Step-by-Step Commentary Accompanying Records Request Flowchart for Justice and Municipal Courts

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Box 1. Request for record received by Court. Record maintained by Court.

This is our starting point. Someone requests to see or copy a record.

The request need not be in writing. However, asking the person making the request (the "requestor") to put the request in writing is a good idea. A written request provides you with a record of the documents or other items the requestor wants.

If the Court does not have the requested record, then you should direct the requestor to the office that does maintain the record. If you don't know where the record is maintained, simply tell the requestor that the Court does not have the requested record.

If the Court does have the record, then use this flowchart to determine if the requested records should be provided to the requestor.

Drop down to Box 8.

Box 2. Was record created or filed in connection with any matter that is or has been before a court?

If yes, then advance to Box 3.

If no, then go to Box 9.

Rule 12 is our guide in determining whether a record of the judiciary is a judicial record or a court case record. Rule 12 is part of the Texas Rules of Judicial Administration. The Supreme Court of Texas promulgates the rules of judicial administration pursuant to the Legislature's grant of authority in Section 74.024 of the Government Code.

Specifically, Rule 12.2(d) defines the term "judicial record" as follows:

> Judicial record means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record. A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

As shown by the underlined language, a record connected with a matter that is or has been before a court is not a judicial record.

Box 3. Record is a Court Case Record.

Access to court case records is controlled by the common law unless a statute or rule controls access to a particular kind of court case record.

Note: If record has been sealed, do not release it.

By arriving here at Box 3, you have answered "yes" to either the question in Box 2 or the question in Box 9. This means you have determined that the requested record is not a judicial record. If a record of the judiciary is not a judicial record, the record is necessarily a court case record.

Access to court case records is controlled by the common law. However, access to some court case records is controlled by statutes dealing with the particular kind of court record at issue. You must determine whether a special statute controls access to the record that has been requested.

Go to Box 4.

Note on "Note": A judge may "seal" a court record in a civil case after the notice and hearing required by Texas Rule of Civil Procedure 76a. If such a sealing order has been entered, then do not release the record. There is no need to go through the rest of the flowchart.

Box 4. Determine whether record is a particular type of court case record to which a statute or rule controls access.

The flowchart asks questions about the requested record. If the requested record is a particular type of record with a special statute that controls access, you will be directed to that statute. If no special statute controls access to the record, the common law will control access. By working through the boxes on the flowchart, you can know with certainty whether a special statute controls access to the requested record.

Advance to Box 5.

Box 5. Is record an arrest warrant, search warrant, or supporting affidavit?

If yes, then move on to Box 6. Special statutes regulating access to arrest warrants, search warrants, and the affidavits supporting both types of warrants need to be consulted.

If no, then go to Box 10. Because the requested record is not an arrest warrant, search warrant, or accompanying affidavit, you need not consider the law concerning access to these documents.

Box 6. Has warrant been executed?

If the arrest warrant or search warrant has been executed, go to Box 7.

Otherwise, go to Box 15.

Access to arrest warrants is controlled by Article 15.26 of the Texas Code of Criminal Procedure.

Access to search warrants is governed by Article 18.01(b) of the same code.

Whether the public should be given access to search warrants or arrest warrants depends in both cases upon whether the particular warrant has been executed. An arrest warrant is executed when an arrest is made. A search warrant is executed when a search has been conducted.

The pertinent portion of Article 15.26 (arrest warrants) reads as follows:

> The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours.

As the statute says, the arrest warrant and the affidavit in support of the warrant are public information once the warrant is executed. The statute is not crystal clear as to whether the warrant and affidavit are available to the public prior to the warrant's execution. However, the implication seems to be that prior to execution, the arrest warrant and underlying affidavit are not open to the public.

The relevant part of Article 18.01(b) is shown below:

> Except as provided by Article 18.011 [dealing with affidavits sealed by a judge], the affidavit is public information if executed, and the magistrate's clerk shall make a copy of the affidavit available for public inspection in the clerk's office during normal business hours.

The statute says "the affidavit" is public information if executed. No reference is made to the search warrant itself. Does this mean Article 18.01(b) applies only to access to affidavits in support of a search warrant and not to the warrants themselves? Probably not. But this appears to be an open question. The flowchart assumes that Article 18.01(b) applies to search warrants themselves as well as to the affidavits in support of the search warrants.

Unlike the statute dealing with arrest warrants, Article 18.01(b) is clear that documents become public only after execution of the warrant.

