DON STRICKLIN
FIRST ASSISTANT

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002-1901

April 27, 1993

Shirley Sutherland
T.D.C.J.–I.D. # 555517
Rt. 4, Box 800 B-2-29
Gatesville, Tx. 76528-9399

Re: Your recent Open Records Act request.

Greetings:

Your recent correspondence concerning the Open Records Act was referred to me for review. This office does not maintain a list of documents contained in the file for Cause No. 526,673, and the Act does not require that such a list be compiled. To the contrary, the attorney general's office held in ORD-467 that the Act does not require governmental bodies to create or prepare new information or to prepare information in the form requested. *

I regret that this office cannot be of more assistance to you at this time.

Yours sincerely,

William J. Delmore, III
General Counsel
Office of the District Attorney

WJD/bd

See page 63 - */** Interrogatory #6 > Holmes released files to Gary Graham's attorney on April 26, 1993
See also page 64 Interrogatory #7

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JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

Atty General's Office assigned # 20289 + Holmes request of Cause # 526673 July 2, 1993 pg 41

May 13, 1993

Hon. Daniel C. Morales
Attorney General
Supreme Court Building
P.O. Box 12548
Austin, TX 78711-2548

Attn.: Open Government Section, Opinion Committee.

Re: Enclosed Open Records Act request.

Dear Sir:

On May 7, 1993, this office received the enclosed request for disclosure of information under the Open Records Act. On behalf of John B. Holmes, Jr., the district attorney of Harris County, Texas, I request that the attorney general determine whether the Harris County District Attorney is a "governmental body" under the Open Records Act, and whether the information sought by the author of the enclosed correspondence is exempt from disclosure under subsections 3(a)(1), 3(a)(3) and 3(a)(8) of the Act.

pg 14 shows my conviction ate as arch 13, 1990

The author of the enclosed request is seeking disclosure of the contents of the district attorney's files for her prosecution for the offense of murder in Cause No. 526,673 in the 180th District Court, Harris County, Texas. The defendant was convicted of murder after a jury trial, and on March 16, 1993, her punishment was assessed at confinement in the Texas Department of Corrections for life, and payment of a $10,000.00 fine. The judgment of conviction has been affirmed on appeal. ★

It is respectfully suggested that the attorney general consider this request in conjunction with the previous correspondence of the Harris County District Attorney, assigned ID # 17357, in which it was requested that the attorney general reconsider all prior opinions which limit the application of the "law-enforcement exception," subsection 3(a)(8), of the Act, to (1) materials in files for "open" investigations and prosecutions, and (2) materials in "closed" files which, if disclosed, would "unduly interfere with law enforcement."

The district attorney also requests that the attorney general reconsider the prior

The Texas Open Records Act (TORA) conflict began concerning my request for files from the DA's office

determination, in Op.Atty.Gen 1984, JM-266, that the Harris County District Attorney is a "governmental body" required to comply with the Texas Open Records Act.

Refers to Volumes of pages in my file

★ The district attorney has no objection to the disclosure of those instruments which were filed in the trial court in which the prosecution occurred. The file for this murder investigation and prosecution is quite voluminous, however, hence the first fifty pages of the contents of the file are enclosed as a representative sample thereof, pursuant to Op.Atty.Gen. 1988, No. ORD-497.

(a) Definition of "governmental body."

It is apparent under the terms of the Open Records Act that John B. Holmes, Jr., the Harris County District Attorney, is not a "governmental body" subject to compliance with the Act.

One of the definitions of "governmental body," set out in subsection 2(1)(A) of the Act, includes any governmental "office" which is "within the executive or legislative branch of the state government"; and subsection 2(1)(H) of the Act specifically provides that "the Judiciary is not included within this definition."

The Harris County District Attorney holds an elective "office" which exists by virtue of Article 5, § 21, of the Texas Constitution. Article 5 of our Constitution establishes and defines the "Judicial Department" of our State government. Since his "office" is created under Article V of the Constitution, the district attorney is a part of the judicial department of State government, *Meshell v. State*, 739 S.W.2d 246, 253 (Tex.Crim.App. 1987), and therefore he does not fall within the definition set out in subsection 2(1)(A).

In opinion No. JM-266, the attorney general stated that the office of the district attorney comes within the definition of "governmental body" set out in subsection 2(1)(G) of the Act, in that it constitutes a "part, section or portion of [an] organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends governmental funds." The attorney general's construction of that provision is too broad, in that it would incorporate and render superfluous all of the other six definitions of "governmental body." If the receipt or expenditure of governmental funds was sufficient to meet the subsection 2(1)(G) definition of "governmental body," the other definitions would be useless surplusage, since all of the agencies and entities described therein do receive or expend governmental funds.

The "part, section or portion" language of 2(1)(G) obviously was intended by the Legislature to apply to divisions of non-governmental corporations or other organizations which are funded by or expend public monies. And the constitutional office of a district attorney simply is not a "part, section or portion" of any "institution or agency."

Although one of the exclusionary provisions of the Act, subsection 3(a)(8), makes reference to certain records of "prosecutors," it must be assumed that Legislature intended that reference to apply only to prosecutors employed by agencies not within the

Mr. Holmes called his office a governmental body in his April 27, 1993 letter from William Delmore to Shirley Sutherland. See page 20

judicial department of State government, in light of the express limitation of the applicability of the Act to officers within the executive and legislative branches of State government.

Any construction of the Act which would require the district attorney to comply with the Open Records Act, such as that suggested in Op.Atty.Gen. 1984, No. JM-266, would violate the separation of powers doctrine set out in Article 2, § 1, of the Texas Constitution. *See Meshell v. State, supra.* A legislative enactment that interfered with the work product privilege of the district attorney woud infringe upon the core functions of a judicial department officer, and suffer from the same constitutional infirmity as that recognized in *Meshell.* The participation of an executive department officer (the attorney general) in enforcement of the Act against the district attorney would further violate the separation of powers doctrine.

It is respectfully submitted that the attorney general's prior construction of subsection 2(1)(G) should be reconsidered for the foregoing reasons.

(b) Subsection 3(a)(8)--the law enforcement exception.

It previously has been determined by the attorney general that witness statements, offense and investigative reports and similar materials from files for "closed" cases are exempt from disclosure under subsection 3(a)(8) only if it can be shown that their disclosure would "unduly interfere with law enforcement." *See, e.g.*, Open Records Act Decision No. 434. Nothing in the Open Records Act or case law construing the Act supports any such distinction between "open" and "closed" files.

Subsection 3(a)(8) unambiguously exempts from Open Records Act disclosure all internal records of law enforcement agencies and prosecutors, and it makes no reference whatsoever to "closed" files or "undue interference with law enforcement."

When this office previously requested a reconsideration of the attorney general's interpretation of subsection 3(a)(8), the response cited for authority the decisions in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex.App.--Houston [14th] 1975), writ refused, 536 S.W.2d 559 (1976), and *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). *See* letter ruling OR 88-389. But the Court of Appeals opinion in the *Houston Chronicle* case expressly held, at 531 S.W.2d 185, that "[t]he Offense Report as described in this opinion is a record of a law enforcement agency that deals with the 'detection and investigation of crime'," and that "these records fall within section 3(a)(8)" and are therefore exempt from disclosure under the Act. Nothing in the *Houston Chronicle* opinion even remotely suggests that its holding was limited to "open" investigations, and that police offense reports and law enforcement records concerning "closed" cases are not exempt unless additional circumstances are present. The Court's holding which requires release of the information which now comprises the first page of a police offense report was not even based upon the Act, but upon a constitutional right of access to information.

The origin of the attorney general's "unduly interfere with law enforcement" proviso

appears to be a single sentence of dicta in *Ex parte Pruitt*, at 551 S.W.2d 710, in which the Supreme Court described its previous dicta in the opinion refusing writ of error in *Houston Chronicle*:

> 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.

The decision in *Ex parte Pruitt* was not even based upon the Open Records Act; it was based instead upon Article 1606c, V.A.C.S. And the above-quoted dicta refers to language in *Houston Chronicle* concerning the public's constitutional right of access to information, rather than the Open Records Act. Furthermore, that dicta was intended to *support* the denial of access to investigatory reports, rather than create some new restriction on the scope of the law enforcement exception to the Open Records Act. In short, there is no case law whatsoever which construes subsection 3(a)(8) of the Open Records Act as exempting records of law enforcement agencies and prosecutors in closed cases *only* upon a showing that release of their records would "unduly interfere with law enforcement."

To the contrary, in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987), the Supreme Court specifically cited subsection 3(a)(8) in its decision recognizing the existence of a "law enforcement privilege" in civil litigation. While *Hobson v. Moore* happened to pertain to discovery of records of an "ongoing criminal investigation," the Court did not indicate that its recognition of the "law enforcement privilege" applied only to pending investigations and prosecutions.

The subsequent decision in Euresti v. Valdez, 769 S.W.2d 575, 579 (Tex.App.--Corpus Christi 1989), seemed to make a distinction between "open" and "closed" files in dicta discussing the "law enforcement privilege" recognized in *Hobson v. Moore, supra*, but that opinion is not persuasive authority for ignoring the express language of the Open Records Act law enforcement exception. First, the opinion expressly limits itself to a determination of the existence of a privilege from civil discovery, and does not purport to construe the Open Records Act. Second, the majority opinion hopelessly confused the rules pertaining to discovery of grand jury testimony (which does not constitute a record of a "governmental body" under subsection 2(1)(G) of the Act) and the rules governing disclosure of prosecutors' records (which have been found to be subject to the Act in opinion No. JM-266).

