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TEXAS OPEN RECORDS ACT: LAW ENFORCEMENT AGENCIES' INVESTIGATORY RECORDS

by J. Graham Hill

The Texas Open Records Act was adopted by the Sixty-Third Texas Legislature and signed by Texas Governor Dolph Briscoe on June 14, 1973. The underlying public policy of TORA is that all persons are entitled to full and complete information regarding the affairs of state government and the official acts of those who represent the people of Texas as public officials and employees. Pursuant to this policy, TORA provides a comprehensive disclosure statute which elucidates the mechanism for public access to state governmental records.

Under TORA, a public record is the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed material which contains public information. All information collected, assembled, or maintained by governmental bodies pursuant to a statutory directive or the transaction of official business is public information, subject to sixteen exceptions. Additionally, fifteen categories of information are

2. Id. § 15.
3. Id. § 1.
4. Id. § 2(2). A public record has been defined in other jurisdictions as a document which is required by law to be kept in the discharge of a public duty. Matthews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952); Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967); Charleston Mail Ass'n v. Kelly, 149 W. Va. 766, 143 S.E.2d 136 (1965). It is the nature and the purpose of the document, rather than the custodian, which is determinative as to a document's status as public or confidential. Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833, 835 (1967).
5. "Governmental body" is defined by TORA as:
   (A) any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government, and which is under the direction of one or more elected or appointed members;
   (B) the commissioners court of each county and the city council or governing body of each city in the state;
   (C) every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city;
   (D) the board of trustees of every school district, and every county board of school trustees and county board of education;
   (E) the governing board of every special district;
   (F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof;
6. The exceptions are:
   (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;
   (2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee
explicitly classified as public information.\(^7\)

within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act;

(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection;

(4) information which, if released, would give advantage to competitors or bidders;

(5) information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor;

(6) drafts and working papers involved in the preparation of proposed legislation;

(7) matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure;

(8) records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement;

(9) private correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy;

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision;

(11) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency;

(12) information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act;

(13) geological and geophysical information and data including maps concerning wells, except information filed in connection with an application or proceeding before any agency;

(14) student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, or that student's parent, legal guardian, or spouse;

(15) birth and death records maintained by the Bureau of Vital Statistics in the State of Texas;

(16) the audit working papers of the State Auditor.

\(\text{Id. § 3(a).}\)

7. The following categories are public information:

(1) reports, audits, evaluations, and investigations made of, for, or by, governmental bodies upon completion;

(2) the names, sex, ethnicity, salaries, title, and dates of employment of all employees and officers of governmental bodies;

(3) information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law;

(4) the names of every official and the final record of voting on all proceedings in governmental bodies;

(5) all working papers, research material, and information used to make estimates of the need for, or expenditure of, public funds or taxes by any governmental body, upon completion of such estimates;

(6) the name, place of business, and the name of the city to which local and state taxes are credited, if any, for the named person, or persons reporting or paying sales and use taxes under the Limited Sales, Excise and Use Tax Act;

(7) descriptions of an agency's central and field organization and the
Upon written application by any person for public information, the custodian of such information must promptly produce the documents for inspection and duplication. If a governmental unit determines that the requested information falls within one of the categories exempted from disclosure, the unit may within ten days request that the Attorney General of Texas determine whether the information is public or confidential. If the public entity refuses to request an attorney general's opinion or to supply requested material which has been defined by the attorney general as public, the party desiring the material may seek a writ of mandamus in state court for a determination of whether disclosure should be compelled.

It would be premature to predict if the governmental units of Texas will be cooperative or recalcitrant vis-à-vis public requests for disclosure of documents. However, based on experience with the Federal Freedom of Information Act, a significant amount of litigation will most likely arise under the Texas Open Records Act. This is due primarily to the fact that

8. The cost of reproducing public records is determined by the state Board of Control. Id. § 9(a). Each governmental body may promulgate reasonable rules and regulations of procedure by which public records may be inspected efficiently, safely, and without delay. Id. § 13.


10. Distributing confidential information is a misdemeanor punishable by confinement not exceeding six months and/or a fine not exceeding $1,000.00. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 10 (Supp. 1974).

11. Id. § 8. If the attorney general determines that the information is not required to be released, the statute fails to provide a remedy for the party seeking the records. Thus, in certain instances, the state's chief legal officer may be the final arbiter of disputes.


justification for confidentiality must be based upon one of TORA's amorphous exceptions.14

The purpose of this Comment is analysis of the countervailing policy considerations of the personal right of privacy, the governmental need for secrecy, and the public's right to know in the context of TORA's exemption from disclosure of the records of law enforcement agencies.15 For example, are criminal and civil enforcement files within the scope of this exemption? Should files which will not be used in pending litigation be exempt from disclosure? Finally, solutions will be proposed for the problems which will be encountered by the Texas courts in applying TORA in this area.

I. A CONFLICT OF PUBLIC POLICY GOALS

The implementation of TORA results in the confrontation of three fundamental rights: (1) the public's right to know, (2) the individual's right to privacy, and (3) the state's need for secrecy. The application of this legislation requires the delicate balancing of the need of government to obtain and retain information needed to enforce the laws, the interest of each individual to control the gathering and use of information about him, and the right of the public to be informed about the activities of government.

The Public's Right To Be Informed. To assure government by and for the people, the polity must have the opportunity to inspect public documents in order to assess whether their public officials are honestly, faithfully, and competently conducting the affairs of state.16 James Madison declared, "A popular government, without popular information, or means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both."17 The means for achieving public access to federal documents is the Federal Freedom of Information Act.18 This Act was intended to increase public participation in government through imposition of liberal disclosure requirements limited only by specific, narrowly constructed exemptions.19 The Act was passed to provide the necessary machinery to assure the availability of governmental information necessary to an informed electorate20 by piercing the paper curtain of the federal bureaucracy that covers public mismanagement with public misinformation and secret sins with secret silence.21 As President Lyndon B. Johnson asserted as he signed the Freedom of Information Act, a democracy works best when the people have all the information that the security of the nation permits.22

14. See note 6 supra.
15. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Supp. 1974).
The public's right to be informed of state governmental affairs has been recognized as essential to the democratic process in Texas. The machinery for achieving this policy goal is TORA, whose purpose is to insure the maximum possible public access to governmental documents.