Box 7. Record must be released.

You must release the warrant and accompanying affidavit to the requestor. You should assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop. Your trip through the flowchart has ended.

Box 8. Record is a "Record of the Judiciary." PIA (Public Information Act) doesn't apply.

The Public Information Act (PIA) is a state law providing the public with access to information held by state and local governments. The law is found in Chapter 552 of the Texas Government Code.

Specifically, Section 552.021 declares that "[p]ublic information is available to the public at a minimum during the normal business hours of the governmental body."

The key term in the foregoing statute is "governmental body." Only governmental bodies are required to provide information to the public under the PIA.

Section 552.003 defines the term "governmental body." The statute specifically states that the term "does not include the judiciary." Thus, the PIA's directive that the public be given access to government records does not apply to records held by the

government's judicial branch. Records held by entities in the judicial branch of government are known as "records of the judiciary."

Justice courts and municipal courts are part of the judiciary. Accordingly, the PIA does not require justice courts and municipal courts to give the public access to their records.

Please note, however, that other law (besides the PIA) does control access to records of the judiciary. The fact that the PIA does not apply to courts does not mean courts can ignore requests to see or copy their records. If such requests could be ignored, there would be no need for this flowchart.

The PIA recognizes that law other than the PIA controls access to records of the judiciary. Section 552.0035 reads as follows:

> Access to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.

Go to Box 16.

Box 9. Does record pertain to the Court's "adjudicative function" even though the record is not related to a specific case?

If yes, move over to Box 3.

If no, drop down to Box 17.

You have already determined that the record was not created or filed in connection with any matter that is or has been before a court. Most such records of the judiciary are judicial records. Accordingly, this question will usually be answered "no." But there is still a possibility that a document that has never been before a court is not a judicial record. This question allows for just such a possibility.

One might have a hard time envisioning a document that has never been before a court, but that is still related to the Court's adjudicative function. Such documents do, however, exist.

Consider a paper presented at a judicial education conference on the topic of dealing with hearsay objections. Does such a paper pertain to the Court's adjudicative function? Certainly. Hearsay is a concern in the courtroom when the judge is adjudicating cases. Ruling on hearsay objections is part of the judge's responsibility in the course of adjudicating cases. Accordingly, the paper pertains to the Court's adjudicative function even though the paper is not related to a specific case.

Box 10. Is record a case charging a child with a non-traffic offense?

If yes, then go to Box 11. Access to the records of a child charged with a non-traffic offense is guided by a specific statute.

If no, then go to Box 18. Because the requested record is not a record charging a child with a non-traffic offense, you need not consider the law concerning access to these documents.

To answer this question, you need to know the definition of "child." The two new statutes governing access to records of children charged with non-traffic offenses do not define the term. However, the term "child" is defined in that portion of the Family Code dealing with juvenile justice. Borrowing that Code's definition makes sense.

Section 51.02 of the Family Code defines "child" as a person "ten years of age of older and under 17 years of age." This definition should be used in determining whether a person is a child for purposes of answering the question in Box 10. Please note that a person who is 17 years old is not a "child" because such a person is not under the age of 17.

Also, the term "traffic offense" is not defined by the new statutes. A logical definition, however, would include any offense listed in the Transportation Code.

The new statutes governing access to the records of children charged with non-traffic offenses are codified in the Code of Criminal Procedure. Specifically, the two new statutes are Articles 44.2811 and 45.0217. Both statute were passed as part of HB 961by the 82nd Legislature and went into effective June 17, 2011. The new law applies to convictions "before, on, or after" the effective date of the Act.

Article 44.2811 of the Code of Criminal Procedure is entitled "Records Relating to Children Convicted of Fine-Only Misdemeanors" and reads as follows:

> All records and files and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public except as provided under Article 45.0217(b). All records and files and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child whose conviction for a fine-only misdemeanor other than a traffic offense is affirmed are confidential upon satisfaction of the judgment and may not be disclosed to the public except as provided under Article 45.0217(b).

