of Inquiry,” a very public process, for doing this same type of investigation:

It shall be the duty of the attorney representing the State to present by information to the court having jurisdiction, any officer for neglect or failure of any duty enjoined upon such officer, when such neglect or failure can be presented by information, whenever it shall come to the knowledge of said attorney that there has been a neglect or failure of duty upon the part of said officer;

Tex. Crim. Proc. Code Ann. art. 2.03 (West 2016). In fact it could be argued that the law prioritizes that process, a Court of Inquiry as provided for in Chapter 52 of the Texas Code of Criminal Procedure. Alternately, Article 2.03 allows for a grand jury process, but in either process the fact finder will be within the “judiciary.” The difficulty in using the Court of Inquiry is that it requires the use of three district judges and a district attorney. Tex. Crim. Proc. Code Ann. art. 52.01 (West 2016). It requires the presentment to a district judge to determine probable cause, that district judge’s requesting the presiding judge of the administrative district to appoint



yet a different district judge to convene the Court of Inquiry, and the presiding district judge to conduct such a hearing and be the solely responsible to “adduced therein, that an offense has been committed, the Judge shall issue a warrant for the arrest of the offender as if complaint had been made and filed.” Tex. Crim. Proc. Code Ann. § art. 52.08 (West 2016). This would simply send the matter back to grand jury for an indictment without necessarily any finding concerning the “neglect or failure of any duty” that triggered the process. This process, like Kabuki theatre, would consist mainly of stylized drama and would not increase public confidence in our governmental processes or the criminal justice system.

Such a cumbersome and probably unproductive process, involving four elected officials makes inquiry into public officers for neglect or failure of any duty very unlikely and probably untimely. That too might be why the law creates alternative of grand jury inquiry of “any act of violation of law or neglect or failure of duty upon the part of any officer.” Tex. Crim. Proc. Code Ann. art. 2.03 (West 2016).

### **Request for Ruling**

At present the Victoria County district clerk’s Office is refusing to accept filings from any grand jury concerning the results of any Victoria County grand jury’s investigation into suspected official misconduct pursuant to Article 2.03 of the Texas Code of Criminal Procedure. This position is understandable given the ambiguity in Texas law on this subject, but it seems at odds with Article 2.03 of the Texas Code of Criminal Procedure and with the best public policy considerations for insuring governmental transparency and deterring official misconduct. Thus this is an ambiguity that needs to be resolved. A definitive ruling from the Attorney General’s Office establishing whether grand jury reports prepared as part of investigations into official misconduct conducted under Article 2.03 of the Texas Code of Criminal Procedure may be filed

with the district clerk for the judicial district of the grand jury will help resolve this issue and thus I respectfully request such a ruling. Attached are two examples of recent grand jury reports following Article 2.03 inquiries. Jessica Priest, "2 officers cleared of wrongdoing in fatal shooting" The Victoria Advocate, September 24, 2015 (<https://www.victoriaadvocate.com/news/2015/sep/24/2-officers-cleared-of-wrongdoing-in-fatal-shooting/>); Jessica Priest, "No indictments for ex-officer, man tased" The Victoria advocate, March 13, 2015 (<https://www.victoriaadvocate.com/news/2015/mar/13/no-indictments-for-ex-officer-man-tased/>).

Respectfully Requested,



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