

Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 05-003

RESPONDENT: Jack Thompson, Administrator, Harris County District Courts

DATE: January 5, 2006

SPECIAL COMMITTEE: Judge B. B. Schraub, Chairman; Judge John Ovard; Judge David Peeples; Judge Jeff Walker; Judge Kelly Moore

Majority *per curiam* opinion:

Petitioner requested “[a]ny and all existing records, documents or communications, electronic or otherwise relating to: . . . reports by Pablo Martinez submitted to any Harris County criminal court or administrative office since January 1, 2005.” Dr. Martinez is a professor with Texas State University in San Marcos and an independent consultant who has studied data about revocation of probation by Harris County district judges. Respondent denied the request, claiming Rule 12.5(a) and (f) exemptions, and claiming the reports are incomplete drafts. Petitioner appealed, and on our request Respondent submitted the reports for our *in camera* review.

We first consider whether the requested records are judicial records to which access is governed by Rule 12. Rule 12.2(d) defines a judicial record as one “made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function.” The definition specifically excludes “[a] record of any nature created . . . in connection with any matter that is or has been before a court.” The disputed records contain statistical and demographic analyses of court decisions. As such, they pertain to those courts’ adjudicative functions, and are outside the Rule 12.2(d) definition of judicial records. Because the dissenting opinion disagrees with this conclusion, we also will address the exemptions to Rule 12 urged by the petitioner.

The exemption from disclosure provided by Rule 12.5(a) is very similar to the exclusion from the definition of judicial record found in Rule 12.2(d). Rule 12.5(a)’s judicial work product and drafts exemption protects “[a]ny record that relates to a judicial officer’s adjudicative decision-making process prepared by . . . any person acting on behalf of or at the direction of the judicial officer.” We find that because the records at issue relate to the courts’ adjudicative functions, they are protected from disclosure under Rule 12.5(a).

We next consider whether the reports would be exempt under Rule 12.5(f) as records relating to internal deliberations of a court or judicial agency, or among judicial officers or members of a judicial agency, on matters of court or judicial administration. If the reports constituted studies by the judges themselves on trends in their court decisions, then they would constitute records relating to internal deliberations among judicial officers on matters of court or judicial administration and

would be exempt under Rule 12.5(f). We believe this exemption extends to employees of the judges and to agents, or outside consultants, retained by the judges. Accordingly, the reports are exempt under Rule 12.5(f).

We note that both the Freedom of Information Act and the Texas Public Information Act have been read to incorporate the deliberative process privilege, which protects from disclosure intra-agency and interagency communications consisting of advice, opinion or recommendations on policymaking matters of the governmental agency at issue. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The purpose of the exemption is to protect advice and opinions on policy matters and to encourage frank and open discussion within the governmental body in connection with its decision-making processes. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). The exemption applies to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. See Open Records Decision No. 631 (1995). We interpret Rule 12.5(f) to incorporate the deliberative process privilege into the adjudication and court administration functions of a court or judicial agency. Because the Martinez reports are predecisional, will be used by the judges and judicial officers in their deliberative process, and relate to their adjudicative and court administration functions, we conclude that they are exempt under Rule 12.5(f).

We sustain the denial of access to the requested records, but note that this decision is not unanimous. We direct the petitioner's attention to Rule 12.9(m), which provides that although our decision is not appealable, it is subject to review by mandamus.

Dissenting Opinion by Judge Jeff Walker:

Our decision in this matter should be governed by the policy expressed in Rule 12.1. The purpose of Rule 12 is to provide public access to information in the judiciary consistent with the constitutional mandate that the public interests are best served by open courts and an independent judiciary, and the rule should be liberally construed to achieve its purpose.

The majority decision is that the records are not within the definition of judicial records in Rule 12.2 and are not exempt from disclosure under Rule 12.5(a) because they pertain to the adjudicative functions of the Harris County district courts. A court's adjudicative function is the process by which a court decides the particular case before it. An after-the-fact analysis of data compilations of court decisions by an outside statistician does not pertain to the courts' adjudicative functions. Furthermore, the administrator of the courts does not exercise an adjudicative function for the courts, and these reports apparently were commissioned by the court administrator for court administration functions and not by the judges to assist them in adjudicating cases. Thus, the reports at issue do not relate to the courts' adjudicative decision-making process and therefore are not excepted from the definition of judicial records by Rule 12.2 or exempted from disclosure by Rule 12.5(a).

Similarly, I would find no exemption under Rule 12.5(f) for internal deliberations on court or judicial administration matters. These records do not relate to internal deliberations of a court or judicial agency, but instead relate to statistics compiled and analyzed by a third party who was commissioned by a court administrator of several different courts. If the reports constituted studies of the judges themselves on trends in their own court's decisions, then they would constitute records

relating to internal deliberations among judicial officers on matters of court or judicial administration and would be exempt under Rule 12.5(f). However, these reports are of an outside consultant to the judges and contain no internal, deliberative material. Accordingly, the reports are not exempt under Rule 12.5(f).

I would grant the petition for access.