Article 45.0217 is entitled “Confidential Records Related to the Conviction of a Child” and is set out below:

> (a) Except as provided by Article 15.27 [dealing with notification to school districts by law enforcement for prosecution of certain offenses] and Subsection (b), all records and files, including those held by law enforcement, and information stored by electronic means or otherwise, from which a record or file could be generated, relating to a child who is convicted of and has satisfied the judgment for a fine-only misdemeanor offense other than a traffic offense are confidential and may not be disclosed to the public.
>
> (b) Information subject to Subsection (a) may be open to inspection only by:
>
> (1) judges or court staff;
>
> (2) a criminal justice agency for a criminal justice purpose, as those terms are defined by Section 411.082, Government Code;
>
> (3) the Department of Public Safety;
>
> (4) an attorney for a party to the proceeding;
>
> (5) the child defendant; or
>
> (6) the defendant’s parent, guardian, or managing conservator.

Please note the underlined language in Article 44.2811. The record of a child’s non-traffic offense is confidential only if there is: (1) a conviction; and (2) the judgment has been satisfied. Accordingly, in order to determine whether the requested record is open to the public, you must know whether the child has been convicted. You also must know whether the judgment has been satisfied.

Box 11. Has child been convicted of the offense?

If yes, advance to Box 12. The record <u>may</u> be confidential.

If no, go to Box 19. The record must be released.

A question arises concerning a child placed on deferred disposition. Is this a conviction? The law is not entirely clear on this, especially in light of the deferred disposition statute, Article 45.051 of the Code of Criminal Procedure. Subsection (c) of that statute declares:

> On determining that the defendant has complied with the requirements imposed by the judge under this article, the judge shall dismiss the complaint, and it shall be clearly noted in the docket that there is not a final conviction.

In light of the foregoing statute, a deferred disposition case should probably not be considered to be a conviction.

Please note that until there is a conviction in the case, the record of the case is open to the public. If there is an acquittal, dismissal, or other end to the case other than a conviction, the record remains public.

Box 12. Has the judgment in the case been satisfied?

If yes, advance to Box 13. The record is not open to the general public.

If no, go to Box 19. The record must be released.

The main concern here is that the child satisfy his or her obligation to pay court costs and any fine that is assessed. The case papers remain open until the judgment is satisfied. The judgment is not satisfied until all court costs and fines are completely paid. There may also be other obligations that the child must fulfill to satisfy the judgment.

Box 13. Record is confidential except it may be released to: (1) the child; (2) the child's parents; (3) an attorney for a party in the case; (4) DPS; or (5) a criminal justice agency for a criminal justice purpose.

These five exceptions to the general rule of confidentiality of these records are listed in Article 45.0217(b) of the Code of Criminal Procedure. This statute is set out in full in the commentary to Box 10.

Go to Box 14.

Box 14. Is requestor one of the five persons or agencies to whom or to which the record can be released?

If yes, advance to Box 22. Although the record is not open to the general public, a requestor in one of these five categories is entitled to access the record.

If no, go to Box 26. The record is confidential and must not be released.

Box 15. Record must not be released.

Neither the warrant nor the accompanying affidavit should be released to the requestor. These documents are confidential prior to execution of the arrest warrant or search warrant.

Stop.

Box 16. Records of the Judiciary fall into two categories:

(1) Judicial Records

(2) Court Case Records

Rules of Access differ for each category.

Determination must be made whether record is a judicial record or a court case record.

As mentioned in the commentary to Box 8, the PIA does not control access to records of the judiciary. But other law does control access. One particular law applies to the subset of records of the judiciary known as “judicial records.” A different law applies to the other subset of records of the judiciary known as “court case records.” (Note: A record of the judiciary must be either a judicial record or a court case record.) In order to apply the correct law, we must first determine if the requested records are judicial records or court case records.

This is our next step. **Go to Box 2**.

Box 17. Record is a Judicial Record.

Access to judicial records is controlled by Rule 12 of the Texas Rules of Judicial Administration.

As mentioned in the commentary to Box 2, Rule 12 is part of the Texas Rules of Judicial Administration. Rule 12 only controls access to judicial records. Rule 12 does not control access to court case records.

The text of Rule 12 can be found in the Texas Rules of Court paperback book by West Publishing. The text of the rule is also available online at http://www.courts.state.tx.us/rules/pdf/rjac.pdf.

Proceed to Box 23.

Box 18. Is record part of a mental health case?

If yes, then go to Box 25. Special statutes regulate access to mental health records.

If no, then go to Box 30. Because the requested record is not related to a mental health case, you need not consider the law concerning access to these documents.

Box 19. Record must be released.

Even though the requested record is a case charging a child with a non-traffic offense, the record is open to the public. This is because either there has been no conviction in the case or the judgment in the case has not yet been satisfied.

