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HOLMES V. MORALES

DELMORE: May it please. This controversy had its genesis in 1984 shortly after the promulgation of the Open Records Act when the Harris county DA asked that the AG recognize that he was not subject to the Act in that it did not fit under any of the definitions of governmental bodies set out in the Act. That issue was resolved against the DA by the AG in an opinion designated JM266 back in 1984. And there was not initially a lot of concern over that ruling because two and perhaps three of the exceptions to disclosure under the Act seem so plainly applicable to the contents of the DA's litigation files, which are the only records in issue here, that it was always believed that they would be found to be exempt from disclosure under the Act. And in fact that's what happened. The AG has always agreed that the entire contents of DA's file for a criminal prosecution is exempt from disclosure under the law enforcement exception and the litigation exception to the Open Records Act as long as the litigation is pending. And that is where we parted ways with the AG a long time ago and this argument has gone on essentially unabated since 1984, eventually resulting in this lawsuit being filed.

SPECTOR: Why is it that the DA will not argue that these files are concerned with law enforcement or crime prevention? It's my understanding that if the DA certifies that these files pertain to law enforcement or crime prevention, then they would not be subject to disclosure, but that the DA doesn't want to do that.

DELMORE: We have taken the position that the file are records of prosecutors dealing with the detection, investigation, prosecution of the crime in their entirety. And the AG agrees with that so long as the litigation is pending. The only issue is whether we retain that blanket exemption from disclosure after the criminal litigation is concluded. And what we are attempting to avoid, I think this is what you're suggesting, is having to go through the file document by document, paragraph by paragraph attempting to establish that each item of information in the file meets the additional requirements imposed by the AG...

SPECTOR: Perhaps file by file?

DELMORE: Well it's document by document by the AG's construction of the Act. They have held that once the litigation is concluded to bring us under the law enforcement exemption we have to show that the release of particular items of information within the file would "unduly interfere with law enforcement." A phrase which appears nowhere in the Texas Open Records Act.

BAKER: That's Justice Spector's question. Why don't you argue that any way when you send up your request? Say, We've got files under 38, and if you let it out it's going to unduly interfere with law enforcement or crime prevention even though the case is closed. Her questions is: why don't you argue that if you're not arguing it?

DELMORE: I think that we are arguing it in the sense that release of the DA's files, the contents of the entire file and having to disclose what the contents of that file are, and what decision-making process has gone into the inclusion of items within the file interferes with law enforcement in itself to the extent that it violates the separation of powers provision in the Texas Constitution.

BAKER: So you are making the argument but General Morales says we don't agree with it, therefore, you have to release it?

DELMORE: Our only argument with General Morales is whether or not we have to make an item by item determination of whether particular items of information within the file would interfere with law

enforcement if released. We believe that the DA's overall concerns regarding the protection of his confidential area or zone of privacy within which he can make his litigation decisions and decide what information to seek out and obtain and included within the file that that is such paramount concern that we should not have to go through there and make the item by item determination, which is a very large difficult task when you're looking at the volume of requests that are received.

CORNYN: Is that your main concern just how laborious it will be to do that?

DELMORE: No your honor.

CORNYN: That is inconsistent isn't it with the rule in civil cases generally where a general request for attorney's litigation file there may be a good objection to that. But we've always said that if there's specific requests that are not otherwise objectionable based on privilege, that that is subject to discovery. Why shouldn't that same rule apply here?

DELMORE: We argue that it does. This court held in Curry v. Walker just within the last year that work product privilege does extend to prosecutors litigation files, and that a request for the complete contents of the file is too broad because it gets into the prosecutor's decision-making process. All of the requests that were made the subject of this suit for declaratory judgment were requests for the complete contents of the file.

CORNYN: Do you have a similar objection to a specific request?

DELMORE: We have yes.

CORNYN: But you concede that it would not be privileged under Walker v. Curry if they did make specific requests for non-privileged information within those files?

DELMORE: Yes. But we also have statutory construction arguments. For instance, I think the only specific request that was made the issue of this suit, there were 8 requests for the complete file: Give us everything you've got under that cause record. There was 1 request for a police offense report. We take the position that the police offense report clearly falls under the statutory exceptions to disclosure: law enforcement exemption; litigation exemption; and that that offense report should not be disclosed under those exemptions. So we have both a broad scope to this litigation and a narrow scope depending on whether you're looking at the larger issue of whether we are a governmental body, whether the act violates the separation of powers, or the more narrow issues of whether these questions of statutory construction have been correctly decided by the AG.

OWEN: Can you tell us specifically what you did prove up in connection with the law enforcement exception?