The Individual's Right to Privacy. While all citizens have a general interest in securing an efficient and honest government, each individual in a democracy also has a right to protect himself against unreasonable disclosures through the governmental process. The United States Supreme Court has held that the right of personal privacy is guaranteed by the United States Constitution.

A common law right to privacy was first recognized by the Supreme Court of Texas in Billings v. Atkinson. The plaintiff brought an action for invasion of privacy against the defendant, an employee of Southwestern Bell Telephone Company, for attaching a wire-tap device to the plaintiff's private telephone line. In holding for the plaintiff, the court defined the right of privacy as:

The right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

26. Development of the individual is particularly important in a democratic society, since the qualities of independent thought, diversity of views and non-conformity are considered desirable traits. Independence requires time for sheltered conduct, and for the opportunity to alter opinions before making them public. A. Westin, Privacy and Freedom 34 (1967).
29. 489 S.W.2d 858 (Tex. 1973).
The court stated that the violation of the right to privacy constituted a legal injury for which a remedy will be granted. Further, the court decided that damages for mental suffering are recoverable without a showing of actual physical injury in an invasion of privacy action.

Prosser has categorized the right of privacy as follows:

1. Intrusion upon the plaintiff's seclusion, solitude or private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation for the defendant's advantage of the plaintiff's name or likeness.

Once the plaintiff proves that the defendant's activities fall within one of these four categories, damages are presumed. Even if the defendant's publication reveals true facts about the plaintiff, the defendant's conduct is actionable. The only defense available to the defendant is express or implied consent.

When a matter of public concern is involved, the courts do not always accord the plaintiff a right to recovery, even though his privacy has been invaded. Basing their opinions on the constitutional protection of free speech and press, the courts have held that a privilege must exist for publishing matters of public concern so long as the report is made without the knowledge that it is false or in reckless disregard of the truth. Matters of privacy. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956). The common law right to privacy, as a personal rather than a property or contractual right, was first proposed in a law review article. Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

31. 489 S.W.2d at 860. In Cullum v. Government Employees Financial Corp., 517 S.W.2d 317 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.), the court refused to extend the Billings doctrine to a situation where a creditor informed the debtor's employer of the debt. Unauthorized appropriation recognized in Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

32. 489 S.W.2d at 861.


38. Time, Inc. v. Hill, 385 U.S. 374 (1967). In Hill the plaintiff instituted an action for damages based on the false report by the defendant that a new play was based upon the experiences of the plaintiff. The Court held that the New York right to privacy statute could not redress false reports of matters of public interest absent a showing that the defendant published with knowledge of its falsity or in reckless disregard of the truth. Id. at 387-88. This rule has been consistently followed by the courts. Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969); Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d


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A public concern encompass newsworthy occurrences of general public interest and the activities of public figures. A public figure has been defined as one who, by his accomplishments, fame or mode of living, or adoption of a profession or calling, gives the public a legitimate interest in his affairs and his character. It is held that a person who engages in public affairs has waived his right to privacy. However, after a length of time, a public person can return to private life or a public event can lose its timeliness, at which point a person regains his right of privacy.

A public official's right of privacy must also yield when recovery would be contrary to the public interest. In the recent Texas court of civil appeals case of Richardson v. City of Pasadena, a police officer attempted to set aside an order of the Pasadena Civil Service Commission which had dismissed him from the force for refusing to take a polygraph test. The court held

39. Cox Broadcasting Corp. v. Cohn, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (story of rape and killing of plaintiff's daughter); Williams v. KCMO Broadcasting Div.-Meredith Corp., 472 S.W.2d 1 (Mo. Ct. App. 1971) (broadcast of plaintiff's arrest, even though he was later released without any charges being brought against him); however, the courts have held that certain stories were not public events. Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969) (film which showed mentally ill inmates at a correctional institution in the nude, where the inmates had not given written releases); Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (picture showing plaintiff at country fair fun-house with her dress blown up by an air jet).
41. Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635 (1947).
43. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (story about plaintiff's life as a prostitute, after she had led an exemplary life for seven years); Dinege v. Philadelphia Daily News, 328 F.2d 641 (3d Cir. 1964) (story published two years after plaintiff's arrest on obscenity charges). On the other hand, the courts have determined in other cases that the event was still of public interest. Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951) (story published 15 years after plaintiff had been prosecutor in the John Dillinger trial); Rozhon v. Triangle Publications, Inc., 230 F.2d 359 (7th Cir. 1956) (story of plaintiff's son's death from narcotics five months after the event); Raynor v. American Broadcasting Co., 222 F. Supp. 795 (E.D. Pa. 1963) (story of criminal act 20 months after plaintiff was sentenced); Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (1949) (story about boxer 10 years after he had abandoned his career).
44. 500 S.W.2d 175 (Tex. Civ. App.—Houston [14th Dist.] 1973), rev'd on other grounds, 513 S.W.2d 1 (Tex. 1974).
45. 500 S.W.2d at 176.
that while a private citizen could refuse to take the polygraph test on the grounds that it was a violation of his right to privacy, a public employee’s right of privacy is not recognized where it conflicts with the public interest.\textsuperscript{46} As the plaintiff’s refusal to take the polygraph test reduced the credibility and efficiency of the police force, the court determined that the public interest outweighed the public employee’s right to privacy.\textsuperscript{47}

**Governmental Requirement of Secrecy.** The final policy consideration under TORA is the need for governmental secrecy in certain circumstances. The state secrets doctrine, as it has emerged, sanctions the withholding of any information the secrecy of which is deemed to be in the national interest. The first United States Supreme Court case on this issue was *Totten v. United States*,\textsuperscript{48} wherein the court refused to compel the disclosure of a secret government contract during the Civil War, since a contrary holding would endanger governmental military and diplomatic operations.\textsuperscript{49}

