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September 8, 2008

The Honorable Greg Abbott
Attorney General, State of Texas
Attn: Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

RE: Public Information Act Request of Stuart Leeds, requesting documents concerning Alberto Osegueda (AG ID #326975)

Dear General Abbott:

I am writing this letter, pursuant to Section 552.301 of the Texas Government Code, to seek your opinion concerning whether certain requested information is excepted from release. Stuart Leeds requests documents concerning Alberto Osegueda. A copy of the request received on August 15, 2008 is attached (See Exhibit 1). Please note the file stamp on the back of the request indicating the date received. Please also note that Monday, September 1, 2008 was a county holiday in observance of Labor Day. All county offices were closed on that day, and thus, it should not be included in the calculation of the fifteen business days. We believe the information requested is excepted from release pursuant to sections 552.101, 552.108, 552.111, 552.114, 552.115, 552.1175, 552.130 and 552.137 of the Texas Government Code. Our original request letter was mailed to your office on August 29, 2008.

Please note that Mr. Leeds is asking for the same documents that had previously been ruled by your office to be excepted from release. Attached as Exhibit 2 is a copy of that ruling (OR2008-07536). Mr. Leeds is arguing that a new order is a change in circumstances that now entitles him to the documents previously ruled to be excepted from release. Attached as Exhibit 3 are copies of the two orders issued by Judge Carl Pendergrass in Cause No. 2008-1016 upon which Mr. Leeds relies. Please note that these orders were signed by Judge Pendergrass on August 28, 2008 and filed with the clerk on September 2, 2008. Thus, the time to file an appeal has not yet expired, and the orders are not yet final orders. The attorney representing Mr. Osegueda has indicated that he does intend to file an appeal. Since the new orders are not yet final, the old order expunging the records is still in place. Attached at Exhibit 4 is a copy of the old expunction order that is still in place until the new order becomes final.

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I could not find any case law or statutes that discuss an action filed to reverse an existing, final expunction order. For all I know, this may be the first time this has been attempted. I can only look to the expunction statute for guidance on how this order should be treated. Article 55.02, section 3(a), of the Texas Code of Criminal Procedure states, "The person who is the subject of the expunction order or an agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases." Texas Rules of Appellate Procedure 26.1 states, "The notice of appeal must be filed within 30 days after the judgment is signed..." In addition, Article 55.02, section 3(c), of the Texas Code of Criminal Procedure makes it clear that a clerk may not execute an expunction order until it is final. Thus, logic would demand that the same be true for an order reversing an expunction order. To rule otherwise would essentially make the right to appeal worthless. Finally, Article 55.04 of the Texas Code of Criminal Procedure makes it a crime for an officer or employee of any agency to release any records or files that are subject to an expunction order. Since the old expunction order is a final order that remains in place until this new order becomes final, then it would be a crime for me or any other officer or employee to release the requested information.

As for my detailed arguments for each exception, I made them all the last time these records were requested by the same requestor. Instead of repeating them here, I am attaching my previous briefs along with the documents that you previously ruled excepted from release. My arguments for each exception are contained in each of those briefs. I hereby resubmit and reassert all of those same arguments here today. I am not attaching documents that you ruled were not excepted from release, since I have already released those documents to the requestor.

Exhibit 5 contains the brief and responsive documents concerning Mr. Leeds' request to the District Attorney's Office. Exhibit 6 contains the brief and responsive documents concerning Mr. Leeds' request to the District Clerk's Office. Please note that in Mr. Leeds' previous request for these records you ruled that they were records of the judiciary not subject to the Public Information Act. This current request, however, was addressed to me for records in my possession as a result of the earlier requests, so I am sending them to you in an overabundance of caution. However, I am only in possession of the documents as legal advisor for the District Clerk who is the custodian of the judiciary's records. Thus, I do believe they still qualify as records of the judiciary. Exhibit 7 contains the brief and responsive documents or portions of responsive documents not previously released concerning Mr. Leeds' request to the County Attorney's Office.

Exhibit 8 contains the brief and responsive documents concerning Mr. Leeds' request to Curtis Flynn, the private investigator appointed to assist the attorney pro tem special prosecutor. Exhibit 9 contains the brief and responsive documents or portions of responsive documents not previously released concerning Mr. Leeds' request to the Sheriff's Office. On the previous occasion, I failed to argue that some portions of the documents were excepted from release under sections 552.1175 and 552.137 of the Texas Government Code. Section 552.1175 excepts from release certain private information concerning employees of the District Attorney's Office, and section 552.137 excepts from release private email addresses. The employee in question in these documents has previously requested privacy of that information in accordance with 552.024 and 552.1175. Even though I did not assert them previously, your office found them to exist and found them to be mandatory. Thus, today I do assert those exceptions as well as all of the others that I previously asserted.

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In conclusion, we believe the information requested is excepted from release pursuant to sections 552.101, 552.108, 552.111, 552.114, 552.115, 552.1175, 552.130 and 552.137 of the Texas Government Code.

I appreciate your response to this inquiry.