You must release the record to the requestor. You should assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop.

Box 20. Do any of the three exceptions apply?

If yes, then go to Box 21.

If no, then go to Box 26.

Box 21. Record must be released on limited basis as specified in the exception.

The record must be released in accord with the relevant exception. *See* commentary associated with Box 25 for a detailed description of the exceptions.

You should assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges. **Stop**.

Box 22. Record must be released to the particular requestor.

You must release the record. However, the record is only to be released to the particular person who requested the record. The record is not open to the general public.

Appropriate copy charges should be assessed. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop. Your trip through the flowchart has ended.

Box 23. Is request from an inmate?

If yes, then move to Box 24.

If no, then drop down to Box 28.

The term inmate is "shorthand" for this description of the requestor in Rule 12.4(b):

> an individual who is imprisoned or confined in a correctional facility as defined in Section 1.07(a), Penal Code, or in any other such facility in any state, federal, or foreign jurisdiction.

The term "correctional facility" is defined in Section 1.07(a) of the Penal Code to include a municipal or county jail. The term also includes a facility operated by the Texas Department of Criminal Justice.

Box 24. No response is required.

Rule 12 says that a court is not required to respond to a request for a judicial record from an inmate. *See* Rule 12.4(a)(4). (The court may respond, but is not required to do so.)

Assuming that you choose not to respond, no further analysis is required.

Stop.

Box 25. Mental health records are confidential unless: (1) county or district judge makes written order granting access; (2) requestor is attorney for patient; or (3) law enforcement needs information in the record in execution of a writ or warrant.

The statute controlling access to mental health records is Section 571.015 of the Texas Health and Safety Code which reads in its entirety as follows:

> (a) Each paper in a docket for mental health proceedings in the county clerk's office, including the docket book, indexes, and judgment books, is a public record of a private nature that may be used, inspected, or copied only under a written order issued by the county judge, a judge of a court that has probate jurisdiction, or a judge of a district court having jurisdiction in the county in which the docket is located.
>
> (b) A judge may not issue an order under Subsection (a) unless the judge enters a finding that:
>
> > (1) the use, inspection, or copying is justified and in the public interest; or
> >
> > (2) the paper is to be released to the person to whom it relates or to a person designated in a written release signed by the person to whom the paper relates.
>
> (c) In addition to the finding required by Subsection (b), if a law relating to confidentiality of mental health information or physician-patient privilege applies, the judge must find that the reasons for the use, inspection, or copying fall within the applicable statutory exemptions.

> (d) The papers shall be released to an attorney representing the proposed patient in a proceeding held under this subtitle.
>
> (e) This section does not affect access of law enforcement personnel to necessary information in execution of a writ or warrant.

As can be seen from the underlined language in Subsection (a), the statute refers to papers held by a county clerk. One could make a strong legal argument that this confidentiality provision does not apply to justices of the peace and municipal judges. However, the best course of action would seem to call for justice courts and municipal courts to treat mental health records as confidential.

Go to Box 20.

Box 26. Record must not be released.

The record is confidential and is not to be released.

Stop.

Box 27. Information is confidential except it may be released to the: (1) parties; (2) attorneys for the parties; (3) judge and court personnel; and (4) in criminal cases, the media if the court has found good cause to permit disclosure.

A juror information sheet contains information collected during the jury selection process about a juror. This information is generally confidential although there are some exceptions. The relevant statute in criminal cases is Article 35.29 of the Code of Criminal Procedure which reads as follows:

> Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of

> good cause, the court shall permit disclosure of the information sought.

This statute makes a juror's home address, home telephone number, social security number, and driver's license number confidential as a general rule. The statute also says that "other personal information" is generally confidential. Please note, however, "other personal information" does not include jurors' names. Tex. Att'y Gen. Op. No. GA-0422 (2006). In a criminal case, petit jury lists (which consist only of jurors' names) are public information. *Id*. ("clerks and judges have no duty to keep [jury] lists confidential from any party, counsel to a party, or third party to a criminal case at any point in time after the clerk has opened the envelope containing the names of the prospective jurors").

A similar statute exists that applies in both criminal and civil cases. Section 62.0132 of the Government Code reads, in pertinent part, as follows:

> (f) Except as provided by Subsection (g), information contained in a completed [jury summons] questionnaire is confidential and is not subject to [the Public Information Act].
>
> (g) The information contained in a completed questionnaire may be disclosed to:
>
> > (1) a judge assigned to hear a cause of action in which the respondent to the questionnaire is a potential juror;
> >
> > (2) court personnel; and
> >
> > (3) a litigant and a litigant's attorney in a cause of action in which the respondent to the questionnaire is a potential juror.