That confusion is highlighted in the dissenting opinions of Chief Justice Nye in *Euresti v. Valdez*, which also provided sound policy reasons for maintaining the confidentiality of prosecutors' files:

> I firmly believe that the investigative files of the county attorney should be exempt from discovery because of the "chilling effect" their discovery would have upon witnesses and others who come forward to give factual information. The need for confidentiality within the criminal justice

> system requires that the statements given by witnesses to authorized prosecuting attorneys be confidential and excepted from discovery in subsequent civil litigation. To hold otherwise would further hamper an already burdened investigative system of the State's attorneys throught the State of Texas . . .

Supra at 769 S.W.2d 582. Chief Justice Nye also pointed out, upon rehearing, the lack of support for any distinction between "open" and "closed" law enforcement files in determining their confidentiality:

> The majority's opinion concludes that the *Hobson* decision is "not in point" and states, regarding the instant case: "Here, there is no evidence that there is an ongoing investigation and, as previously stated, relator has made no attempt to show damage to law enforcement by revealing the information ordered produced." This statement suggests that the information sought by the real party in interest, Kip Van Johnson Hodge, would *not* be discoverable if it pertained to an "ongoing investigation." This logic contradicts the *Hobson* decision and section 3(a)(8) of the Texas Open Records Act. In *Hobson* , our Supreme Court neither stated nor implied that information (exempted from disclosure by section 3(a)(8) of the Texas Open Records Act) pertaining to an ongoing investigation suddenly becomes discoverable once the investigation ceases.
>
> * * *
>
> . . . I do not interpret [subsection 3(a)(8)] to mean that information, in order to be exempt from disclosure, must pertain to an ongoing investigation. The majority has incorrectly determined that the information sought by Hodge is discoverable because it *does not* pertain to an ongoing investigation. The majority has failed to cite any authority for its position.

The attorney general's office similarly has "failed to cite any authority for its position" with regard to the scope of the law enforcement exception set out in subsection 3(a)(8). It stated in letter ruling OR 88-389, in responding to another request for reconsideration of that position, that it "is not free to override the Open Records Act or the Texas Supreme Court's interpretation of the act." But in creating its own limitation upon the unambiguous legislative language of subsection 3(a)(8), that is exactly what the attorney general's office has done.

The examples of "undue interference with law enforcement" provided by the attorney general's office over the years are borrowed from the federal Freedom of Information Act, 5 U.S.C. § 552. But that Act expressly limits the analagous federal "law enforcement exception," set out in subsection (b)(7) of the F.O.I.A., to materials which fall under six enumerated categories, including one for materials which, if produced, "could reasonably be expected to interfere with enforcement proceedings." Our Open Records Act contains no such limitation on the broad scope of the statutory "law enforcement exception." If any such restriction on the unambiguous and unqualified

language of the Open Records Act is to be imposed, it should be imposed by the Legislature, rather than by executive decree.

It is a fundamental rule of statutory construction that "[w]hen the legislative intent is clearly expressed in a statute, it must be enforced as written unless it is found to be unconstitutional or unenforceable for other legitimate reasons," and neither the courts nor the executive branch of government have "authority to circumvent or enlarge the statute to avoid what they consider an inequitable or unwise result." *Robinson v. Steak and Ale No. 105 Club*, 607 S.W.2d 286, 288 (Tex.App.–Txka. 1980, no writ). The Legislature has stated that all internal records of prosecutors pertaining to investigation and prosecution of crime are exempt from disclosure, without limiting that exemption in the manner chosen by the United States Congress in the Freedom of Information Act. There is no ambiguity justifying the construction of the statute adopted by the attorney general's office. The district attorney respectfully suggests that prior opinions applying such a construction be reconsidered, and that upon such reconsideration, the statute be given effect as written.

(c) Subsections 3(a)(1) and 3(a)(3)--the work product of counsel for the State.

The lack of any support, persuasive or otherwise, for a distinction between prosecutors' open and closed files is highlighted by the recent decision of the Supreme Court in *Owens-Corning Fiberglass Corporation v. Caldwell*, 818 S.W.2d 749 (Tex. 1991), wherein the Court held that "the work product privilege is of continuing duration," and that work product materials prepared for one case are privileged and not subject to discovery in subsequent cases, even after the conclusion of the suit for which they were created.

With the exception of those documents filed in the trial court, the contents of the district attorney's file for this criminal case are comprised entirely of the work product of the State of Texas, prepared in anticipation of potential litigation by government investigators and attorneys. Police investigative reports, witness statements and internal memoranda of prosecutors have repeatedly been found to constitute the privileged work product of the State of Texas, exempt from disclosure in either criminal or civil cases. *See Anderson v. Higdon*, 695 S.W.2d 320 (Tex.App.--Waco 1985, writ ref. n.r.e.) (police investigative reports found to constitute privileged work product under Rule 166b, Tex.R.Civ.Proc.); *Brem v. State*, 571 S.W.2d 314 (Tex.Crim.App. 1978) (holding that police offense reports constitute the privileged work product of the State and are not subject to discovery); *Quinones v. State*, 592 S.W.2d 933, 940 (Tex.Crim.App. 1980) (extending "work product" privilege to offense and investigative reports, internal prosecution files and papers, reports on analysis of narcotics, and statements taken by interviewing officers); and *Powers v. State*, 492 S.W.2d 274, 275 (Tex.Crim.App. 1973) (describing police reports and other communications as privileged "work product").

Privileged litigation materials in files for pending cases have repeatedly been found by the attorney general to be exempt from disclosure under subsections 3(a)(1) and 3(a)(3)

of the Open Records Act. If the contents of the district attorney's investigative files are exempt from disclosure as work product during the pendency of the suit for which they are created, they remain privileged and confidential *after* the termination of those proceedings under the express holding of the Supreme Court in *Owens-Corning Fiberglass Corporation v. Caldwell, supra.*

It makes no sense to hold that the district attorney's work product materials are unavailable to litigants or anyone else so long as there is ongoing or anticipated litigation, but the same materials are available to everyone once the litigation is entirely exhausted, and the parties most interested in their content have no more compelling need for it. The district attorney frequently is forced to inform inmates that the contents of the prosecution files, desired for use in post-conviction litigation, can only be disclosed after that litigation is exhausted and their contents are of no further interest in them.

Under the *Owens-Corning* decision, if the materials were created in anticipation of litigation, they remain privileged work product whether the file in which they are contained is considered "open" or "closed."

The district attorney recognizes that subsection 3(e) provides that the State is considered a "party to litigation of a criminal nature," for purposes of subsection 3(a)(3), "until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court." That provision should not be construed to require production of the State's privileged work product upon the expiration of the periods of time described therein. Since subsection 3(a)(8) recognizes an exemption for internal records of law enforcement agencies and prosecutors *without limitation* as to the duration of such exemption, the Legislature could not have intended that subsection 3(a)(8) work product materials be subject to the time limits set out in 3(e).

The subsection 3(e) time periods should be found to refer only to the date of the creation of State work product materials, rather than the date of their disclosure. Under such a construction, investigatory materials created in anticipation of litigation at any time prior to the running of the statute of limitations or the exhaustion of post-conviction remedies would be accorded a work product privilege of unlimited duration. Any other construction would create a needless conflict between the provisions of 3(a)(3) and 3(a)(8).

(d) Subsection 3(a)(1).

Since the materials in question fall under the "law enforcement privilege" recognized by the Supreme Court in *Hobson v. Moore, supra,* and since similar materials have been found to constitute the privileged work product of the State of Texas, they should be found to constitute materials which have been "deemed confidential . . . by judicial decision," under subsection 3(a)(1) of the Act.

Also, the file contains grand jury testimony which is confidential and not subject to

disclosure except upon a judicial finding of "particularized need." *Euresti v. Valdez, supra.* It should therefore be found to be unavailable under subsection 3(a)(1) of the Act.

Yours sincerely,

JOHN B. HOLMES, JR.
Harris County District Attorney

WILLIAM J. DELMORE, III
General Counsel
Office of the District Attorney
(713) 755-5816

Enclosure.
WJD/bd

cc: Shirley A. Southerland, T.D.C.J.–I.D. # 555516

DON STRICKLIN
FIRST ASSISTANT

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HOUSTON, TEXAS 77002-1901

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

June 23, 1993

Southland's assigned cause # 526673 by AG - I.D. 20259 (not recorded with others)

Hon. Daniel C. Morales
Attorney General
Supreme Court Building
P.O. Box 12548
Austin, TX 78711-2548

Attn.: Open Government Section, Opinion Committee.

Re: Open Records Act opinion request I.D. Nos. 19262, 19310, 19397, 19446, 19667, 19732, 19779 and 20373.

Dear Sir:

In its correspondence assigned the identification numbers listed above, this office previously requested that the attorney general reconsider the prior Open Records Act decisions which limited the scope of subsections 3(a)(1), 3(a)(3) and particularly 3(a)(8), as applied to the district attorney's "closed" files for criminal investigations and prosecutions.

Those letters did not address, however, the district attorney's contention (which has been asserted in subsequent correspondence) that the Harris County District Attorney is not a "governmental body" as that term is defined in the Open Records Act. Therefore, in the interest of promoting a prompt judicial resolution of all of the district attorney's arguments regarding the scope and construction of the Act, the Harris County District Attorney respectfully requests that the attorney general address, in responding to the above-described correspondence, his request for reconsideration of Op. Atty. Gen. 1984, No. JM-266, in which it was held that the office of a district attorney constitutes a "governmental body" under subsection 2(1) of the Act.

