IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97-9141

ORDER AND OPINION DENYING REQUEST UNDER OPEN RECORDS ACT

PER CURIAM

The Court has received a request under the Texas Open Records Act, TEX. GOV'T CODE §§ 552.001-.353, from Andrew Wheat with Texans for Public Justice, for "any outgoing and incoming telecommunications records (office/cellular/mobile and fax phones) for Texas Supreme Court Justices and their staffs for the period covering Aug. 30, 1996 to April 2, 1997." The Court's usual practice when it receives a request under the Open Records Act is to instruct the Clerk to deny the request by letter on the grounds that the Legislature has expressly excluded the judiciary from the Act. The Act requires a "governmental body" to release "public information" on request, *id.* § 552.221(a), but to protect the independence of the judiciary the Act plainly states, "'Governmental body' . . . does not include the judiciary", *id.* § 552.003(1)(B). The exclusion of the judiciary simply could not be plainer, as every Attorney General has confirmed since the Act was passed twenty-four years ago.

We must alter our usual practice on this occasion because of Attorney General Dan Morales' recent issuance of Open Records Decision No. 657 (July 24, 1997). For the first time an Attorney General has introduced confusion and uncertainty into the construction of a clear statute. At issue are not merely a few telephone records of the Supreme Court, but all records of all Texas judges and courts. We write to explain why ORD-657 is incorrect.

ORD-657 was issued in response to an inquiry by the general counsel of the General Services Commission whether telephone billing records of the Supreme Court are subject to disclosure under the Open Records Act. The Attorney General concluded that although the telephone billing records belong to the Supreme Court and are only collected and maintained by GSC acting as the Court's

agent, those records "are not records of the judiciary for purposes of the Act". The Attorney General reasoned that records that "do not relate to [the] exercise of judicial power, such as records pertaining to the day-to-day routine administration of a court . . . *should be* subject to the Open Records Act", and that "to fall within the judiciary exception, the document must contain information that directly pertains to the exercise of judicial powers." (Emphasis added.) Notably, ORD-657 does not state that the Supreme Court is a "governmental body" for purposes of the Act but says only that the Court's "telephone billing records are not 'records of the judiciary'".

Attorney General's opinions are not, of course, binding on the courts. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996). Attorney General Morales has acknowledged this himself in his brief last year to this Court in *Tenant Tracker, Inc. v. Morales*, No. 96-0488, *motion for leave to file petition for writ of mandamus denied*, 39 TEX. SUP. CT. J. 1068 (Aug. 16, 1996), in which he stated: "Open Record Decisions of the Attorney General are not binding on courts". The Attorney General has also recognized this Court's administrative determinations concerning the Open Records Act to be binding, including a letter from the Chief Justice. Letter from Attorney General Jim Mattox to F. Witcher McCullough III (Jan. 23, 1987) ("We will not presume to look behind such a clear directive [as a letter from the Chief Justice].") Furthermore, ORD-657 is incorrect for a number of reasons, including the following.

First: ORD-657 flatly contradicts the plain language of the Act. As we have noted, the Act applies only to governmental bodies, which are defined as not including the judiciary. Attorney General John Hill stated twenty-three years ago, less than a year after the Act was passed: "The Open Records Act neither authorizes information held by the judiciary to be withheld nor requires it to be disclosed." Tex. Att'y Gen. ORD-25 (1974). In other words, the Act simply does not apply to the judiciary.

Second: ORD-657 does not state that the judiciary is a governmental body under the Act. It plainly is not. ORD-657 concludes only that the records pertaining to the administration of a court "should be" subject to the Act. It is not the Attorney General's prerogative to decide what the law should be; that belongs to the Legislature. *See Terrazas v. Ramirez*, 829 S.W.2d 712, 722, 728, 732 (Tex. 1991) (plurality op. by Hecht, J.; Gonzalez, J., concurring; Cornyn, J., concurring). The Attorney General's authority, and his duty, is to advise about what the law *is*. ORD-657 does not construe the Act; it attempts to amend the Act.