Sincerely,



Holly C. Lytle
Assistant County Attorney

Attachments

Cc: Stuart Leeds w/o attachments
303 Texas Ave., Ste 1003
El Paso, Texas 79901

12.9 Relief from Denial of Access to Judicial Records.

(a) Appeal. A person who is denied access to a judicial record may appeal the denial by filing a petition for review with the Administrative Director of the Office of Court Administration.

(b) Contents of Petition for Review. The petition for review:

(1) must include a copy of the request to the record custodian and the records custodian's notice of denial;

(2) may include any supporting facts, arguments, and authorities that the petitioner believes to be relevant; and

(3) may contain a request for expedited review, the grounds for which must be stated.

(c) Time for Filing. The petition must be filed not later than 30 days after the date that the petitioner receives notice of a denial of access to the judicial record.

(d) Notification of Records Custodian and Presiding Judges. Upon receipt of the petition for review, the Administrative Director must promptly notify the records custodian who denied access to the judicial record and the presiding judge of each administrative judicial region of the filing of the petition.

(e) Response. A records custodian who denies access to a judicial record and against whom relief is sought under this section may — within 14 days of receipt of notice from the Administrative Director — submit a written response to the petition for review and include supporting facts and authorities in the response. The records custodian must mail a copy of the response to the petitioner. The records custodian may also submit for in camera inspection any record, or a sample of records, to which access has been denied.

(f) Formation of Special Committee. Upon receiving notice under Rule 12.9(d), the presiding judges must refer the petition to a special committee of not less than five of the presiding judges for review. The presiding judges must notify the Administrative Director, the petitioner, and the records custodian of the names of the judges selected to serve on the committee.

(g) Procedure for Review. The special committee must review the petition and the records custodian's response and determine whether the requested judicial record should be made available under this rule to the petitioner. The special committee may request the records custodian to submit for in camera inspection a record, or a sample of records, to which access has been denied. The records custodian may respond to the request in whole or in part but it not required to do so.

(h) Considerations. When determining whether the requested judicial record should be made available under this rule to petition, the special committee must consider:

(1) the text and policy of this Rule;

(2) any supporting and controverting facts, arguments, and authorities in the petition and the response; and

(3) prior applications of this Rule by other special committees or by courts.

(i) Expedited Review. On request of the petitioner, and for good cause shown, the special committee may schedule an expedited review of the petition.

(j) Decision. The special committee's determination must be supported by a written decision that must:

(1) issue within 60 days of the date that the Administrative Director received the

petition for review;

(2) either grant the petition in whole or in part or sustain the denial of access to the requested judicial record;

(3) state the reasons for the decision, including appropriate citations to this rule; and

(4) identify the record or portions of the record to which access is ordered or denied, but only if the description does not disclose confidential information.

(k) Notice of Decision. The special committee must send the decision to the Administrative Director. On receipt of the decision from the special committee, the Administrative Director must:

(1) immediately notify the petitioner and the records custodian of the decision and include a copy of the decision with the notice; and

(2) maintain a copy of the special committee's decision in the Administrative Director's office for public inspection.

(l) Publication of Decisions. The Administrative Director must publish periodically to the judiciary and the general public the special committees' decisions.

(m) Final Decision. A decision of a special committee under this rule is not appealable but is subject to review by mandamus.

(n) Appeal to Special Committee Not Exclusive Remedy. The right of review provided under this subdivision is not exclusive and does not preclude relief by mandamus.



**JOSÉ R. RODRÍGUEZ
COUNTY ATTORNEY**

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500 E. SAN ANTONIO, ROOM 503
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September 8, 2008

Stuart Leeds
Attorney at Law
303 Texas Ave., Ste 1003
El Paso, Texas 79901

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

RE: REQUEST FOR INFORMATION CONCERNING ALBERTO OSEGUEDA

Dear Mr. Leeds:

On August 15, 2008, I received the request described above.

I am writing this letter, pursuant to Section 552.301 of the Texas Government Code, to inform you that we are requesting an opinion from the Office of the Attorney General concerning this request, because we believe the documents responsive to your request are excepted from release. We are withholding release of the documents until we receive an opinion from the Attorney General. Attached is a copy of our brief to the Attorney General. The Attorney General will provide you a copy of his opinion when it is issued, which normally takes about 45 business days after receipt of our brief.

To the extent that your request also requests records maintained by the District Clerk's Office on behalf of the judiciary, I will treat that portion of your request as a request under the Texas Rules of Judicial Administration, Rule 12. Pursuant to Rule 12.5(i), records are exempt from release if they are confidential by law. Chapter 55 of the Texas Code of Criminal Procedure makes expunction records confidential.

Therefore, please consider this letter as Notice of Denial pursuant to Rule 12.8 of that portion of your request for expunction records maintained by the District Clerk's Office. You have the right to appeal this denial pursuant to Rule 12.9 (see attached copy of rule 12.9), to Carl Reynolds, Administrative Director, Office of Court Administration, P.O. Box 12066, Austin, TX 78711-2066. You have thirty (30) days from receipt of this Notice of Denial to file your appeal.

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Mr. Stuart L. Leeds
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If you have any questions about this letter, please let me know.

Very truly yours,



Holly C. Lytle
Assistant County Attorney

Attachments