

Cause No. 2025-27735

Institute for Advanced Criminal
Law Studies
v.
Harris County District Attorney’s
Office

In the District Court
Harris County, Texas
55th Judicial District

Reply to The Office’s Response to Motion
for Protective Order

Judge Payne,

The Institute for Advanced Criminal Law Studies (“The Institute”) replies to the Harris County District Attorney’s Office’s (“The Office’s”) response to The Institute’s *Motion for Protective Order*.

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1 The statute is for this very situation.

The Office complains that The Institute seeks to compel production of the records that are the subject of this suit for mandamus. That is not exactly so. Rather, The Institute seeks to give The Office a full opportunity to meet its burden in this case before The Institute files a traditional or no-evidence motion for summary judgment.

Under section 552.321(a) of the PIA this Court has jurisdiction “to consider whether requested information is subject to disclosure, irrespective of whether the Attorney General has issued a ruling addressing that question.” *Harris Cnty. Appraisal Dist. v. Integrity Title Co., LLC*, 483 S.W.3d 62, 68 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). In other words, the Attorney General’s ruling is not binding on this Court.

In this mandamus proceeding, the governmental body—here The Office—“has the burden to prove that the requested information is not

‘public information.’” *Fallon v. Univ. of Tex. MD Anderson Cancer Ctr.*, 586 S.W.3d 37, 48 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

The Office cannot, without producing the requested information in discovery, meet its burden.

In a suit filed under this chapter, the court may order that the information at issue may be discovered only under a protective order until a final determination is made.

Tex. Gov’t Code Ann. § 552.322. The purpose of that statute is to allow the governmental body to provide the discovery *necessary to meet its burden*, without fear that the information will be disseminated if The Office ultimately prevails. See, e.g., *Dallas Morning News, Inc. v. City of Arlington*, No. 03-10-00192-CV, 2011 WL 182886, at *1 (Tex. App.—Austin Jan. 21, 2011, no pet.) (documents at issue produced pursuant to protective order).

2 The Office mistakes its own burden.

The Office has filed a baseless motion for summary judgment relying on the Attorney General’s purported determinations that The Office could lawfully withhold the Video and the Code (collectively “the Information”). The Office may not rely on that. The burden is

inarguably on The Office, and an Attorney General's opinion is inarguably nonbinding.

If The Office will not provide discovery, The Institute is prepared to proceed to a no-evidence motion for summary judgment.

3 The Institute does not accept The Office's representations, and neither may this Court.

The Office claims, "The Institute is aware of what the requested information consists of..." That is false. The Institute—and this Court—knows only what the Video *appears* (from its filename) to be and what The Office *represents* the video to be, which representation The Institute is not inclined to accept, taking into account:

- The Office's bad-faith request for sanctions in its *Answer*;
- The Office's bad-faith motion for summary judgment; and
- The Office's admission to conduct that violates the rules under which The Office receives confidential information (discussed below at 6).

4 *In camera* review is a fine idea.

The Institute would love for this Court to have a copy of the Video and the Code for review in camera, solely for the purpose of obtaining a ruling on their discoverability. *See* Tex. R. Civ. P. 76a (such records are not "court records"); Harris Cty. Loc. R. Dist. Cts. Electronic Filing

3.3(a)(vi) (such documents may not be electronically filed). The Institute suspects that the Court will find The Office's exploitation of potential jurors' confidential information outrageous.

5 This Court cannot, however, decide the issue ex parte.

This is not an ex parte proceeding, but an adversarial proceeding to which the Texas Rules of Civil Procedure apply. Tex. R. Civ. P. 2, 694.

There is no provision in law that allows the Court to decide the ultimate issues based on evidence presented in camera by The Office, without The Institute's response. Such a decision would be the epitome of improper ex parte.

Both the United States Constitution's Due Process Clause and the Texas Constitution's "due course of law" provision, Article I, section 19, forbid a decision in this adversarial proceeding based on evidence that The Institute has not had the right to challenge.

As a practical matter, the reason the adversarial process works is that the parties can direct the Court's attention to facts and arguments that the Court might not have noticed on its own. For example, in this case:

- The Institute has no interest in potential jurors' confidential information; this Court might not have independent knowledge of how easily that information can be obfuscated or redacted from a video;

- The Attorney General did not identify any statutory exception excluding the Code from disclosure; this Court may want expert guidance on what the Code (and computer code generally) actually does; and
- The Institute contends that The Office failed to invoke any exception to the Public Information Act in its ten-day letters; if so, The Office may only withhold information if it has a compelling reason to do so, a question requiring the adversarial process (and possibly a jury trial) to determine.

If The Office successfully resists producing the Video and the Code so that The Institute can explain to the Court (with expert assistance, if it is called for) why The Office's claimed exceptions are inapplicable, The Office will have produced no evidence in support of any element of its proof.

6 The Office should not be allowed to conceal its wrongdoing.

The Institute believes that the evidence will show that The Office's objections to disclosure of the Information are pretexts for concealing its misconduct.