Third: The basis of ORD-657's rationale — that court administration does not relate to the exercise of judicial power — contradicts Article V, Section 31 of the Texas Constitution, which states: "The Supreme Court is responsible for the efficient administration of the judicial branch . . . ." Judicial administration is a part of the core responsibility of the Supreme Court and a central element

of this Court's exercise of judicial power as authorized by the people of Texas through their Constitution.

Fourth: ORD-657 conflicts with opinions of every Attorney General since the Act was passed, including Attorney General Morales' own opinions and statements. ORD-657 overrules Attorney General Jim Mattox's Opinion No. JM-446, which specifically held that the release of the Supreme Court's telephone records is not required by the Open Records Act. That opinion explained:

> The question here is not whether a list of telephone calls can be considered "public information" under the Open Records Act. If the list were the record of a department or agency covered by the act, and if no exception allowed by the act applied, clearly it could be so considered. But here we are dealing with records of a department to which the Open Records Act *itself* does not apply, and the act's specific exceptions (which are relevant only if the act would otherwise make the information public) as well as the act's definition of "public information" are therefore not pertinent. Once it has been determined that records sought are records of the judiciary, the Open Records Act is no longer controlling.

Op. Tex. Att'y Gen. No. JM-446 (1986) (citation omitted).

ORD-657 also overrules Attorney General Mattox's Open Records Decision No. 535, which held that the Court of Criminal Appeals was not required to release its contract with West Publishing Company for computer-assisted legal research services. The opinion explained:

> If this request for information had been received by an entity that clearly constituted a governmental body under the act, it would be governed by Open Records Decision No. 514 (1988) (contract between Secretary of State and West Publishing Company for publication of Texas Administrative Code). The issue to be resolved is whether the court constitutes a governmental body under the Open Records Act.

Tex. Att'y Gen. ORD-535 (1989). The opinion concluded that the Court of Criminal Appeals was not a governmental body under the Act because it expressly excludes the judiciary.

ORD-657 conflicts with Attorney General Morales' own opinions. His Informal Letter Ruling No. OR94-069 (1994) states: "The judiciary is not a governmental body for purposes of the act." Tex. Att'y Gen. ILR OR-94-069 (1994). The opinion concluded that a computer program used to randomly generate numbers for jury pool selection in Tarrant County belonged to the judiciary,

even though it was created and maintained by the county, and was therefore not subject to production under the Act. Obviously, the program related to the administration of the courts rather than their decision-making. Attorney General Morales' Opinion No. DM-166 (1992) holds that the Act does not set charges for public court records furnished by court clerks. The opinion explained:

> We note initially that the Open Records Act does not apply to records of the judiciary. . . . The Open Records Act neither authorizes information held by the judiciary to be withheld nor requires it to be disclosed, but leaves unchanged the status of that branch of government with respect to information held by it.

Op. Tex. Att'y Gen. No. DM-166 (1992) (citing Op. Tex. Att'y Gen. H-826 (1976), and Tex. Att'y Gen. ORD-25 (1974). This same language was used almost verbatim in Attorney General Morales' Letter Opinion OR95-1053. Tex. Att'y Gen. LO OR95-1053 (1995). ORD-657 does not overrule, or even mention, these three opinions.

Just last year Attorney General Morales opposed a petition to this Court for mandamus requiring the courts of Tarrant County to produce certain court records on electromagnetic media. The Attorney General expressly confirmed the validity of Opinion JM-446, arguing in his brief to us:

> The analysis in that opinion is identical to the legal analysis in the present opinion: the records of the judiciary are not subject to the Open Records Act. While the judiciary is free to make available any of its records, the Open Records Act does not require the disclosure.
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> The analysis used by [petitioner] is flawed at the outset: the records are those of the judiciary; and the judiciary is expressly excepted from the terms of the Open Records Act. A different result might be reached if the information was being held by a governmental body subject to the Open Records Act, but that is not the case here.