DELMORE: We proved up the contents of the files. My only concern was to make the district court able to determine that the files that we had made the issue of this suit fell within the definition of the law enforcement exception and the litigation exception, and that this did in fact constitute the non-public portion of a prosecutor's file. So we did two things in our summary judgment proof: we had a general description of what goes into a prosecutor's file, and descriptions and the purpose of each item; and then we specifically listed each document in each file some times giving it a necessarily generally or generic description so that the court could see that yes these matters were sufficiently related to law enforcement or related to the litigation to fall within these statutory exceptions to disclosure. I didn't attempt to prove any specific interference with law enforcement, that would result from the disclosure of particular items because that's exactly what we are trying to avoid. That's what the AG wants us to do and it's our position that that's not necessary under the plain and unambiguous language of the Act.

CORNYN: Your argument is that these closed files are protected in perpetuity?

DELMORE: Yes your honor.

CORNYN: What if I was writing a book 10 years after a murder case closed and I came to see Mr. Holmes and wanted access to a closed file just purely for background or historical purposes?

DELMORE: He would ask me to review the file and if sufficient time had gone by, and we really didn't have any continuing interest in confidentiality, Mr. Holmes would voluntarily give you the material to work on your book.

CORNYN: On a case by case basis?

DELMORE: Yes so long as there's not items within the file that we are affirmatively prohibited from disclosing which the Open Records Act also does.

ABBOTT: But if we rule in your favor someone not quite as benevolent as Johnny Holmes may not allow someone to look at those files?

DELMORE: That's correct your honor and if you don't like the job your DA's doing, then I suggest you elect somebody else, and that would certainly be our response to anybody that isn't satisfied with the degree of disclosure that Mr. Holmes is making or any other DA is making.

ABBOTT: Frequently though the people who are seeking the information are not the voters in that district.

DELMORE: That's potentially true, that's correct. Let me say this, I originally hoped to just get these issues of statutory construction before the CA, but in order to do that we had to first address the threshold issue of whether we meet the definition of governmental body in the Act. That definition says: officers of the executive or legislative branch. I thought that was very simple, the CCA held in Meshell v. State has since repeatedly held and the CA have relied on that decision n Meshell to also hold that the DA is an officer of the judicial branch of government.

ABBOTT: In that line of argument I don't recall you ever responding to the Etheridge case?

DELMORE: Etheridge is dicta. In Etheridge the CCA had an argument in a death penalty case that some discovery should have been made in pre-trial discovery pursuant to the Open Records Act, and they held, No, the DA is subject to the Act under JM 266, but compliance with the Open Records Act should be in a completely different forum and we are not going to consider that point of error. So they never addressed any of the issues that we are raising in this case. They simply stated in dicta in reliance upon JM 266, that we are subject to the Act without even explaining which definition of governmental body we fall under.

PHILLIPS: Under your argument that no record by any county commissioner would be subject to discovery under the Open Records Act, correct?

DELMORE: That is the most serious concern I have with that argument. That argument certainly exists. I think that you can respond that the Texas Constitution has placed a legislative body within Art. 5.

PHILLIPS: At least they call it a court though.

DELMORE: I think that I probably need to focus on the DA's status and leave the

commissioner's court for another day. I am not really prepared to address that, but I certainly agree that that is a concern if you should hold in our favor. Absolutely.

SPECTOR: What portion of the DA's files must be made available to a defendant or a party to a lawsuit that the DA is pursuing?

DELMORE: That depends. Most of our discovery in criminal cases is informal in nature. We have to give up things like: laboratory examination of physical evidence; witness statements; the defendant statement; a very, very limited amount of discovery under Art. 39.14 of the Code of Criminal Procedure. It's a minute amount of information compared to the discovery in civil cases.

BAKER: On the same page that General Morales raised in Etheridge they also stated that in 1985 the legislature amended the Open Records Act to identify prosecutors as one of the entities that can raise law enforcement exceptions. And their conclusion is there's no need to clarify by an amendment if in fact the DA is not subject to the Open Records Act. What's your answer to that argument?

DELMORE: I believe that that could be construed to apply to municipal prosecutors, prosecutors employed by the AG himself, and other prosecutors that are not within the judicial branch defined and delineated by Art. 5.

BAKER: Do you agree or disagree that you can be a part of the judicial department as Art. 5 states, but not necessarily be a part of the judiciary?

DELMORE: Absolutely your honor. Beginning with JM 266 and going right on through the CA's decision in this case we've continually been confronted with this demolition of some straw-man argument that we have never made that we are subject to exemption under the exclusionary provision that exempts the judiciary. We are not claiming we are part of the judiciary. I think the judiciary has a much more narrow scope than the judicial branch of government. We are arguing that we are not included within one of the inclusive definitions, specifically that we are not an officer created by or within the executive or legislative branch of government.