Thus, in both civil and criminal cases, the general rule is that the information contained on juror information sheets – other than jurors' names – is confidential. In both civil and criminal cases, there is an exception for: (1) parties; (2) attorneys for the parties; and (3) the judge and court personnel. In criminal cases there is one additional exception – the media in cases in which the judge finds good cause to permit disclosure of the information.

Go to Box 31.

Box 28. Is record a publication commercially available to the public?

If yes, then move to Box 29.

If no, then drop down to Box 33.

Box 29. Record need not be provided.

Rule 12 does not require a court to allow a person to see or copy information in a publication that is commercially available to the public. *See* Rule 12.4(a)(3). The court may respond, but is not required to do so.

Assuming that you choose not to respond, no further analysis is required.

Stop.

Box 30. Is record a juror information sheet?

If yes, then go to Box 27. A special statute regulates access to juror information sheets.

If no, then go to Box 37. Because the requested record is not a juror information sheet, you need not consider the law concerning access to these documents.

Box 31. Do any of the four exceptions apply?

If yes, then go to Box 32. The four exceptions are set out in the commentary accompanying Box 27.

If no, then go to Box 39.

Box 32. Record must be released to the particular requestor.

You must release the record to the requestor. You should assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop. Your trip through the flowchart has ended.

Box 33. General Rule: Records are open to the public under Rule 12.

But there are several exceptions to the general rule.

Seven exceptions exist that are relevant to records held by justice and municipal courts.

If an exception exists, the Court need not release the requested record, but may still do so if the Court wants to release the record.

Under Rule 12, "judicial records . . . are open to the general public for inspection and copying during regular business hours. Rule 12.4(a). However, there are many exceptions to this general rule.

The next step is to determine if any of the exceptions apply to the request for records.

Go to Box 34.

Box 34. Does record contain: (1) a security plan; (2) personnel information that would constitute a clearly unwarranted invasion of personal privacy if disclosed; (3) a person's home address, home or personal telephone number, social security number, or family members; (4) information about an applicant for employment or a volunteer position; (5) internal court deliberations or deliberations among judges on court or judicial administration; (6) a judge's calendar information; or (7) information relating to civil or criminal litigation or settlement negotiations in which the court or judge may be a party?

If yes, then move on to Box 35.

If no, then drop down to Box 46.

The list of exceptions to the general rule of openness under Rule 12 is found in Rule 12.5. There are 12 exceptions in Rule 12.5. Not all of the exceptions are relevant to records held by justice and municipal courts. Nine of the exceptions could possibly apply to the records held by justice and municipal courts. Seven of these nine exceptions are listed here. The other two possible exceptions are covered later in the flowchart.

Box 35. Information in any of the foregoing seven categories may be redacted from the record. If all of the information in the record falls into one or more of these seven categories, then the entire record may be withheld from the public.

Information in records falling into one or more of these seven categories is an exception to the general rule requiring disclosure. Thus, information in these categories is not required to be disclosed. This is different from information that is "confidential." If information is confidential, the law requires that the information not be disclosed. Accordingly, you may choose to release records containing information falling into these seven categories. But you may also choose not to disclose such information.

What if the record contains a piece of information that need not be disclosed, but the remainder of the record must be disclosed? For example, what if a judicial record contains a social security number, but is otherwise a record that must be released?

Assuming you want to withhold the social security number, you should redact the number from a copy of the record and then release the copy. Never make any redactions on the original document.

You should, of course, assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop.

Box 36. Is record requested by the person being investigated?

If yes, then move to Box 44.

If no, then drop down to Box 43.

Box 37. No statute or rule controls access to the record. Access to record is controlled by the common law.

As mentioned in the commentary to Box 3, access to court case records is controlled by the common law. However, access to some court case records is controlled by statutes dealing with the particular kind of court record at issue.

By reaching this box, you have necessarily determined that there is no special statute governing access to the requested record. Accordingly, the common law controls access to the record. **Go to Box 45.**

Box 38. Does judge feel record would become a vehicle for improper purposes if released?

If yes, then go to Box 39.

If no, then go to Box 50.