The question of governmental privilege arose in the case of *United States v. Reynolds*,\textsuperscript{50} which involved a wrongful death action under the Federal Tort Claims Act.\textsuperscript{51} The plaintiffs requested documents containing statements taken in connection with an official investigation of the accident that were in the custody of the Secretary of the Air Force.\textsuperscript{52} The request for production was denied by the Government.\textsuperscript{53} The United States Supreme Court ruled that the privilege of non-disclosure by the Government of military or diplomatic secrets is well established,\textsuperscript{54} and it was error for the district court to compel disclosure, since there was a reasonable danger that the requested documents contained military secrets.\textsuperscript{55}

The privilege of secrecy was invoked by President Richard M. Nixon in response to a subpoena duces tecum issued by the special prosecutor for the production of tape recordings. In *United States v. Nixon*\textsuperscript{56} the Court recognized a need for confidentiality in order to encourage candid, objective, and even blunt or harsh opinions in presidential discussions, for the chief executive and his aides must be free to examine all policy alternatives.\textsuperscript{57} However, the privilege is not absolute.\textsuperscript{58} The President’s generalized interest in confidentiality, unsupported by a need to protect military, diplomatic, or sensitive national security secrets, could not prevail over specific judicial need for the documents.\textsuperscript{59}

\textsuperscript{46} Id. at 177.
\textsuperscript{47} Id. In Richardson v. Pasadena, 513 S.W.2d 1 (Tex. 1974), the supreme court reversed the court of civil appeals on the theory that the closed hearing conducted by the city civil service commission was a violation of the plaintiff’s right to procedural due process. Id. at 4.
\textsuperscript{48} 92 U.S. 105 (1875).
\textsuperscript{49} Id.
\textsuperscript{50} 345 U.S. 1 (1953).
\textsuperscript{52} 345 U.S. at 3.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 6-7.
\textsuperscript{55} Id. at 10-11; accord, Knopf v. Colby, 509 F.2d 1362 (4th Cir. 1975).
\textsuperscript{56} 418 U.S. 683 (1974).
\textsuperscript{57} Id. at 708.
\textsuperscript{58} Id. at 707.
\textsuperscript{59} Id. at 713.
II. RECORDS OF LAW ENFORCEMENT AGENCIES: AN ILLUSTRATION

The public policy precepts of individual privacy, governmental secrecy, and the public's right to know collide under the law enforcement agency disclosure exemption of TORA. This exception to public disclosure states that "records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters related to law enforcement" are not subject to public review under TORA.60

The public policy goals set forth above are clearly illustrated in the application of this exemption under TORA. First, law enforcement agencies have a need to conduct investigations of possible criminal activity in secrecy to insure effective enforcement of the state laws. If their files were open to the public, a person who has violated or intends to violate the law might avoid prosecution or detection by law enforcement officers. On the other hand, there are numerous examples of investigatory files which contain information in which the public has a legitimate interest. For example, the public has the right to know the crime rate in different sections of the state, the number of apprehensions of law violators by law enforcement officers, the disposition of criminal cases, and so forth. Further, each private person investigated and every private individual who assists law enforcement agencies has a right to be protected by the state from unwarranted invasions and public revelations concerning their private affairs. Thus, in each factual situation, the competing interests of the law enforcement agency, the public, and the affected individual must be balanced to determine whether the records should be made public or remain confidential.

The first request under TORA for public disclosure of law enforcement records, which resulted in an attorney general's opinion,61 was made by the Houston Post, a major metropolitan newspaper. The Post demanded that Houston Airport Security arrest records from January 1, 1973, to the present be made public.62 The city of Houston denied access to the records and requested a determination of the issue by the Texas Attorney General.63 On January 15, 1974, the attorney general ruled that: (1) The Houston Airport Security Police was a law enforcement agency; (2) the arrest records at issue dealt with the detection and investigation of crime; and (3) the records were maintained for internal use by the agency in matters relating to law enforcement.64 As such, the information sought by the Houston Post was protected from public disclosure by TORA.65

60. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Supp. 1974).
61. OPEN RECORDS DECISION No. 18 (Jan. 15, 1974).
62. Id. at 1. Specifically, the Post wanted to ascertain the name, age, address, offense and disposition of each case. In addition to the requested material, the arrest records contained detailed information regarding the detection of crime. Id.
63. Id.
64. Id.
65. Id. The legislative history of TORA supports OPEN RECORDS DECISION No. 18 (Jan. 15, 1974). On April 6, 1973, the following exchange took place at a meeting of the Senate Jurisprudence Committee:

Senator Braecklein: 'Well, what I am concerned with is an arrest record that does not result in any final conviction. . . . I don't think that should
This opinion resulted in such a public outcry that a quasi-judicial hearing was held in Austin, Texas, on January 21, 1974, by the Texas Attorney General's office. After testimony was received from representatives of the press, the legislature, law enforcement agencies, and the general public, a clarifying opinion was issued on March 25, 1974. Although the specific holding of the original opinion was affirmed, the attorney general took the opportunity to expand that holding in the subsequent opinion. The opinion noted that Texas State Representative Lane Denton, who was one of the principal sponsors of TORA, had stated that an arrest record was not subject to disclosure to the public. However, the attorney general decided that even though TORA did not compel disclosure of arrest records, investigatory agencies could allow public access to such documents, if the right to privacy is preserved. Therefore, a law enforcement agency could waive its right to secrecy. Further, specific information such as the name, address, and offense of the arrestee and the disposition of the case should be, in the opinion of the attorney general, disclosed to the public by the custodian of such records. The remaining portion of the files should be kept secret.

Although the attorney general stated that he was affirming the original opinion with the subsequent opinion, he was, in reality, overruling himself. In the initial opinion, the entire arrest record information was exempt from public disclosure, while the second opinion ruled that specific information contained in the record was to be disclosed to the public. In the discussion, the attorney general acknowledged the competing policy goals of right to privacy and public right to know. He attempted to accommodate these two goals by distinguishing between general factual data, such as name, address, and offense of the arrestee which should be made public, and other data, such as the identities of undercover agents, procedures of law enforcement personnel in undercover maneuvers, and so forth, which should be kept secret. Certainly, the public has a right to know basic facts concerning alleged criminal events, such as the names of the participants and ensuing police action. The mere reporting of such information would not constitute an invasion of privacy, for alleged criminal activity is a public event. Further, the release of this basic data would not seriously hamper law enforcement efficiency in performing its public mission. As the second

be made public.'
Representative Denton: 'And I feel that it is definitely confidential in terms of this bill [TORA].'