Claims the D.A. office is not a governmental body See file pg 20

Several copies of this letter are enclosed, to be appended to the district attorney's prior correspondence assigned the identification numbers listed above.

See pg 41 for TDRA Request concerning Cause No. State of Texas vs Shirley Southland 526673

This set does not mention "unduly interfere with law enforcement"

As previously noted by the Harris County District Attorney, one of the definitions of "governmental body," set out in subsection 2(1)(A) of the Act, includes any governmental "office" which is "within the executive or legislative branch of the state government"; and subsection 2(1)(H) of the Act specifically provides that "the Judiciary is not included within this definition."

The Harris County District Attorney holds an elective "office" which exists by virtue of Article 5, § 21, of the Texas Constitution, but Article 5 of our Constitution establishes and defines the "Judicial Department" of our State government. Since his "office" is created under Article V of the Constitution, the district attorney is a part of the judicial department of State government, *Meshell v. State*, 739 S.W.2d 246, 253 (Tex.Crim.App. 1987), and therefore he does not fall within the definition set out in subsection 2(1)(A).

In opinion No. JM-266, the attorney general stated that the office of the district attorney comes within the definition of "governmental body" set out in subsection 2(1)(G) of the Act, in that it constitutes a "part, section or portion of [an] organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends governmental funds." The attorney general's construction of that provision is too broad, in that it would incorporate and render superfluous all of the other six definitions of "governmental body." If the receipt or expenditure of governmental funds was sufficient to meet the subsection 2(1)(G) definition of "governmental body," the other definitions would be useless surplusage, since all of the agencies and entities described therein do receive or expend governmental funds.

The "part, section or portion" language of 2(1)(G) obviously was intended by the Legislature to apply to divisions of non-governmental corporations or other organizations which are funded by or expend public monies. And the constitutional office of a district attorney simply is not a "part, section or portion" of any "institution or agency."

Although one of the exclusionary provisions of the Act, subsection 3(a)(8), makes reference to certain records of "prosecutors," it must be assumed that Legislature intended that reference to apply only to prosecutors employed by agencies not within the judicial department of State government, in light of the express limitation of the applicability of the Act to officers within the executive and legislative branches of State government.

Any construction of the Act which would require the district attorney to comply with the Open Records Act, such as that suggested in Op.Atty.Gen. 1984, No. JM-266, would

violate the separation of powers doctrine set out in Article 2, § 1, of the Texas Constitution. *See Meshell v. State, supra.* A legislative enactment that interfered with the work product privilege of the district attorney would infringe upon the core functions of a judicial department officer, and suffer from the same constitutional infirmity as that recognized in *Meshell.* The participation of an executive department officer (the attorney general) in enforcement of the Act against the district attorney would further violate the separation of powers doctrine.

It is respectfully submitted that the attorney general's prior construction of subsection 2(1)(G) should be reconsidered for the foregoing reasons. Thank you for your consideration of this request.

Yours sincerely,

JOHN B. HOLMES, JR.
Harris County District Attorney

WILLIAM J. DELMORE, III
General Counsel
Office of the District Attorney
(713) 755-5816

WJD/bd

cc: (1) Mr. Randy Schaffer, Attorney at Law
(2) Ms. Barbara McCalla
(3) Morgan & Singleton, Attorneys at Law
(4) Mr. Anthony Washington
(5) Mr. David Branam
(6) Mr. Donovan J. Carey
(7) Mr. Joel Chavez
(8) Mr. Bruce McLeod Burns

I am not listed in this TORA litigation

Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 2, 1993

Mr. William J. Delmore, III
General Counsel
Office of the District Attorney
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-408

Dear Mr. Delmore:

526673
my case

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# 20289.

The Harris County District Attorney's Office (the "district attorney") has received a request for access to the district attorney's file in Cause No. 526,673, in which the district attorney prosecuted the requestor for the offense of murder. You do not object to release of some of the requested information. You claim, however, that the remaining information may be withheld from required public disclosure under section 3(a) of the Open Records Act.

As a threshold issue, we first address your contention that the district attorney's office is a part of the judiciary within the meaning of section 2(1)(H) of the act and therefore is not subject to the act. We rejected this argument in a recent ruling issued to your office, Open Records Letter OR93-213 (1993). As we stated in that letter, a district attorney's office does not fall within the judiciary exception because it is not a court and is not directly controlled or supervised by one and because its functions are primarily executive in that its primary duty is to enforce the law. *See* Attorney General Opinion JM-266 (1984). Furthermore, the district attorney is an entity that is supported by or expends public funds. V.T.C.S. art. 6252-17a, § 2(1)(G) (definition of governmental body). Accordingly, the district attorney is subject to the act and must release the requested information unless it falls within one of the exceptions enumerated in section 3(a) of the act. You claim that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim

Sutherland's cause 526673)
Assigned ID # 20289 (is not listed in letter of July 23, 1993

with separation of ID Nos it appears there are separate TORA litigations concerning my request and the other 8

that the requested information is excepted by section 3(a)(1) because it constitutes work product and is subject to the "law enforcement privilege" set forth in *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987). This argument was also rejected in Open Records Letter OR93-213 (1993). As we stated in that ruling, section 3(a)(1) does not encompass work product or discovery privileges. *See also* Open Records Decision No. 575 (1990). Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements.[1] You do not indicate that litigation in this matter is pending or reasonably anticipated. We thus have no basis on which to conclude that the requested information may be withheld from required public disclosure under either the work product doctrine or section 3(a)(3) of the Open Records Act. *See* Open Records Decision Nos. 551 (1990) (section 3(a)(3) applies to information relating to pending or reasonably anticipated litigation); 518 (1988) (section 3(e) does not relieve governmental body from demonstrating general applicability of section 3(a)(3)).[2]

Section 3(a)(8), which 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.

With respect to section 3(a)(8), you argue that this exception should apply to all material in a closed law enforcement file. You also dispute our use of a standard that permits you to withhold from a closed file only that information the release of which

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[1]Please note that section 14(f) of the act, added by the 71st Legislature in 1989, chapter 1248, section 18 provides in part that "exceptions from disclosure under this Act do not create new privileges from discovery." Accordingly, the *Hobson* court's apparent use of section 3(a)(3) as a basis for the "law enforcement privilege" is no longer valid.

[2]The information submitted to us for review appears to include information generated by the National Crime Information Center ("NCIC"), the Texas Crime Information Center ("TCIC") files, and certain locally compiled criminal history record information ("CHRI"). Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* We conclude, therefore, that if the CHRI data was generated by the federal government or another state, it may not be made available to the public by the district attorney except in accordance with federal regulations. *See* Open Records Decision No. 565. CHRI information generated within the state of Texas and TCIC files must be withheld from required public disclosure under section 3(a)(1) in conjunction with common law privacy doctrine. *See* Open Records Decision Nos. 565; 216 (1978); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public). However, section 3B of the Open Records Act grants the requestor a special right of access to CHRI information generated within the state of Texas and to TCIC files relating to her.

would "unduly interfere with law enforcement." In Open Records Letter OR93-213, we reviewed the same argument and rejected it. Accordingly, we will apply the existing standard of undue interference with law enforcement.

When section 3(a)(8) is claimed as a basis for excluding information from public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)); *see also* Open Records Decision No. 413 (1984) (Department of Corrections is a "law enforcement" agency within the meaning of section 3(a)(8)). We have examined the information submitted to us for review. We conclude that release of some of the information would undermine a legitimate law enforcement interest. This information has been marked and may be withheld from required public disclosure under section 3(a)(8) of the Open Records Act. Except as noted above, the remaining information must be released in its entirety.

Because 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 this office.

Yours very truly,

William Walker
Assistant Attorney General
Opinion Committee

WMW/GCK/jmn

Enclosures: Marked Documents

Ref.: ID# 20289 ← never saw these or the 50 pages submitted by Holmes
ID# 20668

cc: Ms. Shirely Southerland
TDCJ-ID #555516
Route 4, Box 800 B-2-29
Gatesville, Texas 76597-9399
(w/o enclosures)

DON STRICKLIN
FIRST ASSISTANT

DISTRICT ATTORNEY'S BUILDING
201 FANNIN, SUITE 200
HOUSTON, TEXAS 77002-1901

JOHN B. HOLMES, JR.
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

July 15, 1993

Shirley Southerland
I.D. No. 555516
Route 4, Box 800 B-2-29
Gatesville, Texas 76597-9399

Re: *John B. Holmes, Jr., District Attorney of Harris County, Texas, v. Dan Morales, Attorney General of the the State of Texas*, Cause No. 93-07978 (261st District Court, Travis County, Texas).

Dear Ms. Southerland:

As you know, the attorney general has ruled that some or all of the district attorney's records, which you have sought to obtain under the Texas Open Records Act, are subject to mandatory disclosure under the Act. In the hope of resolving this issue as promptly and definitively as possible, the district attorney has requested that a district court in Travis County issue a declaratory judgment as to the correct construction of the Open Records Act. The Open Records Act expressly provides for such an action to resolve disputes between the attorney general and other governmental officials.

You have been described as an interested party in the petition for declaratory relief, and you will be served with a copy of that petition, by the district clerk or a constable, in the near future. Although you may be listed as a "defendant" in this civil action, because of a legal requirement in the Civil Practice and Remedies Code, please be assured that the district attorney is only seeking resolution of a *legal issue*, and does *not*, at this time, anticipate making any request for monetary damages or other relief upon disposition of this suit.