6.1 The Office should not be storing jurors' CHRI and PII in a training video.

As an agency with access to criminal history record information (CHRI) The Office is required to follow and enforce FBI Criminal Justice Information Services (CJIS) rules.

In part those rules provide that CHRI “shall be stored for extended periods only when they are key elements for the integrity and/or utility of case files and/or criminal record files.” Criminal Justice Information Services, Security Policy § 4.2.4 (Fed. Bureau of Investigation June 1, 2020) (“the CJIS Security Policy”), https://www.fbi.gov/file-repository/cjis/cjis_security_policy_v5-9_20200601.pdf.

In addition to an unambiguous violation of the CJIS Security Policy, the Office may be violating regulations or laws, and is surely violating best practices, by storing potential jurors’ PII in a training video on its office intranet.

6.2 The Office’s mere possession of the PII may be in violation of law.

Given that The Office has already admitted conduct that violates section 4.2.4 of the CJIS Security Policy, this Court and The Institute might expect to find that The Office has violated other rules, and possibly laws, in service of its investigation of potential jurors.

[C]onfidential information contained within the video includes concealed handgun licensing records, dates of birth, driver’s licenses and personal identification records, FBI numbers, juror personal information, and social security numbers.

State’s Response 4. Until the Court and The Institute have reviewed the Video, we cannot know where The Office got the confidential

information, including personal identifying information (“PII”) that The Office admits is stored in the video.

Take, though, what might be the most egregious specific intrusion that The Office is copping to: obtaining and storing potential jurors’ Social Security Numbers (SSNs).

Texans are required to provide their SSNs to DPS to get driver’s licenses. DPS is allowed to disclose these numbers only to:

- (1) the child support enforcement division of the attorney general’s office;
- (2) another state entity responsible for enforcing the payment of child support;
- (3) the United States Selective Service System as provided by Section 521.147;
- (4) the unclaimed property division of the comptroller’s office;
- (5) the Health and Human Services Commission;
- (6) the secretary of state for the purposes of voter registration or the administration of elections; or
- (7) an agency of another state responsible for issuing driver’s licenses or identification documents.

Tex. Transp. Code § 521.044(a). The Office is not on this list. If The Office is obtaining potential jurors’ Social Security Numbers from the Department of Public Safety, whether directly or indirectly (from some

agency that DPS may disclose these numbers to) *someone* is breaking the law.

7 Unlike The Office, The Institute can be trusted with jurors' confidential information.

Counsel for The Institute has been subject to protective orders in many cases. In state-court child-sex-assault cases he receives CPS records subject to protective orders; in federal healthcare fraud cases he receives patient-victims' medical records subject to such orders; in federal identity-theft cases he receives all of victims' personal identifying information under such orders.

In every state criminal case The Institute's counsel receives discovery pursuant to article 39.14(f) of the Texas Code of Criminal Procedure.

Never has he made an improper disclosure. Never has he had The Office's cavalier attitude toward PII or CHRI.

The Institute finds it outrageous that The Office has been storing jurors' social-security numbers for years in an in-house training video. We are not talking about defendants or the subjects of investigations or witnesses here, but potential jurors—people who have come to the

courthouse to do their civic duty. These people—*the People*—should know what their servants are doing.

The Institute, on behalf of the People, is not interested in jurors' personal identifying information (PII) or CHRI itself, but is interested in:

1. How The Office gets potential jurors' PII and CHRI;
2. How The Office uses potential jurors' PII and CHRI to investigate potential jurors;
3. Why The Office has preserved potential jurors' PII and CHRI in a form accessible to many or all members of The Office; and
4. Whether jurors' PII and CHRI that The Office has stored in the video can be redacted or obfuscated, so that the People can learn the answers to questions (1)–(3).

8 The Office is explicitly authorized to reveal confidential information if ordered to by this Court.

The Office claims that it “is barred from releasing the jury training video as it—

contains a significant amount of criminal history record information, which is confidential pursuant to Texas Government Code §§ 411.083 & 411.084, TEX. CODE CRIM. PROC. art. 66.203, as well as 28 C.F.R. § 20.21(c)(1).

The Office's *Response* at 4.

Obviously this Court can order The Office to disclose criminal-history record information, and The Office must comply. Beyond the obvious, the Government Code specifically allows it. Criminal history record information:

may be disclosed or used by the recipient only if, and only to the extent that, disclosure or use is authorized or directed by:

...

(D) an order of a court of competent jurisdiction

Tex. Gov't Code Ann. § 411.084.

9 Conclusion

The Office has three options:

1. Produce the information under a protective order, and litigate the ultimate issue with assurance that the information will not be disseminated if The Office is ultimately able to satisfy its burden;
2. Produce the information without a protective order, and trust that The Institute, lacking The Office's slapdash attitude toward confidential juror information, will redact such information before disseminating the information; or
3. Do not produce the information, lose a no-evidence motion for summary judgment, appeal that, and lose that appeal.

The Institute is equally happy with any of the three options.

10 Certificate of Service

I emailed a copy of this reply to counsel for Respondent before filing it with this Court.

Thank you,

A handwritten signature in blue ink, consisting of a wavy line followed by a circular flourish and two horizontal lines extending to the right.

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