Transcript on file with the legislative counsel.
66. OPEN RECORDS DECISION No. 18A (March 25, 1974).
67. Id. at 2.
68. Id. at 7.
69. Id. at 10.
70. Id.
71. Id. at 2.
72. OPEN RECORDS DECISION No. 18 (Jan. 15, 1974).
73. OPEN RECORDS DECISION No. 18A (March 25, 1974).
74. Id. at 4.
75. Id. at 10.
76. Id. at 9.
77. See notes 37-43 supra and accompanying text.
opinion accommodated the conflicting policy considerations, it reflects better judgment.

Another significant attorney general’s opinion involved the Retail Credit Company’s request that the city of Pasadena release a police officer’s offense report concerning a named individual. The opinion stated that the disclosure of such information was covered by the investigatory files exemption of TORA and would constitute an invasion of the right of privacy. This opinion appears to be inconsistent with a later decision of the attorney general dealing with the city of El Paso police accident reports. However, the El Paso opinion noted that accident reports must be prepared by police officers and submitted to the Texas Department of Public Safety, and that such reports are to be available to the public as a matter of law. Therefore, the city police accident reports should be made public, regardless of the fact that they are still in the control of the city.

In addition to the statutory basis mentioned above, the two opinions may be distinguished upon right of privacy considerations. In the Pasadena opinion the requested information concerned one named individual. Although the opinion does not reveal the report’s contents, the report may have contained material of a highly objectionable nature. Further, the information was requested by a credit company for the presumed purpose of conducting a credit check on the individual. Certainly, this is not related to TORA’s goal of public monitoring of governmental officials. In contrast, the El Paso decision involved routine traffic accident reports which are documents prepared in the discharge of a public employee’s legal duty and, thus, are public records. Further, the public has a legitimate interest in highway safety, and as the information relates to public events and is not highly objectionable, the individual’s right of privacy must be subordinated. The state’s efficiency in investigating and prosecuting alleged violators would not be sacrificed in this instance, because the participants in the accident are fully aware of their involvement in the investigatory proceedings of the

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78. OPEN RECORDS DECISION No. 19 (Jan. 15, 1974).
79. Id. at 1.
80. OPEN RECORDS DECISION No. 43 (Aug. 16, 1974).
81. Id. at 1.
82. Id. TEX. REV. CIV. STAT. ANN. art. 6701d, § 47 (1969) provides for public access to accident reports submitted after Jan. 1, 1970. OPEN RECORDS DECISION No. 84 (May 5, 1975) held that accident reports submitted prior to that date were exempted from disclosure to the public. However, even though the reports themselves are confidential, the attorney general ruled in OPEN RECORDS DECISION No. 88 (May 14, 1975) that the fact of whether or not a person had filed an accident report prior to Jan. 1, 1970 was public information.
83. OPEN RECORDS DECISION No. 43 (Aug. 16, 1974). The information was also not excepted from disclosure by TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(3) (Supp. 1974), as information relating to civil litigation. OPEN RECORDS DECISION No. 43 (Aug. 16, 1974).
84. This statement is reasonably inferable from the opinion’s reference to Billings v. Atkinson, 489 S.W.2d 853 (Tex. 1973). OPEN RECORDS DECISION No. 19 (Jan. 15, 1974). For discussion of Billings see notes 28-32 supra and accompanying text.
police. In balancing the interests, it would appear that the scale is tipped in favor of public disclosure.

The police manual of the University of Texas Special Services-Security Division was the subject of another attorney general's opinion.86 The opinion held that the Texas Legislature intended to distinguish in TORA between administrative and law enforcement records,87 and as the requested records were of both types, the attorney general reasoned that the administrative material should be revealed,88 while the law enforcement records should remain confidential.89 This opinion reflects a careful balancing between the public's right to know and the state's need for secrecy in order to promote efficient enforcement of the laws. Specific distinctions were made in the opinion between types of administrative materials for the purpose of determining what should be made public.90 Unless the administrative data is related to specific operations or equipment of the police force or the identities of undercover officers, the material is to be made public.91 This approach adequately accommodated the competing interests involved in the controversy.

The Texas Department of Public Welfare's protective services records pertaining to complaints of child neglect and abuse were ruled to be exempted from disclosure in another important attorney general's opinion.92 The law enforcement section was applicable as the welfare department's investigation was conducted on behalf of a law enforcement agency to determine whether criminal prosecution was warranted.93 Thus, public revelation of the information would have severely hampered the detection and prosecution of child abuse.94 Further, the opinion noted that the requested material fell within the ambit of family privacy which is protected by the United States Constitution,95 and for this reason should not be disclosed.96

Without comment or analysis, the attorney general has recently ruled that a criminal investigation report of the bail bond industry was clearly exempted from disclosure by the law enforcement section97 and letters pertaining to an investigation of alleged violations of the Texas Real Estate License Act98 were public information.99 The distinction between these records is difficult to perceive from the facts presented by the opinions. If the bail bond

86. Open Records Decision No. 22A (June 6, 1974).
87. Id. at 2.
88. Id.
89. Id.
90. Id. at 3.
91. Id.
92. Open Records Decision No. 73 (March 27, 1975).
93. Tex. Fam. Code Ann. art. 34.05 (1975) provides that the Department of Welfare must compile and forward these records to the appropriate law enforcement agency.
94. Open Records Decision No. 49 (Sept. 9, 1974) recognized the common law privilege of protecting the identity of informers of child abuse. The opinion stated that the rule promoted the effective detection of crime.
95. See note 27 supra and accompanying text.
96. Open Records Decision No. 73 (March 27, 1975).
investigatory report contained the identity of informants, information regarding the methods of detecting bail bond violators, facts to be used in future litigation, and so forth, the opinion was clearly correct. However, the opinion does not reveal such facts. Hopefully, future opinions will better clarify the rationale for disclosing or exempting records under TORA.