The district attorney continues to regret that he cannot provide you with the information you are seeking under the Open Records Act, until this issue is finally resolved. You will be kept informed of the progress of this matter. Please do not hesitate to call me if you have any questions in this regard.

Yours sincerely,

WILLIAM J. DELMORE, III
General Counsel
(713) 755-5816

WJD/cr

CITATION

THE STATE OF TEXAS

Cause No. 9307978

JOHN B. HOLMES JR., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, Plaintiff

vs.

DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS, WENDY SCHAFFER, JIM MEINEKE, WINFRED R. MORGAN, & DAVID BERMAN, Defendant

To: SHIRLEY SOUTHERLAND, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
#555510, ROUTE 4, BOX 880 H-2-29
CLEVELAND, TEXAS 77327-9399

Defendant, in the above styled and numbered cause:

YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A. M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the SECOND AMENDED ORIGINAL PETITION FOR DECLARATORY RELIEF of the PLAINTIFF in the above styled and numbered cause, which was filed on the 19th day of July, 1993, in the 261ST Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 20th day of July, 1993.

AMALIA RODRIGUEZ-MENDOZA
Travis County District Clerk
Travis County Courthouse
1001 Guadalupe, P.O. Box 1748
Austin, Texas

By Mary Lorraine Delgado
CONNIE ARZOLA, Deputy

REQUESTING ATTORNEY:
WILLIAM J. DELMORE, III, ASST DIST A
HARRIS COUNTY, JOE FANNIN
HOUSTON, TEXAS 77002
(713) 755-5816

RETURN

Came to hand on the ____ day of _____, ____ at ____ o'clock ____ M. Executed at _____ within the County of _____ on the ____ day of _____, ____ at ____ o'clock ____ M., by delivering to the within named _____, each in person, a true copy of this citation together with the accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee: $ _____

Sworn to and subscribed before me this the ____ day of _____, ____

_____
NOTARY PUBLIC, THE STATE OF TEXAS

Service Copy

Constable Precinct 5

BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS

SHERIFF/CONSTABLE/AUTHORIZED PERSON

By: _____

PRINTED NAME OF SERVER

_____ County, Texas

9307978-D15

JUL 21 1993

MAILED THIS _____ DAY OF _____, 19 ____

BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS
BY _____
DEPUTY

CAUSE NO. 93-07978

JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS, Plaintiff, V. DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS, et al., Defendants	§	IN THE DISTRICT COURT FOR THE 261ST JUDICIAL DISTRICT, TRAVIS COUNTY, TEXAS

PLAINTIFF HOLMES' ANSWERS TO SCHAFFER'S FIRST SET OF INTERROGATORIES

The Harris County District Attorney, John B. Holmes, Jr., plaintiff in the above-captioned cause, respectfully submits the following answers to the first set of interrogatories served upon him by interested party Randy Schaffer:

INTERROGATORY NO. 1

Please state the name of the defendant and cause number of all requests for the disclosure of information under the Open Records Act that you honored before you requested an Attorney General's opinion in 1993.

> Plaintiff Holmes responds that the answer to this question may be derived or ascertained, pursuant to Rule 168, § 2, Tex.R.Civ.Proc., from the business records of the district attorney, and specifically from the Open Records Act inquiries received and maintained by the district attorney, which will be produced in response to Schaffer's request for production, in that the burden of deriving or ascertaining the answer to this question from said records is substantially the same for the party serving this interrogatory as for the party served.

a. For each request honored, state the name and address of the person making the request and the date on which you complied.

Plaintiff Holmes responds that the answer to this question may be derived or ascertained, pursuant to Rule 168, § 2, Tex.R.Civ.Proc., from the business records of the district attorney, and specifically from the Open Records Act inquiries received and maintained by the district attorney, which will be produced in response to Schaffer's request for production, in that the burden of deriving or ascertaining the answer to this question from said records is substantially the same for the party serving this interrogatory as for the party served.

INTERROGATORY NO. 2

Please state the name of the defendant and cause number of all requests for the disclosure of information under the Open Records Act that you honored since you requested an Attorney General's opinion in 1993.

The plaintiff's staff recalls having satisfied requests for information regarding only the following defendants since the date of the plaintiff's first request for an attorney general's opinion in 1993:

(1) Gary Graham, a.k.a. Kenneth Stokes, Cause Nos. 334,462; 335,136; 335,137; and 335,378.

(2) Juan Jose Rivera, a.k.a. Jorge Valentine, Cause Nos. 576,019 and 595,462.

(3) Melvin Ellis, Cause Nos. 132,261; 132,262; 289,794; and 411,212.

(4) Juan San Miguel, Cause No. 412,247.

a. For each request honored, state the name and address of the person making the request and the date on which you complied.

The plaintiff's staff recalls having satisfied requests for information regarding the above-listed prosecutions which were received from the following persons:

(1) Anthony S. Haughton, 3223 Smith Street, Suite 215, Houston, Tx. 77006; information provided April 26, 1993.

(2) and (3) - David Cunningham, 2740 Texas Commerce Tower, 600 Travis, Houston, Tx. 77002; information provided August 12, 1993.

(4) Jose L. Gonzales-Falla, P.O. Box 61508, Houston, Texas 77028-1508; information provided to associate on August 23, 1993.

INTERROGATORY NO. 3

Why did you honor requests for the disclosure of information under the Open Records Act before the date on which you ceased to do so?

Plaintiff Holmes objects to this question on grounds that the information sought is entirely irrelevant to the determination of the purely legal issues raised by Holmes' request for a declaratory judgment as to the construction of specified portions of the Texas Open Records Act, and said question is not reasonably calculated to lead to the discovery of any evidence admissible in the trial of this cause.

Plaintiff Holmes further objects to this question on grounds that it erroneously assumes the truth of a fact not in evidence, namely, that the district attorney has "ceased" to "honor requests for the disclosure of information under the Open Records Act."

Plaintiff Holmes further objects to this question as calling for disclosure of communications protected by attorney-client privilege, and for disclosure of the mental processes, conclusions and legal theories of counsel for the plaintiff, which are privileged as work product of counsel, and which do not constitute information subject to discovery under the Rules of Civil Procedure.

Subject to and without waiving the foregoing objections, plaintiff Holmes responds that the attorney general has erroneously determined that Holmes is a "governmental body" subject to compliance with the Act, and that the contents of Holmes' "closed" files are not exempt from disclosure under §§ 3(a)(1), 3(a)(3) and 3(a)(8) of the Act; and information from those "closed" files was disclosed pursuant to the Act in reliance upon those erroneous opinions of the attorney general.

INTERROGATORY NO. 4

Why did you stop honoring requests for the disclosure of information under the Open Records Act on the date that you did so?

Plaintiff Holmes objects to this question on grounds that the information sought is entirely irrelevant to the determination of the purely legal issues raised by Holmes' request for a declaratory judgment as to the construction of specified portions of the Texas Open Records Act, and said question is not reasonably calculated to lead to the discovery of any evidence admissible in the trial of this cause.

Plaintiff Holmes further objects to this question on grounds that it erroneously assumes a fact not in evidence, namely, that the district attorney has "stop[ped] honoring requests for the disclosure of information under the

Open Records Act."

Plaintiff Holmes further objects to this question as calling for disclosure of communications protected by attorney-client privilege, and for disclosure of the mental processes, conclusions and legal theories of counsel for the plaintiff, which are privileged as work product of counsel, and which do not constitute information subject to discovery under the Rules of Civil Procedure.

Subject to and without waiving the foregoing exceptions, plaintiff Holmes responds that the attorney general's opinions pertaining to disclosure of the contents of the plaintiff's "closed" files are erroneous and insupportable; and that compliance with those erroneous opinions has interfered with the constitutionally protected discretion of the district attorney in the representation of the State in criminal law matters, and imperiled the successful performance of the district attorney's constitutional and statutory functions, and imposed an unnecessary and onerous burden upon members of the district attorney's staff, and interfered with the performance of those staff members' other duties.

INTERROGATORY NO. 5

State all reasons that you requested the Attorney General's opinion in this matter.

Plaintiff Holmes objects to this question on grounds that the information sought is entirely irrelevant to the determination of the purely legal issues raised by Holmes' request for a declaratory judgment as to the construction of specified portions of the Texas Open Records Act, and said question is not reasonably calculated to lead to the discovery of any evidence admissible in the trial of this cause.

Plaintiff Holmes further objects to this question as calling for disclosure of communications protected by attorney-client privilege, and for disclosure of the mental processes, conclusions and legal theories of counsel for the plaintiff, which are privileged as work product of counsel, and which do not constitute information subject to discovery under the Rules of Civil Procedure.

Plaintiff Holmes further objects to this question as ambiguous, in that numerous opinions of the attorney general have been requested and received, for varying reasons.

Subject to and without waiving the foregoing exceptions, plaintiff Holmes responds that the attorney general's opinions pertaining to disclosure of the contents of the plaintiff's "closed" files are erroneous and insupportable; and that compliance with those erroneous opinions has interfered with the constitutionally protected discretion of the district attorney in the

representation of the State in criminal law matters, and imperiled the successful performance of the district attorney's constitutional and statutory functions, and imposed an unnecessary and onerous burden upon members of the district attorney's staff, and interfered with the performance of those staff members' other duties.