Even Attorney General Morales' published handbook on the Open Records Act states unequivocally that Section 552.003(1)(B) "excludes the judiciary from the Open Records Act." DAN MORALES, TEXAS OPEN RECORDS ACT HANDBOOK 3 (1995).

ORD-657 not only overrules two prior opinions and contradicts Attorney General Morales' own opinions and statements, it conflicts with opinions by every other Attorney General since the Open Records Act was enacted. Tex. Att'y Gen. ORD-572 (1990) (information and reports about the release of arrestees on personal bond are records of the judiciary and not subject to the Act); Tex. Att'y Gen. ORD-274 (1981) (municipal court summons and complaints not required to be disclosed under the Act "[s]ince the Open Records Act is not applicable to the judiciary", although they were public court records); Tex. Att'y Gen. ORD-236 (1980) (adult probation records not required to be produced under the Act because they were "a record of the judiciary and, as a result, not subject to the Open Records Act"); Tex. Att'y Gen. ORD-131 (1976) (employment applications of persons who applied for the position of court coordinator for the criminal courts of Dallas County were not required to be produced because, "[s]ince this information was collected, assembled and is maintained by the judiciary, the Open Records Act is not applicable"); Op. Tex. Att'y Gen. No. H-826 (1976) ("[w]e note that the Open Records Act by its express terms does not apply to the judiciary"; "we believe that the court has inherent power to control public access to its own records"); Tex. Att'y Gen. ORD-25 (1974) (papers filed with justice of the peace not subject to the Open Records Act because it "neither authorizes information held by the judiciary to be withheld nor requires it to be disclosed", although the papers were public court records).

Fifth: The evidence is very strong that ORD-657 contradicts legislative intent in excluding the judiciary from the Act. If the Legislature believed that Attorneys General for more than two decades had misconstrued the judiciary exclusion in the Act, it would likely have amended the Act as it has done in the past. The Act has been amended in each of the last ten regular sessions of the Legislature, from 1979 to the present. Often those amendments have been in response to constructions of the Act by the Attorney General and the courts. For example, in 1976 Attorney General Hill concluded that "the information collected, assembled and maintained by the Board [of Law Examiners] is held on behalf of the judiciary, and that the Board, as an agency directly responsible to and under the control of the Supreme Court, is not subject to the provisions of the Open Records Act." Tex. Att'y Gen. ORD-136 (1976). In 1979 the Legislature amended the statute creating the Board of Law Examiners and expressly stated, "The Board is subject to the open records law". Law of May 28, 1979, 66th Leg., R.S., ch. 594, § 1, 1979 Tex. Gen. Laws 1253 (amending former article 304(f), TEX. REV. CIV. STAT. ANN. (1925), now TEX. GOV'T CODE 82.003(a)). As another example, in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), we held that the Open Records Act does not require a prosecutor to disclose closed criminal litigation files. Less than a year later the Legislature amended the Act to specify in detail what records in a prosecutor's files should and should not be disclosed. Law of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 1231 (amending TEX. GOV'T CODE § 552.108). Despite the Legislature's continued interest in the Act and its application, not once has it attempted to modify the judiciary exclusion in response to its consistent broad construction from the inception.

Sixth: ORD-657's construction of the judiciary exclusion makes the Act unworkable. The opinion states that although some of the judiciary's records are subject to the Act, "one or more of the act's enumerated exceptions may protect the information from disclosure." The Act requires that this determination be made by the Attorney General. TEX. GOV'T CODE § 552.301(a). Thus, under ORD-657, a court would be required to seek an opinion of the Attorney General concerning the applicability of any statutory exception. Yet as we have already noted, the courts have held, and the Attorney General has expressly acknowledged, that his opinions are not binding on the courts. Instead, the Attorney General has deferred to this Court's construction of the Act, even when made in a letter from the Chief Justice. Why should a court be required to obtain an opinion it is has no duty to follow? Moreover, a court is not even authorized to request an Attorney General's opinion. The Act permits only a "governmental body" to request an opinion, *id.*, and specifically states that a "governmental body" "does not include the judiciary", *id.* § 552.003(1)(B).