The only court decision in Texas based upon the law enforcement exemption of TORA is *Houston Chronicle Publishing Co. v. City of Houston.* The plaintiff’s request for access to all offense reports and individual criminal records of the Houston Police Department had been denied by the defendants on the ground that the material was exempt from disclosure under TORA. The court permanently enjoined the city of Houston from denying the plaintiff the information based upon TORA, but also determined that TORA did not affirmatively grant the plaintiff access to the material. Additionally, the court held the law enforcement agency records exemption, *inter alia,* was void and unenforceable. The decision is presently pending before the court of civil appeals.

The correct disposition of the *Houston Chronicle* case would have been to allow the plaintiffs access to the name, address, and offense of each arrestee, and the disposition of each case. First, the legislative intent and the mandate of TORA support disclosure of the information. Under TORA, government records are presumed to be public and the Act is to be liberally construed in favor of disclosure. Second, the automatic exemption of any data which is labeled “investigatory” constitutes an unconstitutional infringement upon the freedom of the press, as governmental denial of newsworthy information whether directly or indirectly is constitutionally invalid, without a showing of a compelling state need. In balancing these policies, the public’s interest in disclosure must prevail. It is speculative that as a general rule the dissemination of limited information concerning criminal activity would seriously impair the enforcement of the laws. In contrast, the press has the highest duty to report the news with respect to public events, such as the

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100. No. 985,531 (Dist. Ct. of Harris County, 125th Judicial Dist. of Texas, Aug. 29, 1974).
101. Id. at 2. See notes 61-77 supra and accompanying text for discussion regarding the role of the Texas Attorney General in this controversy.
102. No. 985,531 (Dist. Ct. of Harris County, 125th Judicial Dist. of Texas, Aug. 29, 1974).
103. Id.
104. Id. Specifically, the court held that four sections of TORA were overbroad, vague, in conflict with each other, and an unauthorized delegation of legislative power. The four sections were: (1) reports, audits, evaluations, and investigations made of, for, or by governmental bodies which are public records upon completion. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 6(a)(1) (Supp. 1974); (2) information currently regarded by agency policy as open to the public, which is public information. Id. § 6(a)(15); (3) information considered confidential by law, which is exempt from disclosure. Id. § 3(a)(1); and (4) records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notation of such enforcement agencies which are maintained for internal use in matters relating to law enforcement, which are exempt from public disclosure. Id. § 3(a)(8).
105. No. 985,531 (Dist. Ct. of Harris County, 125th Judicial Dist. of Texas, Aug. 29, 1974). Oral arguments were held in the court of civil appeals on Feb. 12, 1975.
109. See notes 37-43 supra and accompanying text.
apprehension of a suspect. Finally, the publication of limited factual data is a minor invasion of privacy when contrasted with the need of society to be informed of public events. Therefore, the general rule should be that limited information concerning alleged criminal activity should be subject to public disclosure. However, if the state can show that the disclosure would significantly impede the enforcement of the laws or constitute an unwarranted invasion of an individual's right to privacy, the court may, after an in camera inquiry, hold that the documents should be exempt from disclosure.

III. TORA AND INVESTIGATORY FILES: A LOOK AHEAD

In terms of future problems that Texas will confront in applying TORA, a review of the case law under the Federal Freedom of Information Act's provision for exemption from disclosure of investigatory files is instructive. TORA was modeled after the federal Act; consequently, the policies and procedures of the two acts are very similar. Additionally, TORA's section on law enforcement records is almost identical to the Freedom of Information Act's provision for investigatory files. The federal Act provides for the non-disclosure of investigatory files compiled for law enforcement purposes except to the extent the information is available by law to a party other than an agency. The general policy underlying this exception is to prevent premature disclosures to a defendant in a federal enforcement proceeding to enhance the detection of federal statutory violations, to protect the privacy of citizens who are being investigat-

111. Texas State Representative Lane Denton, one of the sponsors of TORA, addressing the Texas House of Representatives, Feb. 13, 1973. Transcript on file with the legislative counsel.
113. 5 U.S.C. § 552(b)(7) (1970). This section was amended by the 93rd Congress, 2d Session on Nov. 21, 1974. The provision presently provides for nondisclosure of investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. 5 U.S.C. § 552(b)(7) (Supp. 1974). The 1975 amendment will not be analyzed in this Comment. As the new section will not be effective until March 1975, there is an absence of case law. Further, the 1975 amendment is substantially different from TORA. Thus, the new law would not provide any assistance regarding the application of TORA by the courts, which is the purpose of this Comment.
115. Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972); Frankel v. SEC, 460 F.2d 813
ed,116 and to provide information to the federal government in their inquiries.117

**A. Civil and Criminal Law Files**

The courts are in general agreement that the investigatory file exception of the Freedom of Information Act applies to files prepared for both criminal and civil enforcement actions,118 although one commentator has stated that the statutory language and the legislative history of the federal Act leave room for doubt on this issue.119 Although TORA clearly includes criminal actions within the exemption, the Act does not expressly cover civil files of regulatory agencies.120 The Texas courts may adopt a restricted application of the exemption based upon legislative history121 or public policy.122 If the Texas courts apply TORA literally, thereby restricting applicability to criminal files, the Texas Legislature should amend the Act to include the civil investigatory files of regulatory agencies in the exemption. The policy reasons for non-disclosure of criminal investigatory files are applicable to civil investigatory records. The state has a legitimate interest in preventing premature disclosure of civil investigatory records in order to enhance the detection of law violators and enforcement of regulatory laws. If these agencies' files are held to fall within the scope of the exemption, a number of

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120. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Supp. 1974).

