



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 20, 2004

The Honorable Richard J. Miller
Bell County Attorney
Post Office Box 1127
Belton, Texas 76513

Re: Whether a person may waive the prohibition on public access to his or her criminal history information that is subject to an order of nondisclosure (Request No. 0209-GA)

Dear Mr. Miller:

We have received your request for an attorney general opinion, dated April 8, 2004, and have designated it as Request No. 0209-GA. Please refer to that number in future correspondence with us about this matter. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received. TEX. GOV'T CODE ANN. § 402.042(c)(2) (Vernon 1998). We received your request on April 12, 2004 setting a due date for your opinion of October 9, 2004. We will respond by that date, or before, if possible.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefs if they care to do so. If you are aware of other interested parties, please let us know as soon as possible. We ask that the briefs be submitted by May 20, 2004 to ensure that the Opinion Committee will have adequate time to review and consider arguments relevant to the request from all interested parties. Written submissions are most useful, as the members of the Opinion Committee are not available to comment on or discuss the merits of legal questions at issue in an opinion request. Parties may request an extension of time to file a brief by calling (512) 463-2110.

Very truly yours,

Nancy S. Fuller
Chair, Opinion Committee

NSF/SLG/kld

Enclosure: Request No. 0209-GA

- cc: The Honorable Royce West, Texas State Senate
The Honorable Terry Keel, Texas House of Representatives
Ms. Mary Ann Courter, General Counsel, Texas Department of Public Safety
Ms. Becky C. Kumar, Office of the General Counsel, United States Office of Personnel Management
Mr. William Harrell, Executive Director, American Civil Liberties Union of Texas
Ms. Katherine Garner, Executive Director, Freedom of Information Foundation
Mr. Luis Roberto Vera, Jr., Legal Advisor, League of United Latin American Citizens of Texas
Ms. Leola Canada, Parents of Concerned Inmates
Ms. Ann Arnold, Executive Director, Texas Association of Broadcasters
Mr. Joseph Martinez, Executive Director, Texas Criminal Defense Lawyers Association
Mr. Philip Berkebile, Executive Vice President, Texas Daily Newspaper Association
Mr. Robert Kepple, Executive Director, Texas District and County Attorneys Association
Mr. Gary L. Bledsoe, President, Texas Branch of the National Association for the Advancement of Colored People
Mr. Micheal Hodges, Executive Director, Texas Press Association
Mr. Volente Gonzalez, Web Master, www.deferredadjudication.org
Mr. Ken Anderson, Governor's Appointment Director

RICHARD J. MILLER

County Attorney

P.O. Box 1127
Belton, Texas 76513

Bell County, Texas

(254) 933-5135
1-800-460-2355
FAX (254) 933-5150

RQ-0209-GA

April 8, 2004

RECEIVED

Greg Abbott
Attorney General
P.O. Box 12548
Austin, TX 78711-2548

APR 12 2004
OPINION COMMITTEE

FILE # ML-43623-0
I.D. # 43623

Re: Request for Opinion Interpreting Section 411.081, Texas Government Code

Dear General Abbott:

I am requesting an opinion from your office regarding interpretation of Section 411.081 of the Texas Government Code, with respect to two questions:

1. May a person affirmatively waive the prohibition on public access to his or her criminal history information that is subject to an order of nondisclosure; and
2. Upon inquiry for criminal history information that is contained in documents subject to an order of nondisclosure, what is the appropriate response from the custodian of the records? May a law enforcement agency respond "no disclosable record" to someone not authorized by such order to receive the information, as opposed to "no record," if there is an actual record under such an order? Section 411.081 does not appear to prohibit disclosure that a record exists, only the information contained therein.

Section 411.081, as amended by the Legislature in 2003, establishes a procedure whereby a person who has successfully completed a deferred adjudication community supervision authorized under Section 5, Article 42.12, Code of Criminal Procedure, may petition the sentencing court for an order of nondisclosure. Thereafter, a criminal justice agency is prohibited from disclosing the information to the public, with certain exceptions listed. Section 552.142, Government Code, excepts such information from public disclosure.

Our county recently had an inquiry from the United States Office of Personnel Management, accompanied by a signed "Authorization for the Release of Information" from the individual involved, who was seeking federal employment. One portion of the Authorization specifically authorized access to that individual's criminal history information, although no mention was made of the existence of an order of nondisclosure. The individual had a previous misdemeanor involving a deferred adjudication and a nondisclosure order had been entered. This presents all sorts of interesting questions that our Legislature did not address. For example, is the FBI or any other criminal justice agency prohibited from accessing a nondisclosable record when it is solely for employment background or security clearance information, or is that a "criminal justice" purpose between law enforcement agencies?

Your response to this query will be greatly appreciated.

Yours very truly,

A handwritten signature in black ink, appearing to read "Rick Miller". The signature is written in a cursive style with a large initial "R" and "M".

Rick Miller
Bell County Attorney