A request for an attorney general's opinion is effectively required by the Open Records Act as a predicate to the filing of this civil action seeking relief from further compliance with those erroneous opinions of the attorney general.

INTERROGATORY NO. 6

Did you receive a request for disclosure of the State's file in the Gary Graham case?

Yes.

a. If so, did you disclose any portion of that file to Graham's post-conviction counsel?

Yes.

b. If you did disclose same, what specific portions of the file did you disclose?

All portions previously disclosed to trial counsel for defendant Graham, including offense reports, witness statements, photographs, etc.

c. If you did disclose same, on what date did you do so?

April 26, 1993.

d. If you did disclose same, why did you do so?

Plaintiff Holmes objects to this question on grounds that the information sought is entirely irrelevant to the determination of the purely legal issues raised by Holmes' request for a declaratory judgment as to the construction of specified portions of the Texas Open Records Act, and said question is not reasonably calculated to lead to the discovery of any evidence admissible in the trial of this cause.

Plaintiff Holmes further objects to this question as calling for disclosure of communications protected by attorney-client privilege, and for disclosure of the mental processes, conclusions and legal theories of counsel for the plaintiff, which are privileged as work product of counsel, and which do not constitute information subject to discovery under the Rules of Civil Procedure.

See file pages 188, 10 and 200 —

Grahams files were disclosed after my request 4-15-1993 and before Holmes' letter 4-26-93 to deny me files

Subject to and without waiving the foregoing objections, plaintiff Holmes responds that Gary Graham's scheduled execution was imminent at the time of the receipt of the attorney general's opinion regarding disclosure of information from the district attorney's file regarding Graham's prosecution.

Graham is the subject of a national controversy regarding his impending execution and his claimed innocence of the offense for which he was convicted. Counsel for plaintiff Holmes did not wish to institute the instant suit for a declaratory judgment upon receipt of the attorney general's opinion regarding disclosure of the contents of the Gary Graham case file because the notoriety of the Graham case would possibly divert attention from the serious legal issues raised herein; because the institution of this suit based solely upon a request for access to the Graham case file would possibly encourage claims of an attempted "cover-up" of materials in that file; and because of concern that the filing of this suit would be used by Graham's counsel to seek a stay of Graham's execution during the pendency of this suit.

INTERROGATORY NO. 7

Have you ever referred to the Harris County District Attorney's Office as a "governmental body"? If so, please state the date and circumstances of each such occasion.

Plaintiff Holmes has no recollection at this time of having done so.

Respectfully submitted,

John B. Holmes

JOHN B. HOLMES, JR.
Harris County District Attorney

See page 20 * > Holmes refers to his office as a "governmental body"[5].

Obviously, since my case was kept hush-hushed there was no need to squash any claims of "cover up"

VERIFICATION

Before me, the undersigned authority, personally appeared John B. Holmes, Jr., who upon being duly sworn, deposed as follows:

My name is John B. Holmes, Jr., and I am the elected district attorney of Harris County, Texas. I am over eighteen years of age, of sound mind, and competent to testify to the following facts.

I have read the foregoing answers to interrogatories, and the answers stated therein are true and correct.

JOHN B. HOLMES, JR.

Sworn to and subscribed before me on this the 9th day of September, 1993.

JO ANN TINKLE
Notary Public, State of Texas
My Commission Expires
4/30/97

NOTARY PUBLIC
HARRIS COUNTY, TEXAS

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of this instrument have been mailed to the clerk of the court in which this action is pending and to all parties to the instant action (or their attorneys if they are represented by counsel), by regular first class mail, on the date of the mailing of the original to interested party Randy Schaffer.

WILLIAM J. DELMORE, III
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Tx. 77002
(713) 755-5816
T.B.C. No. 05732400

Sept) 1995

NO. 03-94-11179-CV
In the Court of Appeals
For the Third District of Texas,
at Austin, Texas

Cause No. 93-07978
In the District Court
For the 261st Judicial District,
Travis County, Texas

JOHN B. HOLMES, JR., DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS,
Appellant,
v.
DAN MORALES, ATTORNEY GENERAL OF THE STATE OF TEXAS, et al.,
Appellees

APPELLANT HOLMES' MOTION FOR REHEARING

WILLIAM J. DELMORE, III
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002
(713) 755-5826
FAX (713) 755-5809

Counsel for Appellant Holmes

I'm the only person in TX referenced by name in this litigation motion -

SUBJECT INDEX

LIST OF AUTHORITIES

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document has been mailed by United States mail, postage prepaid, or sent by telephonic document transfer to the recipient's current telecopier number on the 3rd day of November, 1993.
To:

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Shirley Southerland
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#555516,
Route 4, Box 800 B-2-29
Gatesville, Texas 76597-9399

Madeleine Johnson
Assistant Attorney General

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

COMES NOW THE APPELLANT, Harris County District Attorney John B. Holmes, Jr., and moves the Court to reconsider and withdraw its opinion delivered August 16, 1995, in the instant case for the following reasons:

GROUNDS FOR REHEARING (LISTED)

(1) The Court erred in failing to address the merits of points of error two, three and four, in that there is a well-defined, live "controversy" with regard to the disclosure of the particular records in issue, and no advisory opinion is being sought.

(2) The Court erred in failing to address the merits of points of error two, three and four, in that the Court erroneously concluded that some additional "factual determination" is necessary before the Court can rule upon the applicability of TEX.GOV'T CODE §§ 552.101, 552.103 and 552.108 (Vernon 1994), to the records in issue.

(3) The Court erred in implicitly accepting the appellee's argument that the district attorney's litigation files lose their blanket protection from disclosure under the Act upon conclusion of the litigation for which they were created, without fulfilling its obligation to explain its reasoning in that regard.

(4) In its implicit acceptance of the attorney general's argument that the district attorney's litigation files lose their protected status upon conclusion of the criminal litigation for which they were created, the Court has misconstrued TEX.GOV'T CODE §§ 552.101, 552.103 and 552.108 (Vernon 1994), and erred in holding that the files are not exempt from disclosure in their entirety.

(5) By failing to address the merits of points of error two, three and four, the Court failed to comply with the mandatory provisions of TEX.R.APP.PROC. 90(a).

(6) The Court erred in holding that the district attorney is an officer of the executive branch of State government, and therefore subject to the Open Records Act under the definition of "governmental body" set out in TEX. GOV'T CODE § 552.003(a)(1) (Vernon 1994).

(7) The Court erred in holding that application of the Open Records Act to the district attorney's litigation files does not violate TEX. CONST. art. II, § 1, in that compelled disclosure of the district attorney's work product constitutes an infringement of the district attorney's exclusive constitutional authority by both the legislative and executive departments of government.

ARGUMENT AND AUTHORITY IN SUPPORT OF APPELLANT'S GROUNDS FOR REHEARING

I. FAILURE TO ADDRESS THE MERITS OF POINTS OF ERROR TWO, THREE AND FOUR.

(a) Introduction.

The appellant strenuously objects to this Court's determination that "no controversy is raised on appeal" with regard to the applicability of TEX. GOV'T CODE §§ 552.101, 552.103 and 552.108 (Vernon 1994) to the contents of the nine specific litigation files in question. The issue of the *continued* applicability of those provisions to the entire contents of the files described in the district attorney's petition and summary judgment proof is ripe; it is squarely presented and fully briefed; and its resolution is solely a question of law--a matter of statutory construction--which requires no further factual determination whatsoever.

The main issue raised by these points of error is whether a litigation file created by counsel for the State, exempt from disclosure under the Act *in its entirety* during the pendency of a criminal case, loses that blanket protection from disclosure upon conclusion of the judicial proceedings for which it was created. That was the issue raised by the parties' competing motions for summary judgment. That was the issue duly presented to, and decided by, the district court. That was the issue resolved by the district court in the attorney general's favor, when that court held that the contents of the specific files in controversy are no longer subject to any blanket exemption from disclosure under the specified sections of the Act, and that virtually the entire contents of those files must be disclosed as requested.

The appellant district attorney vehemently disagrees with that holding, does not

desire to disclose the contents of the files in question, and has appealed the adverse declaratory judgment to this Court. It is difficult to understand how or why there could now be an "absence of an appellate controversy about the nine particular files," as stated in the Court's opinion.

(b) The genesis and development of the controversy.

The "litigation exception" to the Open Records Act, now designated § 552.103 of the Government Code, expressly permits the district attorney the discretion to refuse to disclose information "relating" to criminal litigation. The "law enforcement exception," now designated § 552.108 of the Government Code, provides that prosecutors' records dealing with the "detection, investigation, or prosecution of crime," or "maintained for internal use in matters relating to law enforcement or prosecution," are exempt from mandatory disclosure under the Act.

At the time of the initiation of a criminal case, the district attorney opens a file for the "internal use" of prosecutors, the contents of which "relate" to that particular criminal litigation, and indisputably deal with the "detection, investigation and prosecution of crime." The contents of such a file have always been held to constitute the privileged work product of counsel for the State. Even the existence in the file of otherwise non-privileged items falls within the zone of work-product protection, under the express holding of *State ex rel Curry v. Walker*, 873 S.W.2d 379, 380-381 (Tex. 1994), since those items were chosen for inclusion within the file in an exercise of pretrial preparation, and their disclosure would illustrate the thought processes of the prosecutor.

> In *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex.1993, orig. proceeding), we stated that "[a]n attorney's litigation file goes to thge heart of the privileged work area guaranteed by the work product exemption. The organization of the file, as well as the decision as to what to include in it, necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." Thus under *National Union*, the privilege extends to the entire litigation file, not only to documents which, considered individually, are attorney work product. [Citations omitted.]
>
> The work product privilege is appplicable to litigation files in criminal as well as civil cases . . .