121. The legislative intent is shrouded with doubt. In response to a question before the Senate Jurisprudence Committee on April 10, 1973, Texas State Representative Lane Denton stated that agencies which act in a quasi-judicial capacity such as the Insurance Commission, the Water Quality Board, the Air Control Board, the State Securities Board and the Industrial Accident Board are covered by this section. During the senate floor debate on May 17, 1973, Senator William Meier stated that the exception included the Alcoholic Beverage Commission, the Parks and Wildlife Department and other agencies charged with the enforcement of criminal statutes. Transcripts on file with the legislative counsel. Speaking before the 11th Annual Conference of the Texas and New Mexico Association of College and University Traffic and Security Departments, William Reid, a member of the Attorney General's Opinion Committee stated that the law enforcement exemption would probably be restricted to uniformed services. The Attorney General has ruled that the Special Services Security Division of the University of Texas is included within the exemption. OPEN RECORDS DECISION No. 22A (June 6, 1974). The issue of whether the Air Control Board was a law enforcement agency was avoided in TEX. ATTY. GEN. OP. NO. H-276 (1974). OPEN RECORDS DECISION No. 27 (April 11, 1974) held that inspection reports of the Potter County Health Department were not within the law enforcement record exception.

122. The legislature intended that the provisions of TORA should be liberally construed in favor of granting any request for information. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(d) (Supp. 1974).
interesting problems will arise under TORA similar to those which have been litigated under the Freedom of Information Act.

B. Investigatory Files Which Will Be Used in Litigation

Substantial case authority exists under the investigatory files exception to the Freedom of Information Act which exempts from public disclosure investigatory records which are being or will be used in an enforcement proceeding prior to the time they would be available under discovery methods. In *Clement Brothers Co. v. NLRB* statements made by the plaintiff's employee to a federal agency, which were to be used in an enforcement action under the National Labor Relations Act, were not subject to disclosure under the Freedom of Information Act. The court based its decision on the theory that employees would be less likely to reveal damaging information about their employers if their statements were freely discoverable by employers; and, the regulatory investigation would thus be significantly hampered. The information would be available to the plaintiffs only if the employees were called as witnesses.

Similarly, in *Barceloneta Shoe Corp. v. Compton* the court refused to compel disclosure of witnesses' statements obtained by the NLRB during investigation of unfair labor practices prior to an enforcement hearing. In the court's view, the congressional intent in enacting the Freedom of Information Act was not to give private parties charged with violating federal regulatory statutes greater access to investigatory records than has been granted to a defendant charged with a criminal offense. This reasoning was adopted in *Cooney v. Sun Shipbuilding & Drydock Co.* in which it was held that the investigatory file exemption of the Freedom of Information Act did not create an additional method of discovery in civil cases, for the primary purpose of the Act was to avoid such premature discovery of an agency's case. Therefore, statements of witnesses and agency deliberations or recommendations were exempt from disclosure. A rule for limited review of agency investigatory records prior to litigation was


125. *Id.* at 542.

126. *Id.*

127. *Id.*

128. *Id.*


130. *Id.* at 594.

131. *Id.* at 593. Under the Jencks Act, 18 U.S.C. § 3500 (1970), the statements of a witness obtained during investigation of alleged criminal violations are not available to the opposing party until after the witness has given direct testimony against the accused. For general provisions of criminal discovery, see *FED. R. CRM. P.* 16.

132. 288 F. Supp. 708 (E.D. Pa. 1968) (wrongful death action involving a request for an accident investigation report prepared by the Office of Occupational Safety, which was not a party to the law suit).

133. *Id.* at 711. The scope of discovery in federal civil cases is governed by *FED. R. CIV. P.* 26(b); accord, *Kerr v. U.S.N. Dist. Ct. of Cal.*, 511 F.2d 192 (9th Cir. 1975).


135. *Id.* at 718.
adopted in *B & C Tire Co. v. Commissioner*, where a taxpayer sought records prepared by an IRS agent in connection with the plaintiff's tax return. Although the liberal disclosure requirement of the Freedom of Information Act was recognized, the records were exempted from disclosure. The court rejected the taxpayer's contention that the records were not an investigatory file as the audit was conducted merely as a monitoring activity and criminal prosecution was not contemplated. In the court's view, monitoring and prosecutorial activities both fall within the scope of the investigatory files exemption and should not be disclosed since they are to be used in litigation.

The Texas courts should follow the decisions under the Freedom of Information Act on the issue of whether the law enforcement exemption of TORA provides an additional method for discovery in enforcement proceedings. There are compelling policy considerations of efficient investigatory procedures which serve the public interest. The government agency must conduct legitimate inquiries concerning possible violations of the law in secrecy in order to competently perform its agency mission. Further, there is no indication in the legislative history or the statutory language of TORA to support the proposition that the legislature intended to displace the present Texas procedure for discovery. Under the present language of TORA the Texas courts should hold that civil and criminal law enforcement agency records, which are or will be used in litigation, should be exempt from disclosure, if they are not discoverable.

**C. Investigatory Files Which Will Not Be Used in Litigation**

The federal courts do not agree on the question of whether investigatory files, which will not be used in an enforcement proceeding, are subject to disclosure under the Freedom of Information Act. In *Bristol-Myers Co. v. FTC* the plaintiff sought documents procured by an FTC staff investigation. In the court's view, an agency could not, consistent with the broad disclosure mandate of the federal Act, automatically exempt all of its files with the label "investigatory" and a suggestion that enforcement proceedings might be launched at some future date. The Government must show a prospect of future enforcement concrete enough to merit the agency's refusal to disclose the information under the Freedom of Information Act. This rule did not, as reasoned by the court, offend the Act's policy against premature disclosure of government documents to an adverse party.