The Act authorizes the Attorney General to sue a governmental body to compel the release of information covered by the Act, *id.* § 552.321, and it authorizes a governmental body to sue for a declaration that information is not covered by the Act, *id.* § 552.325. Under ORD-657, this Court would be required, after requesting an Attorney General's opinion that it has no duty to follow, to sue the Attorney General in the district court to obtain a decision. But a district court is obliged to follow the law stated by an appellate court. How can this Court ask a district court to decide whether this Court's legal position is correct? Even if the lower courts could choose to follow an Attorney General's opinion rather than this Court's view of the law, appeal would ultimately lie to this Court. Even if every Justice recused and the Governor appointed a special Court to hear the appeal, the tribunal would still be the Court whose records were at issue and whose decision was contested.

No such absurdities inhere in the Act as it was consistently construed before ORD-657. The unworkable scheme presupposed by ORD-657 is a strong reason to reject it as a proper construction of the Act. "Statutory provisions will not be so construed or interpreted as to lead to absurd conclusions . . . if the provision is subject to another, more reasonable construction or interpretation." *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 322 n.5 (Tex. 1994) (citing *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (1942)). *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) ("Courts should not read a statute to create such an absurd result.") (citing *McKinney v. Blankenship*, 282 S.W.2d 691, 698 (1955)).

* * * * *

For all these reasons, ORD-657 incorrectly states the law.

We believe, of course, that the judiciary must be as accountable to the people it serves as each of the other two Departments of Government. We certainly do not argue that the judiciary has no responsibility to account for the expenditure of public funds. But the judiciary does account through regular, detailed, public budgeting and auditing processes for the expenditure of all funds, not through the Open Records Act.

The issue is not simply a few telephone records of this Court. The issue is whether records of the judiciary of all kinds and for all courts should be subject to disclosure. The judiciary's records reflecting the decisions of cases have been public for centuries. The propriety and advisability of disclosing records relating to judicial administration, the burdens and advantages of it, the reasonable limits upon it, all are issue for the Legislature, subject to the limits of the Constitution and the inherent power of the Judicial Department to control its own functions. The Legislature has determined that the judiciary should not be subject to the Open Records Act at all, not only to relieve it from the additional burdens that Act imposes and to preserve a means of construing and enforcing the Act in disputes between people and the other Departments of Government, but to preserve the independence of the judiciary. The wisdom of the Legislature's decision is shown by the federal Freedom of Information Act, which, like the Open Records Act, simply does not apply to the judiciary. 5 U.S.C. § 551(1)(B).

Neither the Open Records Act nor any other law should be misused to intimidate judges and courts from serving as conscience and oath require. Much concern has been expressed that political criticism of federal judges impinges on their independence. The same concern applies to state judges who do not hold office for life.

IT IS THEREFORE ORDERED that the request of Andrew Wheat with Texans for Public Justice, for "any outgoing and incoming telecommunications records (office/cellular/mobile and fax phones) for Texas Supreme Court Justices and their staffs for the period covering Aug. 30, 1996 to April 2, 1997" is denied because the request calls for documents of the judiciary not subject to the Open Records Act, TEX. GOV'T CODE § 552.003(1)(B); that Attorney General Open Records Decision ORD-657 is incorrect; and that the Chief Justice and the Clerk are directed not to comply with the provisions of the Open Records Act for challenging Attorney General decisions under the Act.

Order and Opinion delivered: August 21, 1997

THE SUPREME COURT OF TEXAS

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August 21, 1997

Mr. Andrew Wheat
Texans for Public Justice
609 West 18th Street, Suite E
Austin, Texas 78701

RE: Your letter of August 6, 1997 requesting information under the Texas Open Records Act.

Dear Mr. Wheat,

Attached, is an order of the Supreme Court of Texas of this date denying your request.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.