Accordingly, the attorney general has always agreed that the district attorney's files for pending or anticipated litigation are exempt *in their entirety* from disclosure under the Open Records Act. The attorney general concedes, in his brief filed in the instant case,[1] that the active litigation files of a prosecutor are exempt from disclosure under the Act in their entirety:

> [13] Active files of prosecutors are protected from disclosure so long as a district attorney follows the proper procedural steps to preserve the applicable exceptions. An active file of a prosecutor may be one that is under investigation, under indictment, in trial or on appeal. Section 552.108 (former section 3(a)(8)) protects information under investigation, while section 552.108 or 552.103 (former section 3(a)(3)) may be invoked to protect from disclosure information in files that are under prosecution or on appeal.

No review of the particular contents of a prosecutor's active litigation file is required to determine that such contents are exempt from Open Records Act disclosure. By the plain language of §§ 552.103 and 552.108, the *entire* contents of those files are "protected from disclosure." To this extent, the appellant district attorney and the appellee attorney general seem to be in accord.

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[1] Brief of Appellee Dan Morales, Attorney General of the State of Texas, at p. 27, n. 13.

The parties are most certainly *not* in accord, however, with regard to the contents of the district attorney's "closed" files. After termination of the litigation for which a file has been created, the attorney general has repeatedly held that in order to establish a continued, blanket exemption from disclosure under § 552.103, the district attorney must show that further litigation is "reasonably anticipated" with regard to that particular case. When the district attorney invokes § 552.108, the attorney general requires him to establish that disclosure of particular portions of individual documents within a file would "unduly interfere with law enforcement." *See* Appellee Morales' original brief at pp. 15-16, 27.

These onerous requirements have no basis in the text of the Open Records Act or in the case law construing that Act; and for the reasons stated more fully in the argument in support of points of error two, three and four in the appellant's original brief, which is incorporated by reference herein as if fully set forth, these requirements constitute an impermissible administrative limitation upon the plain language of the exceptions to disclosure stated in the Act.

★ Therefore, upon receiving several Open Records Act requests for disclosure of particular case files, as fully described in the appellant's petition and summary judgment proof, the appellant district attorney duly requested that the attorney general reconsider its prior rulings and hold, in keeping with the unambiguous language of the Act, that the portions of the requested files which had not previously been made public remained exempt from disclosure in their entirety after termination of the criminal litigation for which they were created. With the exception of the items which had been filed in court or otherwise disseminated to the public, the district attorney reproduced the entire contents of the files and submitted the copies to the attorney general for his review.

★ Begins reference to my/Southerland's case - no one else in Texas is mentioned in this appeal but me.

The attorney general disagreed with the appellant's position, and ruled that since the district attorney had declined to attempt to show that disclosure of any of the particular items submitted for review would "unduly interfere with law enforcement," he must disclose the entire contents of all of the files, thousands of pages, with the exception only of the computerized criminal history information protected by federal regulation and two police incident reports pertaining to criminal defendant Shirley Sutherland.[2]

The district attorney then timely instituted this suit for a declaratory judgment, and sought a summary judgment declaring that portions of his files not previously revealed to the public remained exempt from disclosure in their entirety, after conclusion of the litigation for which they were created, under §§ 552.101, 552.103 and 552.108. The summary judgment proof included comprehensive, detailed descriptions of all of the previously undisclosed documents in the specific files in question, at pages 5 thropugh 11 of the summary judgment affidavit, so that the district court could determine that all of the specific documents in question "relate" to the criminal litigation, deal with the "detection, investigation, or prosecution of crime," and were "maintained for internal use in matters relating to law enforcement or prosecution," as required by §§ 552.103 and 552.108.

The attorney general filed a competing motion for summary judgment, arguing that the Court should declare the entire files to be available under the Act, with the

---

[2] For some reason, the attorney general determined on his own initiative that the release of the contents of the Sutherland incident reports would "unduly interfere with law enforcement," something he has not previously been known to do. He did rule that the entire remainder of the voluminous Sutherland file was subject to mandatory public disclosure, including even the crime scene and autopsy photographs depicting the female homicide victim.

7 * the word not was left out - Morales ruled in my favor -

exception only of the computerized criminal history information and the Sutherland offense reports, because no further litigation was "reasonably anticipated" and there was no showing that disclosure of the particular documents described in the motion for summary judgment proof would "unduly interefere with law enforcement."

The district court denied the appellant's motion for summary judgment, and effectively granted the appellee's motion for summary judgment, since the final judgment directed release of the records "in accordance with" the attorney general's written rulings, *i.e.*, in their entirety, with the minor exceptions of the computerized criminal history information and the Sutherland offense reports.

The district attorney asks this Court to reverse and vacate that judgment, and render the judgment requested in the appellant's motion for summary judgment--a declaration that the previously unreleased contents of the nine files in issue are exempt from disclosure in their entirety under §§ 552.101, 552.103 and 552.108. The attorney general again disagrees and asks that the judgment be affirmed. The issue is joined. It is narrowly defined and clearly focused: upon completion of the original criminal litigation, do these internal litigation files remain exempt from disclosure in their entirety under the specified sections of the Government Code, without regard to whether their disclosure would "unduly interfere with law enforcement"? Or must the complete contents of these files, with the exception of computerized criminal history material, be disclosed in the absence of a showing that their disclosure would "unduly interfere with law enforcement"?

The Court errs in stating in its opinion that appellant Holmes "does not complain of those terms" of disclosure "previously designated by the attorney general in his advisory rulings." While Holmes agrees that computerized criminal history information

cannot be released, the attorney general's "terms" of disclosure are that *everything* else must be released, and Holmes has steadfastly and vociferously complained of those "terms." He says that nothing should be released, other than the documents which were filed with the clerks of the criminal courts or otherwise disseminated to the public, which are *not* in issue in this case. The parties are thousands of pages apart, and their disagreement as to the application of the specified sections of the Government Code to that material is focused, concrete and absolute. Appellant Holmes is not asking for an advisory opinion about some *other* files, as suggested in the court's opinion; he wants a declaratory judgment in his favor with regard to *these* files, and specifically the records particularly described in his summary judgment proof.

There is, was and will be an "appellate controversy" as to whether the specific contents of the files in question lost their blanket exemption from disclosure upon termination of the litigation for which they were created, and the Court erred in holding to the contrary.

(c) Implicit acceptance of the attorney general's arguments.

The paragraph of the opinion dispensing with the statutory construction arguments on the basis of an absence of "appellate controversy" contains several inaccuracies, which appear to stem from an implicit acceptance of the attorney general's substantive arguments in this case. In other words, the Court appears to have first determined that Holmes' points of error are without merit, in order to determine that those points of error need not be addressed.

At page 11 of the slip opinion, the Court states, "It appears undisputed . . . that any particular file may contain records or information that are excepted from compelled disclosure *along with other records or information that are not.*" That is not true; it is

All of the *facts* necessary to decide this point of error are stated in the affidavit attached to Holmes' motion for summary judgment, and those facts are indeed undisputed, presenting only a question of law for this Court's resolution. The files in question were created for the internal use of prosecutors in representing the State in criminal prosecutions. All of the materials contained in each file "relate" to the litigation for which it was created, and they are accurately and comprehensively described in the affidavit. No more factual determination need be made. It is agreed that all of the materials were exempt from disclosure under the Act *before* the criminal litigation ended; the only dispute is the legal effect of the termination of that litigation.[3]

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[3] Appellant Holmes fears that his decision not to offer into evidence the documents submitted to the attorney general for his review, as summary judgment exhibits, has somehow contributed to this Court's belief that there is no concrete appellate controversy here. It is respectfully submitted, however, that the detailed description of the documents in issue, at pp. 5-11 of the summary judgment affidavit, was entirely sufficient.

The appellant decided to use as summary judgment proof a description of the contents of the files not previously made public, rather than the documents themselves, for two reasons. First, there are several thousand pages of records in issue here, which, in order to maintain confidentiality, would have had to have been submitted for in camera review and then sealed for inclusion in the record, tremendously increasing the cost of the appellate record and creating a severe logistical problem.

Second, that additional cost and effort was deemed unnecessary in light of the legal issues raised in this case. By virtue of their inclusion in the non-public portion of the district attorney's litigation files, *all* of the materials in question fell within the "litigation" and "law enforcement" exceptions to the Act when the criminal cases were pending. The main issue presented in this case is whether they lost their blanket exception to disclosure upon conclusion of the criminal litigation for which they were accumulated. The answer to that question does not require review of the contents of specific documents.

The appellee has not complained of the procedure in which the contents of the files were described, rather than reproduced, and no objection to such procedure, in the context of this case, comes to mind.

If inadequate briefing has obscured the nature of the issue raised by these three points of error, then it is hoped that this clarification will result in the granting of a rehearing and a substantive determination of the merits of the points of error. If, on the other hand, the Court has already determined that these points of error are not well taken, and that termination of the criminal litigation ended the blanket exception to disclosure for the files in their entirety, it is asked that the opinion be amended to state that these points of error have been considered and overruled *on their merits*. It is respectfully suggested that an *implicit* acceptance of the appellee's substantive arguments, while purporting to decline to address the merits of the appellant's points of error, unfairly limits the appellant's ability to seek further review of the Court's reasoning, and violates the provisions of TEX.R.APP.PROC. 90(a).