137. Id. at 711-14.
138. Id. at 713.
139. Id. at 714.
140. Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972).
141. In Texas, the government is not required in criminal trials to produce for inspection by the accused the statements of witnesses prior to the trial. Bryant v. State, 397 S.W.2d 445 (Tex. Crim. App. 1965), cert. denied, 385 U.S. 858 (1966). For scope of discovery and production of documents in a civil trial, see Tex. R. Civ. P. 167.
143. Id.
144. Id. at 939.
145. Id.
In *Wellford v. Hardin*\(^{146}\) the *Bristol-Myers* rationale was adopted by the Fourth Circuit, the court finding that the underlying policies of the Act demanded strict and narrow construction of the disclosure exemptions.\(^{147}\) Records of past administrative enforcement proceedings were not under the disclosure umbrella, as the purpose of the law enforcement files exemption was merely to prevent premature discovery of the Government’s case by the defendant.\(^{148}\)

The recent case of *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*\(^{149}\) followed the *Bristol-Myers* rule in a situation involving a Department of Labor report which contained conclusions regarding the cause of an injury to an employee of the plaintiff.\(^{150}\) Although the Department of Labor asserted that the files were investigatory, the court ruled that this was an insufficient reason for confidentiality.\(^{151}\) The Government had the burden of showing that the revelation of the material would result in a premature disclosure of the Government’s position in an enforcement proceeding or the agency’s investigatory techniques.\(^{152}\) Since an enforcement proceeding involving the Government was neither pending nor contemplated and the investigatory methods employed by the Government had been disclosed by other documents released by the department, the data was not protected by the Freedom of Information Act.\(^{153}\)

Similarly, in *Black v. Sheraton Corp. of America*\(^{154}\) FBI documents were not entitled to protection by the Freedom of Information Act, in that ten years had elapsed since the records had been compiled, and a trial was not reasonably foreseeable.\(^{155}\) Thus, the court ruled that the documents must be disclosed.\(^{156}\)

Likewise, in *M.A. Schapiro & Co. v. SEC*\(^{157}\) the court required the Government to show that a law enforcement proceeding based on the documents prepared in the agency’s investigation of offboard trading activities was contemplated within the reasonably near future in order to protect the agency records from disclosure.\(^{158}\) As six years had elapsed since the investigation had begun, and the agency had failed to release any facts that would show that proceedings were imminent, the exemption did not apply.\(^{159}\)

The automatic disclosure rule was also rejected in *Cooney v. Sun Ship-

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\(^{148}\) 444 F.2d at 23.

\(^{149}\) 508 F.2d 945 (4th Cir. 1974).

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id. at 949.

\(^{153}\) Id.


\(^{155}\) Id. at 102.

\(^{156}\) Id.


\(^{158}\) Id. at 470.

\(^{159}\) Id.
building & Drydock Co.,\textsuperscript{160} where, in the view of the court, the seventh exemption of the Freedom of Information Act should not be applicable when the investigation has ceased and the prospect of future law enforcement proceedings is slim.\textsuperscript{161}

Another line of authority holds that the exemption applies notwithstanding the fact that litigation has ceased or is not contemplated. In \textit{Cowles Communications, Inc. v. Department of Justice}\textsuperscript{162} a party to a libel suit sought production of records of the Immigration and Naturalization Service on the theory that the records would not be used in any future enforcement proceeding.\textsuperscript{163} The court held that the federal Act protected from disclosure investigatory files compiled for law enforcement purposes.\textsuperscript{164} Under the court's literal interpretation of the statute, it was irrelevant whether the enforcement proceeding actually occurred or was even contemplated in terms of the disclosure or non-disclosure issue.\textsuperscript{165} Disclosure would reduce the efficacy of agency investigations as informers would be less likely to give information if their statements were not to be kept confidential.\textsuperscript{166} Since the individual's right to privacy might be sacrificed, the court was hesitant to hold that investigatory files which would not be used in litigation were subject to disclosure.\textsuperscript{167} In this instance, the policy values of privacy and governmental efficiency, in the court's opinion, clearly outweighed the public's need to know.\textsuperscript{168}

\textit{Evans v. Department of Transportation}\textsuperscript{169} involved an eleven-year-old letter received by the defendant expressing the opinion that the plaintiff was too mentally ill to fly.\textsuperscript{170} Because the document was characterized by the court as part of an investigatory file, it was exempted from disclosure. The court said that if disclosure was ordered after enforcement proceedings were complete, few people would aid the Government in future investigations.\textsuperscript{171}

Similarly, in \textit{Frankel v. SEC}\textsuperscript{172} the plaintiff's request for documents used by the defendant in civil litigation against persons who were not parties to the law suit was denied.\textsuperscript{173} The court noted that if the exemption did not apply after the investigation and enforcement proceeding had terminated, future law enforcement efforts would be less effective as the procedures for obtaining information would be public knowledge.\textsuperscript{174} Thus, the plaintiff was limited to the usual rules of discovery.\textsuperscript{175}

\begin{thebibliography}{99}
\bibitem{161} \textit{Id.}
\bibitem{162} 325 F. Supp. 726 (N.D. Cal. 1971).
\bibitem{163} \textit{Id.} at 726.
\bibitem{164} \textit{Id.} at 727.
\bibitem{165} \textit{Id.}
\bibitem{166} \textit{Id.}
\bibitem{167} \textit{Id.} at 727.
\bibitem{168} \textit{Id.}
\bibitem{169} 446 F.2d 821 (5th Cir.), \textit{cert. denied}, 405 U.S. 918 (1971).
\bibitem{170} \textit{Id.} at 822-23.
\bibitem{171} \textit{Id.} at 824.
\bibitem{173} 460 F.2d at 818.
\bibitem{174} \textit{Id.} at 817.
\bibitem{175} \textit{Id.} at 818.
\end{thebibliography}
A writer sought FBI records concerning the assassination of President John F. Kennedy in Weisberg v. Department of Justice. The District of Columbia Circuit Court of Appeals, sitting en banc, concluded that as the files were investigatory records prepared for law enforcement purposes they were not subject to disclosure, despite the fact that enforcement proceedings were not contemplated.

The plaintiff sought access to affidavits given by its employees to an NLRB investigator in Wellman Industries, Inc. v. NLRB. In exempting the documents from public disclosure, the Fourth Circuit ruled that since the affidavits were procured to enforce the National Labor Relations Act, the information was gathered for law enforcement purposes. The fact that an unfair labor complaint had not been filed at the time the material was obtained did not obviate the agency's privilege of confidentiality.

The Department of Defense records concerning the adequacy of the United States Army's investigation of the My Lai incident was the subject of Aspin v. Department of Defense. Since there had been enforcement proceedings based upon the report, the documents were privileged. Based on the policy of governmental efficiency, the exemption from disclosure continues even after proceedings have ceased.

This confidential per se rule was applied in Ditlow v. Brinegar to the records of the National Highway Traffic Safety Administration, because they were collected during an investigation of automobile safety. Likelihood of adjudication was not a decisive determinant in resolving the controversy.