A discussion of whether release of a record would become a vehicle for improper purposes can be found in the commentary to Box 49.

Box 39. Record must not be released.

The requested information is not to be released.

Stop.

Box 40. Is the record confidential under some other law?

If yes, then go to Box 41.

If no, then advance to Box 42.

Rule 12.5(i) provides that information made confidential by other law is an exception to the general rule of openness under Rule 12. The language of the exception is set out below:

> (i) *Information Confidential Under Other Law*. Any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute or common law, including information that relates to:
>
> > (1) a complaint alleging misconduct against a judicial officer, if the complaint is exempt from disclosure under Chapter 33, Government Code, or other law;
> >
> > (2) a complaint alleging misconduct against a person who is licensed or regulated by the courts, if the information is confidential under applicable law; or

(3) a trade secret or commercial or financial information made privileged or confidential by statute or judicial decision.

Box 41. Record must not be released.

Unlike information coming under the other exceptions to Rule 12's general rule of openness, information that is confidential under other law may not be disclosed. There is no option to disclose the information.

Accordingly, you may not release the requested record. **Stop.**

Box 42. Does record relate to an investigation of a person's character or conduct?

If yes, then go to Box 36.

If no, then move down to Box 47.

Box 43. Does judge believe release of record would impair the investigation?

If yes, then go to Box 48.

If no, then move down to Box 47.

Box 44. Record must be released to requestor.

Rule 12.5(k) creates an exception to the general rule of openness under Rule 12 that reads as follows:

(k) *Investigations of Character or Conduct.* Any record relating to an investigation of any person's character or conduct, unless:

(1) the record is requested by the person being investigated; and

(2) release of the record, in the judgment of the

> records custodian, would not impair the investigation.

As can be seen from the foregoing rule, if the record is requested by the person being investigated, then the exception does not apply.

Accordingly, the requested record must be released. Appropriate copy charges should be assessed. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop.

Box 45. General Rule: Court Case Records are open to the public under the common law.

In 1978, the United States Supreme Court recognized the public's general right to inspect and copy court records under the common law. *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597 (1978). This right has also been recognized in Texas. *See Ashpole v. Millard*, 778 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1989, no writ).

Accordingly, as a general rule, court case records are open to the public and must be released. There is an exception to the general rule, however.

Advance to Box 49 to consider the exception.

Box 46. Two final considerations remain before final conclusion can be reached as to whether record can be released.

Both of these considerations come from the list of exceptions to the general rule of openness under Rule 12.

Go to Box 40.

Box 47. Record must be released.

Rule 12.5(k) creates an exception to the general rule of openness under Rule 12 that reads as follows:

> (k) *Investigations of Character or Conduct.* Any record relating to an investigation of any person's character or conduct, unless:

(1) the record is requested by the person being investigated; and

(2) release of the record, in the judgment of the records custodian, would not impair the investigation.

As can be seen from the foregoing rule, if the judge believes release of the record would not impair the investigation, then the record must be released. You must release the record and assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges. **Stop.**

Box 48. Record <u>may</u> be withheld from the public.

Because the judge feels release of the record would impair the investigation, release of the record is not required. The record may be withheld. However, the record is not required to be withheld.

Stop.

Box 49. Exception: Judge can deny public access if release of record would be a vehicle for improper purposes.

As mentioned in the commentary to Box 45, the Supreme Court recognized the public's right to access court records in *Nixon v. Warner Communications*. At the same time, the Court acknowledged that the right of access was not absolute. Writing for the Court, Justice Powell said:

> It is uncontested, however, that the right to inspect and copy judicial records [meaning "records of the judiciary" as that term is defined in this paper] is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a <u>vehicle for improper purposes</u>.

So what is an improper purpose? How broad is the latitude given to judges to withhold court case records from the public? Justice Powell declined to define the concept, saying:

> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining

> whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

As the quote immediately above shows, the judge makes the ultimate decision as to whether release of a court case record would become a vehicle for improper purposes.

Perhaps an example would be helpful. If a judge believes the requestor would use the record to stalk someone, the record, if released, could well become a vehicle for improper purposes. A judge would likely be justified in declining to release the record to the requestor.

Go to Box 38.

Box 50. Record must be released. However, certain personal information (such as social security number, driver's license number, and financial information) should be redacted from record under the common law right of privacy.

While the requested information must be released, there first must be a determination as to whether certain personal information should be redacted.