Rule 90(a) provides that the opinion of the court of appeals "shall address every issue raised and necessary to final disposition of the appeal." This aspect of rule 90(a) "is mandatory, and the courts of appeals are not at liberty to disregard it." *State Bar of Texas v. Evans*, 774 S.W.2d 656, 658-659, n. 6 (Tex. 1989).

By failing to expressly address an issue which is squarely presented and ripe for determination, the Court of Appeals does a disservice to all Texans interested in a definitive resolution of this controversy. For nearly two years, the attorney general has graciously deferred ruling upon Open Records Act requests for disclosure of the non-public portions of the district attorney's litigation files, while awaiting this Court's determination of the rectitude of his construction of §§ 552.103 and 552.108 of the Act. The desire of both parties for a final resolution of the conflict has been frustrated, and the process must start over again, only to eventually return the issue to this Court in approximately the same posture as now presented.

In summary, appellant Holmes objects to the Court's conclusion that no "appellate controversy" exists with regard to the records in question. The attorney general has held that virtually all of their contents must be disclosed; the appellant argues that none of their contents need be disclosed. Resolution of the conflict requires only this Court's determination of purely legal issues—whether the blanket exception to disclosure existing for the contents of a prosecutor's internal litigation file ceases to exist after conclusion of the litigation for which the records were accumulated or created, and whether the attorney general is correct in thereafter requiring a showing that disclosure of such contents would "unduly interfere with law enforcement," before a particular document may be withheld from disclosure under § 552.108. The appellate controversy is sharply defined and ripe for resolution, and the appellant beseeches the Court to withdraw its opinion in order to expressly address that ongoing controversy.

II. REASSIGNMENT OF PROSECUTING ATTORNEYS TO THE EXECUTIVE DEPARTMENT OF GOVERNMENT.

Appellant Holmes moves the Court to reconsider its unprecedented holding that a Texas district attorney is an officer of the executive department of state government, and thereby subject to the provisions of the Texas Open Records Act. It is respectfully suggested that the authors of the Texas Constitution intentionally placed district and county attorneys within the judicial department, in framing the articles of our Constitution pertaining to each department, and that this Court lacks the authority to determine that a mistake has been made and to summarily reassign them to the executive department.

The Open Records Act is applicable only to offices "within" or "created by the executive or legislative branch of state government." TEX.GOV'T CODE § 552.003(a)(1) (Vernon 1994). The issue raised by the appellant's first point of error is solely one of statutory construction: what offices did the Legislature have in mind when it drafted this particular definition of the term "governmental body"?

Since the Legislature chose to include within its statutory definition only those offices actually "within" or "created by" the executive branch, and made no reference to the function or duties of those officers, it is respectfully suggested that this Court erred in utilizing a functional test to determine whether a given officer *should* be a member of the executive department of state government, for the purposes of determining the applicability of the Open Records Act. The use of a functional test could lead to a situation in which a particular officer is sometimes a "governmental body," under § 552.003, sometimes not, depending upon the particular task he is performing on a given day--a situation which could not possibly have been anticipated

The rest of this motion applys to the other 8 "interested parties"

by the Legislature in drafting the definition in issue.

The wording of § 552.003(a)(1) would lead a reasonable person to believe that the relevant question is, "To which branch or department of Texas state government has a state office been assigned?" And every source that an interested party could consult would lead him to believe that a Texas district attorney has historically been considered an officer of the judicial branch of State government.

The obvious starting point is the Constitution itself, and it places the provision pertaining to district and county attorneys squarely within Article V, which delineates the "judicial department" of state government.

Second, the Court of Criminal Appeals—the high court for criminal matters and an authoritative source of case law pertaining to prosecutors—definitively held in *Meshell v. State*, 739 S.W.2d 246, 253 (Tex.Crim.App. 1987), that prosecuting attorneys are officers of the judicial branch of government:

> The office of county attorney, as well as district and criminal district attorney, is established in Article V, § 21, of the Texas Constitution . . . . By establishing the office of county attorney under Article V, the authors of the Texas Constitution placed those officers within the Judicial Department.

The decision in *Meshell* was not an obscure, isolated holding which may lightly be disregarded. There is now a substantial body of criminal case law which has reaffirmed that district attorneys are officers of the judicial branch of State government. *See, e.g., State ex rel. Edison v. Edwards*, 793 S.W.2d 1, 7 (Tex.Crim.App. 1990) (holding that prosecutors are constitutionally protected from involuntary disqualification in a particular case, and noting "their status as independent members of the *judicial* branch of government" [emphasis supplied]); and *State ex rel. Hill v. Pirtle*, 887 S.W.2d

921, 928 (Tex.Crim.App. 1994) ("As long as [the Potter County District Attorney], a member of the judicial branch of government, retains ultimate supervisory authority over the instant criminal prosecutions--as relator proved in the instant case--then the prosecution power remains in the hands of the judicial branch.").

This Court may not feel obligated, in a civil case, to follow the precedent established by the Court of Criminal Appeals. But in ignoring this line of established case law, the Court also paid no heed to holdings of the Supreme Court of Texas, in which that Court has stated that the dual system of civil and criminal appellate courts in Texas requires a diligent exercise of comity with regard to the criminal high court, and every effort to avoid unnecessary conflict in decisions. *See, e.g., Pope v. Ferguson*, 445 S.W.2d 950, 955 (Tex. 1969); *Dearing v. Wright*, 653 S.W.2d 288 (Tex. 1983); and *One 1985 Chevrolet v. State*, 852 S.W.2d 932, 934 (Tex. 1993).

Finally, the Supreme Court has itself indicated that the judicial branch of government is defined and limited by article V of the Constitution, and that prosecutors are officers of that branch. In *The State of Texas v. Moore*, 57 Tex. 307, 314-315 (1882), in the context of discussing the separation of powers provision of the Constitution, the Supreme Court expressly noted that county attorneys--unlike the attorney general--are members of the *judicial* branch of government.[4]

This Court held in the instant case that district attorneys are officers of the

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[4] The precise holding of *The State of Texas v. Moore*, regarding the respective authority of the attorney general and district attorney to institute certain suits on behalf of the State, was found to have been "practically overruled" in *Brady v. Brooks*, 89 S.W. 1052, 1054-1055 (Tex. 1905), but that subsequent decision did not question the characterization of county attorneys as officers of the judicial department. To the contrary, the Court noted that to the extent that the attorney general's duties are "judicial in the sense, that he is to represent the state in some cases brought in the courts," the constitutional provision pertaining to the attorney general might properly have been placed in article V, defining the judicial department. *Id.*, at 89 S.W. 1056.

executive branch because their *duties* are executive in nature, but in *Moore*, the Supreme Court found that the possibility of such reassignment from department to department, based upon the nature of an officer's function in government, was foreclosed by the Constitution:

> This is recognized in art. 2 of the constitution, which provides that "that the powers of the government of the state of Texas shall be divided into three distinct department, each of which shall be confided to a separate body of magistracy, to wit: those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."
>
> The attorney general is made a member of the executive department, while *county attorneys are made members of the judicial department. They each have certain powers, the exercise of which would seem to require that the one as well as the other might properly have been made a member of the executive department; but the constitution provides otherwise*, and grants to the attorney general certain powers, the exercise of which can only be had in the judicial department, and those are "in the instances herein expressly permitted" [emphasis supplied].

This line of reasoning in *Moore* is not limited to Supreme Court cases of nigh-ancient origin. In *Vondy v. Commissioner's Court of Uvalde County*, 620 S.W.2d 104, 110 (Tex. 1981), the Supreme Court similarly determined the character of judicial branch offices by identifying the article of the Constitution within which provisions relating to those offices are located:

> . . . Constables, provided for in the "Judicial Branch" Article of the Constitution, Tex. Const. Art. V § 18, additionally serve other functions necessary to the judicial branch of the state.
>
> Even though *the commissioners court is also part of the judicial branch of this state, existing under Article V Section 1 of the Texas Constitution*, this fact does not alter our powers to protect and preserve the judiciary by compelling payment for process servers. The legislative

> branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately . . . [emphasis supplied].

TEX.CONST. art. IV, § 1, entitled "Officers constituting the Executive Department," states that "[t]he Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General." It makes no mention of district attorneys, and it is respectfully suggested that this Court erred in amending it to include the Harris County District Attorney, without benefit of constitutional convention or public vote.

When the authors of the Constitution placed the attorney general and the district attorney in separate departments of government, and then decreed in Art. II, § 1, that "no person being of one of these departments . . . shall exercise any power properly attached to either of the others," they may have intended to establish an additional check or balance upon the powers of these respective government attorneys. Any such intent is nullified by this Court's action in reassigning the district and county attorneys to the same department as that occupied by the attorney general, and eliminating any resort to separation of powers principles in resolving their jurisdictional disputes.

Appellate courts must "follow the plain meaning of a statute," and may not construe a statute in a manner inconsistent with its plain meaning merely because the legislative "policy seems unwise or inconsistent with other policies." *Meno v. Kitchens*, 873 S.W.2d 789, 792 (Tex.App.--Austin 1994, writ denied). The "plain meaning" of § 552.003(a)(1) requires a determination of the department of state government to which a particular officer has been assigned; and the Legislature *must* have anticipated that the

Texas Constitution would be consulted in the making of that determination.

Because the Legislature could not have had district attorneys in mind when it made the Open Records Act applicable only to officers of the executive and legislative branches of government, this Court's overruling of the first point of error should be reconsidered, and upon such reconsideration, that point of error should be sustained.