The Circuit Court of the District of Columbia further focused the test for disclosure in Rural Housing Alliance v. United States Department of Agriculture. The court held that the question to be addressed was: how and under what circumstances were the files compiled? The Government must merely show that the files were assembled for adjudicative or enforcement purposes. Once this burden is met, the privilege of confidentiality continues, even when there is no longer any prospect for future enforcement.
The scope of the phrase "law enforcement purposes" was recently expanded in Center for National Policy Review on Race & Urban Issues v. Weinberger. At issue were twenty-two active files involving HEW review of public school discrimination and segregation practices. The court drew a sharp distinction between administrative and investigatory files. Records are protected only when the agency's activities depart from routine administrative matters and focus with special intensity upon a particular party. Whether or not the agency has assumed an investigatory posture is a judicial inquiry.

Although the HEW records in Weinberger were protected by the Freedom of Information Act, the court in Sears, Roebuck & Co. v. General Services Administration ruled that the plaintiff's affirmative action plans, which had been submitted to the defendant as required by law, were administrative records and subject to public disclosure. As the agency had not focused directly upon specifically alleged illegal acts, the records were not classified by the court as law enforcement.

The better rule, which should be adopted by Texas, is that the governmental body should assume the burden of proving that an enforcement proceeding based on the requested documents will be conducted in the foreseeable future. Documents should not be kept from the public view merely upon the assertion by an agency that a file is labeled as a "detection and investigatory file." If the agency meets this burden of proof, the information should be exempt from disclosure, based upon the policy of need for governmental secrecy in investigating possible violations of the law and preparing for litigation based on such violations. However, if the governmental body fails to sustain its burden of proof, the records should not be automatically disclosed. In certain instances, the government's sources and investigatory techniques and an individual's right to privacy must be protected. The attorney general or the courts should make an in camera inspection of the documents to balance the competing interests of the agency and affected individuals and the public's need to be informed. A final determination of whether the documents should be made public should turn on which interest demands the most protection in the specific factual circumstance.

This approach is desirable because it protects the three underlying and often conflicting policies of the individual's right to privacy, the government's need for secrecy, and the public's right to be informed. A rule which automatically denies public access based on the mere fact that a file is labeled by state agencies as "investigatory" fails to follow the underlying

191. Id.
192. 502 F.2d 370 (D.C. Cir. 1974).
193. Id.
194. Id. at 373.
195. Id.
196. Id. at 375.
197. Id.
198. 509 F.2d 527 (D.C. Cir. 1974).
199. Id.
200. Id.
public disclosure policy of TORA. Additionally, an in camera inspection of the documents to balance the competing interests protects the individual's right to privacy and the government's desire to exempt documents from disclosure. Therefore, the Texas Legislature should amend TORA to set forth explicitly the legislative policy on this matter, or the courts should adopt such a rule in interpreting TORA.

D. Investigatory Files to Which Opposing Parties Have Access

There is authority for the proposition that investigatory files compiled for law enforcement purposes are not exempt from disclosure under the Freedom of Information Act where the parties to the proceedings have copies of or access to such files. This rule does not offend the underlying policy of the exemption, which is to enhance the effectiveness of the government's enforcement efforts. The exemption is designed to prevent disclosure of investigatory files prior to the time that an adverse litigant might otherwise obtain them. If the party opposing the government in litigation has access to or is in possession of such files, there is no longer a reason for exempting the files from public disclosure. Only the government may assert the privilege. Once an opposing party obtains a document, the right of secrecy does not inure to that party. This rule is based upon sound reasoning and public policy and should be applied to the law enforcement records section of TORA. Assuming that there is not an invasion of any individual's right of privacy, the public's right to know should prevail, as the government does not have a legitimate need for governmental secrecy.

IV. CONCLUSIONS AND RECOMMENDATIONS

The underlying policy of the Texas Open Records Act for openness in government is laudable. In fact, it is essential in a democratic society that the public have access to the records of its government in order to assess fully the management of its public affairs. However, equally compelling policy goals of the individual's right to privacy and the government's need for secrecy are often overlooked by commentators and lawmakers in discussing open record laws. Accommodations and compromises must be made by the legislature and the courts in order to protect these three valuable precepts.

Based upon the foregoing analysis of the investigatory files exception to disclosure under the Texas Open Records Act, which illustrates the collision of legitimate policy considerations, several recommendations are proposed: First, the legislature should explicitly state whether the law enforcement records exception encompasses the numerous civil regulatory agencies of

203. Id. at 777.
204. Id.
205. La Morte v. Mansfield, 438 F.2d 448 (2d Cir. 1971).
206. Id. at 451.
Texas. Although there is some legislative history to support an affirmative response, an amendment to the Texas Open Records Act would conclusively resolve this issue. It is urged that the legislature adopt the position that regulatory agencies are included within the umbrella of the law enforcement records exemption because they perform an important role in the enforcement of the state's laws. As such, their records should be protected from public revelation when it serves the public interest. Additionally, these agencies possess information which must be concealed from the public when disclosure would constitute an invasion of privacy. However, the veil of secrecy must be removed where the public's need to know is greater than that of the government's or individual's need for confidentiality.

Second, the Texas Open Records Act should be amended in order to clarify the relationship between the law enforcement exemption and enforcement proceedings. It is strongly recommended that Texas adopt the rule that investigatory files are automatically exempt from disclosure if the governmental body can show that an enforcement proceeding is either pending or imminent. This rule promotes the effective enforcement of state laws. However, if the government fails to meet its burden of proof, then an in camera inspection of the records should be made by the attorney general or the courts to balance the competing policy interests of individual privacy, governmental secrecy, and the public's right to know.

Finally, the case law and attorney general's opinions should be continually monitored by the legislature and the public in order to determine whether any policy objectives are being unreasonably sacrificed. If so, immediate legislative action should be taken to correct the situation.

By enacting TORA, the State of Texas has entered into a new era of openness and honesty in government. However, policy goals are not talismen; the machinery and guidelines for public disclosure must be continually fine-tuned to assure just results in opening the records of government to the people of Texas.