The doctrine of common-law privacy creates an exception to the general rule of openness of court case records. The doctrine protects information from release if the information meets two requirements. First, the information must contain "highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person." Second, the information must not be of legitimate concern to the public. *Industrial Foundation of the South v. Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976).

Social security numbers and driver's license numbers are arguably "highly intimate facts." The publication of a person's social security number and driver's license number would likely be highly objectionable to a reasonable person. This is especially the case today given the problems in today's society with identity theft.

Moreover, an individual's social security number should generally not be of any legitimate concern to the public.

In regard to social security numbers and driver's license numbers, both parts of the two-part common-law privacy exception are met. Accordingly, these particular

pieces of information should be redacted from court case records before the records are released.

Both parts of the two-part test would seem to also be satisfied in regard to personal financial information. The Texas Attorney General has found "that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest." *See* Tex. Att'y Gen. OR2010-10785.

What about a financial transaction related to a transaction between an indivicual and the government? Arguably, such information would also satisfy both parts of the test. Thus, financial information in a defendant's application to pay costs and fines on a payment plan would be covered by the common-law privacy exception. The amount of the monthly payments and the overall amount owed, however, would still be public information.

Information such as social security numbers, driver's license numbers and personal financial information should be redacted from the requested record before the record is released. After any appropriate redactions have been made, the record must be released. You should assess appropriate copy charges. *See* Appendix at the end of this commentary for a list of appropriate copy charges.

Stop.

Appendix – Copy Charges

Judicial Records

The relevant provision in Rule 12 is Rule 12.7(a) and (b) which reads as follows:

> (a) *Cost*. The cost for a copy of a judicial record is either:
>
> (1) the cost prescribed by statute; or
>
> (2) if no statute prescribes the cost, the cost the office of the Attorney General prescribes by rule in the Texas Administrative Code.
>
> (b) *Waiver or Reduction of Cost Assessment by Records Custodian*. A records custodian may reduce or waive the charge for a copy of a judicial record if:
>
> (1) doing so is in the public interest because providing the copy of the record primarily benefits the general public; or
>
> (2) the cost of processing collection of a charge will exceed the amount of the charge.

Local Government Code, Section 118.121 sets justice courts charges at $2.00 for the first page of a certified copy and $0.25 for each page thereafter. In the case of a non-certified document, a justice court is to charge $1.00 for the first page and $0.25 for each additional page.

There is no statute dictating the amount that may be charged for a copy by a municipal court. However, Section 552.266 of the Government Code is important. The statute says "[t]he charge for providing a copy made by a municipal court clerk shall be the charge provided by municipal ordinance." Thus, if municipal ordinance sets a copy charge, the charge set in the municipal ordinance should be assessed.

If there is no municipal ordinance setting a charge, then a municipal court must charge the amounts prescribed by rule in the Texas Administrative Code.

The relevant Texas Administrative Code provision is 1 Tex. Admin. Code § 70.10. The charges in this provision are as follows:

(1) Standard paper copy: $0.10 per page.

(2) Nonstandard-size copy:

(A) Diskette: $1.00

(B) Magnetic tape: actual cost

(C) Data cartridge: actual cost

(D) Tape cartridge: actual cost

(E) Rewritable CD (CD-RW): $1.00

(F) Non-rewritable CD (CD-R): $1.00

(G) Digital video disc (DVD): $3.00

(H) JAZ drive: actual cost

(I) Other electronic media: actual cost

(J) VHS video cassette: $2.50

(K) Audio cassette: $1.00

(L) Oversize paper copy (not on specialty paper such as a mylar, blueprint, blueline, map or photograph: $0.50

(M) Specialty paper: actual cost.

(3) Labor Charge:

(A) For programming: $28.50 per hour

(B) For locating, compiling, and reproducing: $15 per hour

(4) Overhead Charge: 20% of labor charge

Justice courts are required to assess the charges listed above for documents other than paper copies.

Court Cost Records

The provisions in Rule 12 do not apply to court case records. However, the statutes cited above do apply.

Thus, justice courts must still adhere to Section 118.121 of the Local Government Code. Accordingly, justice courts must charge $2.00 for the first page of a certified copy and $0.25 for each page thereafter. In the case of a non-certified document, a justice court is to charge $1.00 for the first page and $0.25 for each additional page.

For non-paper documents, the only limit on the amount a justice court may charge is reasonableness. Justice courts would be well-advised to follow the Texas Administrative Code guidelines when assessing charges for copies of non-paper documents. These charges are presumed to be reasonable.