III. VIOLATION OF THE SEPARATION OF POWERS PROVISION OF THE TEXAS CONSTITUTION.

It is respectfully suggested that the Court erred in holding that application of the Open Records Act to prosecutors' litigation files would not violate TEX. CONST. art. II, § 1—the separation of powers provision of the our State Constitution.

First, the Court's reassignment of the district attorney to the executive branch of state government would seem to render unnecessary the Court's determination of whether the Act "purports to authorize the *attorney general's* interference with the office of district attorney" (slip opinion at p. 7), since the attorney general and district attorney would, under this Court's analysis, be part of the same department of government. Some clarification of the precise issue under consideration may be required.

The district attorney's first argument regarding the separation of powers provision is that, as in *Meshell*, the Legislative Department is impermissibly interfering with his exclusive constitutional authority to represent the State in criminal trials, by its passage of the Open Records Act. The appellant's second argument under the fifth point of error is that a different and additional constitutional violation occurs when the district attorney is required to provide his most confidential work product to the attorney general—an officer of the executive branch—for his review. It is respectfully suggested that the Court's opinion be clarified with regard to the existence of these two separate arguments.

On a more substantive basis, it is respectfully suggested that the Court erred in basing its decision upon the principle that citizens have *always* had a right to inspection of the district attorney's internal case files, enforceable by judicial review upon application for writ of mandamus, and that no significant change has occurred with the

promulgation of the Open Records Act.

To the contrary, the district attorney believes, and other courts have held, that citizens have *no* common law right of access to the litigation files of prosecuting attorneys. For instance, the Supreme Court of Wisconsin specifically held in *State ex rel. Richards v. Faust*, 477 N.W.2d 608 (Wis. 1991), that the common law exempted prosecutors' litigation files from the general rule that governmental records were open to the public for its review.

In *State ex rel. Richards v. Faust*, the Wisconsin Supreme Court relied primarily upon the existence of cases recognizing a work product privilege for prosecutors' files. There is no lack of similar case law in Texas. As noted in the appellant's original brief in this case, the Court of Criminal Appeals has frequently held that the contents of prosecutors' files are not subject to discovery. *See Brem v. State*, 571 S.W.2d 314, 322 (Tex.Crim.App. 1978) (holding that "prosecution files and papers" constitute privileged "work product" of the State which is not subject to discovery); *Quinones v. State*, 592 S.W.2d 933, 940 (Tex.Crim.App. 1980) (applying "work product" privilege to "internal prosecution files and papers").

More significantly, from this Court's perspective, the Supreme Court has agreed that a prosecutor's internal litigation files are protected by work product privilege, when the contents of those files were sought in a related civil proceeding. *State ex rel. Curry v. Walker*, *supra*. The Supreme Court also has held that the work product privilege is of indefinite duration. *Owens-Corning Fiberglas Corporation v. Caldwell*, 818 S.W.2d 749 (Tex. 1991).

In addition, the Supreme Court has recognized a broad "law enforcement privilege," protecting law enforcement materials from disclosure in civil cases. *Hobson*

v. *Moore*, 734 S.W.2d 340 (Tex. 1987).

On the other hand, there does not appear to be any case law in which the contents of a prosecutor's litigation files were found to be available for public review or use in related civil litigation, prior to promulgation of the Open Records Act.

Under the common law, therefore, it is apparent that prosecutors' work product is *not* subject to disclosure, and this Court's analysis is therefore based upon a faulty premise. Application of the Open Records Act to prosecutors' internal files and papers does constitute a new and intolerable interference with prosecutors' discretion in choosing and creating items for inclusion in their litigation files, by eliminating the zone of confidentiality guaranteed them in *State ex rel. Curry v. Walker*, *supra*.

The Court is mistaken in holding that nothing has changed other than the creation of an opportunity to seek an attorney general's advisory opinion, and mandatory venue in Travis County for subsequent judicial proceedings. Slip Opinion at pp. 10-11. From the perspective of a prosecutor, everything has changed. That which was confidential, and subject to disclosure only in the discretion of the prosecutor, is now made public record by legislative act, unless a prosecutor can satisfy an "undue interference with law enforcement" standard manufactured out of whole cloth by the attorney general, an officer of the executive department.

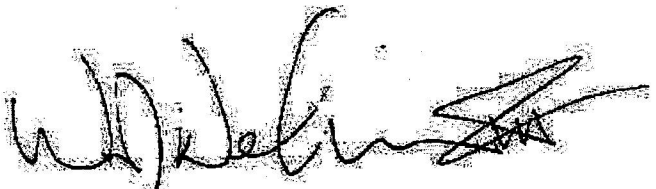
It is now conclusively established that pretrial preparation is a constitutionally protected, core function of a prosecutor's duties. *Meshell v. State*, *supra*. As aptly stated in *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 393 (1947), confidentiality is "essential" to pretrial preparation:

> . . . In performing his various duties, however, it is *essential* that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference [emphasis supplied].

Since the Supreme Court of Texas has expressly held that work product privilege applies even to the selection of otherwise non-privileged items for inclusion in prosecutors' files, *State ex rel. Curry v. Walker, supra*, it necessarily follows that a legislative act eradicating work product privilege for prosecutors' files must constitute an impermissible *legislative* interference with a core function of *judicial* branch officers. To the extent that the Act requires submission of prosecutors' confidential work product to the attorney general, as a prerequisite to judicial review, it additionally authorizes and requires an impermissible degree of *executive* interference with the constitutionally protected functions of officers of the judicial department of government. It is respectfully suggested that in ignoring the entire issue of work product privilege, the Court's opinion obscures rather than illuminates the issues presented by this case, and should be reconsidered and withdrawn.

CONCLUSION

It is respectfully requested that the Court grant this motion for rehearing and reconsider its decision in the instant case, and upon such reconsideration, reverse the judgment of the trial court and render a judgment in the appellant's favor, as requested in the appellant's original brief in this cause.



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was mailed to the defendant/appellee, Hon. Dan Morales, Attorney General of the State of Texas, at P.O. Box 12548, Capitol Station, Austin, Tx. 78711-25483, by certified mail, return receipt requested; and to the other parties interested in the outcome of this case or their counsel, if any, at the addresses listed upon their most recent pleadings in this case or Open Records Act inquiry, by regular mail, on the date of the transmission of the original to the Clerk of this Court.

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INFORMATION. Information is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

§ 552.102. EXCEPTION: PERSONNEL INFORMATION. (a) Information is excepted from the requirements of Section 552.021 if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter. The exception to public disclosure created by this subsection is in addition to any exception created by Section 552.024. Public access to personnel information covered by Section 552.024 is denied to the extent provided by that section.

(b) Information is excepted from the requirements of Section 552.021 if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, § 6, eff. Sept. 1, 1995.

§ 552.103. EXCEPTION: LITIGATION OR SETTLEMENT NEGOTIATIONS INVOLVING THE STATE OR A POLITICAL SUBDIVISION. (a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1999, 76th Leg., ch. 1319, § 6, eff. Sept. 1, 1999.

§ 552.104. EXCEPTION: INFORMATION RELATED TO COMPETITION OR BIDDING. (a) Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

(b) The requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 2001, 77th Leg., ch. 1272, § 7.01, eff. June 15, 2001.

§ 552.105. EXCEPTION: INFORMATION RELATED TO LOCATION OR PRICE OF PROPERTY. Information is excepted from the requirements of Section 552.021 if it is information relating to:

(1) the location of real or personal property for a public purpose prior to public announcement of the project; or

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

§ 552.106. EXCEPTION: CERTAIN LEGISLATIVE DOCUMENTS. (a) A draft or working paper involved in the preparation of proposed legislation is excepted from the requirements of Section 552.021.

(b) An internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation is excepted from the requirements of Section 552.021.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1997, 75th Leg., ch. 1437, § 1, eff. June 20, 1997.

§ 552.107. EXCEPTION: CERTAIN LEGAL MATTERS. Information is excepted from the requirements of Section 552.021 if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing

because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct; or

(2) a court by order has prohibited disclosure of the information.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, § 7, eff. Sept. 1, 1995; Acts 2005, 79th Leg., ch. 728, § 8.014, eff. Sept. 1, 2005.

§ 552.108. EXCEPTION: CERTAIN LAW ENFORCEMENT, CORRECTIONS, AND PROSECUTORIAL INFORMATION.. (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, § 7, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1231, § 1, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 474, § 6, eff. Sept. 1, 2001; Acts 2005, 79th Leg., ch. 557, § 3, 4, eff. Sept. 1, 2005.

§ 552.109. EXCEPTION: CERTAIN PRIVATE COMMUNICATIONS OF AN ELECTED OFFICE HOLDER. Private correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy are excepted from the requirements of Section 552.021.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

§ 552.110. EXCEPTION: TRADE SECRETS; CERTAIN COMMERCIAL OR FINANCIAL INFORMATION. (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1999, 76th Leg., ch. 1319, § 7, eff. Sept. 1, 1999.

§ 552.111. EXCEPTION: AGENCY MEMORANDA. An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

§ 552.112. EXCEPTION: CERTAIN INFORMATION RELATING TO REGULATION OF FINANCIAL INSTITUTIONS OR SECURITIES. (a) Information is excepted from the requirements of Section 552.021 if it is information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

(b) In this section, "securities" has the meaning assigned by The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).

(c) Information is excepted from the requirements of