Similarly, if a municipal ordinance sets a copy charge, a municipal court must assess that charge. If there is no ordinance assessing a copy charge, there is no limit on the amount a municipal court may charge other than reasonableness. However, assessing charges consistent with the Texas Administrative Code guidelines would be a good idea. Again, such charges would be reasonable.

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Records Request Flowchart for Justice and Municipal Courts

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Assistant General Counsel

1. Request for record received by Court. Record maintained by Court.

2. Was record created or filed in connection with any matter that is or has been before a court?

3. Record is a **Court Case Record**.

Access to court case records is controlled by the common law unless a statute or rule controls access to a particular kind of court case record.

Note: If record has been sealed, do not release it.

4. Determine whether record is a particular type of court case record to which a statute or rule controls access.

5. Is record an arrest warrant, search warrant or supporting affidavit?

6. Has warrant been executed?

7. Record must be released.

8. Record is a "Record of the Judiciary." PIA (Public Information Act) doesn't apply.

9. Does record pertain to the Court's "adjudicative function" even though the record is not related to a specific case?

10. Is record a case charging a child with a non-traffic offense?

11. Has child been convicted of the offense?

12. Has the judgment in the case been satisfied?

13. Record is confidential except it may be released to: (1) the child; (2) the child's parents; (3) an attorney for a party in the case; (4) DPS; or (5) a criminal justice agency for a criminal justice purpose.

14. Is requestor one of the five persons or agencies to whom or to which the record can be released?

15. Record must not be released.

16. Records of the Judiciary fall into two categories:

(1) Judicial Records

(2) Court Case Records

Rules of access differ for each category.

Determination must be made whether record is a judicial record or a court case record.

17. Record is a **Judicial Record**.

Access to judicial records is controlled by Rule 12 of the Texas Rules of Judicial Administration.

18. Is record part of a mental health case?

19. Record must be released.

20. Do any of the three exceptions apply?

21. Record must be released on limited basis as specified in the exception.

22. Record must be released to the particular requestor.

23. Is request from an inmate?

24. No response is required.

25. Mental health records are confidential unless: (1) county or district judge makes written order granting access; (2) requestor is attorney for patient; or (3) law enforcement needs information in the record in execution of a writ or warrant.

26. Record must not be released.

27. Information is confidential except it may be released to the: (1) parties; (2) attorneys for the parties; (3) judge and court personnel; and (4) in criminal cases, the media if the court has found good cause to permit disclosure.

28. Is record a publication commercially available to the public?

29. Record need not be provided.

30. Is record a juror information sheet?

31. Do any of the four exceptions apply?

32. Record must be released to the particular requestor.

33. General Rule: Records are open to the public under Rule 12.

But there are several exceptions to the general rule.

Seven exceptions exist that are relevant to records held by justice and municipal courts.

If an exception exists, the Court need not release the requested record, but may still do so if the Court wants to release the record.

34. Does record contain: (1) a security plan; (2) personnel information that would constitute a clearly unwarranted invasion of personal privacy if disclosed; (3) a person's home address, home or personal telephone number, social security number, or family members; (4) information about an applicant for employment or a volunteer position; (5) internal court deliberations or deliberations among judges concerning court or judicial administration; (6) a judge's calendar information; or (7) information relating to civil or criminal litigation or settlement negotiations in which the court or judge may be a party?

35. Information in any of the foregoing seven categories may be redacted from the record. If all of the information in the record falls into one or more of these seven categories, then the entire record may be withheld from the public.

36. Is record requested by the person being investigated?

37. No statute or rule controls access to the record. Access to record is controlled by the common law.

38. Does judge feel record would become a vehicle for improper purposes if released?

39. Record must not be released.

40. Is the record confidential under some other law?

41. Record must not be released.

42. Does record relate to an investigation of a person's character or conduct?

43. Does judge believe release of record would impair the investigation?

44. Record must be released to requestor.

45. General Rule: Court Case Records are open to the public under the common law.

46. Two final considerations remain before final conclusion can be reached as to whether record can be released.

47. Record must be released.

48. Record may be withheld from the public..

49. Exception: Judge can deny public access if release of record would be a vehicle for improper purposes.

50. Record must be released. However, certain personal information (such as social security number, driver's license number, and financial information) should be redacted from record under the common law right of privacy.