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RESPONDENT

MORRIS: Good morning. I think to begin my response to Mr. Holmes' arguments is to address the points of error 1 and 2. Those are the points that suggest that the DA Holmes is part of the judiciary or because they are mentioned within the judicial department in Art. 5, §1 of the Texas Constitution, that they do not need to comply with the Open Records Act. Along with that this court mentioned the case of Meschell and there was a little discussion and with Etheridge. Our position is we rely on the case of Etheridge. It does say and I disagree with counsel that it was mere dicta. It says very clearly that the DA's office is subject to the Open Records Act.

CORNYN: You take the position the legislature could subject the judicial branch to the Open Records Act?

MORRIS: We do not. The exception within the Open Records Act says: it does not comply to the judiciary is how I have understood part of this argument to have been framed.

CORNYN: I am asking now I guess more of the separation of powers argument that Mr. Holmes makes. He makes the argument as I understand it that the legislature could not constitutionally apply the Open Records Act to the DA's office. And I am asking in terms of the legislature's power could it subject the judicial branch to the Open Records Act?

MORRIS: His reliance on Meschell to that conclusion we believe is misplaced to the extent that the CCA's reviewed the separation of powers of cases. They concluded that it went to the core function of a prosecutor that the speedy trial act prevented a prosecutor from doing that essential exclusive function of a prosecutor to prosecute his cases. Our response to you your honor is under the functional application of the separation of powers doctrine, the Open Records Act is not prohibiting Holmes or his other DAs to prosecute DA cases, to file and to prosecute criminal cases. Certainly under the exceptions within the Open Records Act those are available to DAs. We are talking about closed cases. And that very limited interference it is so very limited that we do take the position that it could have been and has been done by the legislature.

CORNYN: It could apply to the judiciary?

MORRIS: No your honor.

CORNYN: It could not constitutionally apply to the judiciary, or it could? I am not talking about this case. I am talking about a broader question.

MORRIS: You were subject to an open records request for telephone records a couple of years back. And the general services commission held onto those. And the AG's office at that time determined that that would have been an intrusion into the judicial department, the records of the judiciary.

ABBOTT: And isn't the reason for that is because this aspect of the judiciary is clearly created by the constitution, not created by the legislature, and is clearly not a part of the executive branch?

MORRIS: Yes it was. Under §1, Art. 5, this court is conferred judicial powers. The DA's office although mentioned in Art. 5 of the Texas Constitution is not conferred any judicial powers.

ABBOTT: Let's talk about the creation of the DA's office, because you cite in your brief on page 7, the Harris Co. DA's office is specifically created and its powers as defined in §43.180 of the Texas Gov't Code?

MORRIS: Yes, sir. That's what we rely upon as far as the constitution of the State of Texas in §21 refers to DAs. It is in 43.108 that it specifically creates the office of the Harris County DA.

ABBOTT: And so does that tie in your argument that the Harris Co. DA's office is subject to subsection 552.003(A)(1) of the Open Records Act because the Harris Co. DA's office was created by a legislative branch of state government?

MORRIS: Yes your honor. We also rely on (A)(10), which requires that governmental bodies that receive a portion or are funded or supported by public funds must comply with the Open Records Act. We have 2 provisions that define them as governmental bodies.

SPECTOR: Is opposing counsel correct that the AG requires that every document be looked at by the DA if they're claiming that it involves law enforcement, or can they just take a certain person's file and say we cannot disclose this because of a future investigation?

MORRIS: I believe that statement is rather inflammatory in the sense that counsel even in this case submitted representative samples of the files. In this case and is very common parties depending on the documents can produce and mark representative files. You mentioned folders and you mentioned packets of information or files of information. I would not agree with my opposing counsel that that is the concern that he needs to have addressed. As the court mentioned the Open Records Act does not turn on whether it's a lot of work for governmental bodies to comply with. I heard a little bit of because it's so much work we should not have to comply with that.

HECHT: If someone asks the DA for a pending file, and he says no, do you agree he doesn't have to produce it period; is that right or not?

MORRIS: Generally your honor that is correct. They certify to us...that when we hear the word pending we are looking for even contemplated, even anticipated.

HECHT: And if they ask for a closed file, then what?

MORRIS: Under the closed file and Holmes has refused to do this, all he needs to do is claim that it will unduly interfere with law enforcement, that would be the exception obtained for him under .108. Holmes has taken a risk. They have drawn a line. They have taken in my view a very strident position. Now they say under .108, the concept of unduly interfering with law enforcement is not found anywhere. Your honors this court even that very standard was reputed most recently in A&T v. Sharp, an open records case from this court, that referred to the law enforcement exception under .108. And it required certain documents to be disclosed because in your honors' words it said: that it would not unduly interfere with law enforcement. Prior to that and we cited in our brief we had the Ex Parte Pruett case, a case up from this court that referred to active arson investigation files, the court's decision not unduly interfere with law enforcement.

BAKER: Are you saying that for instance that DA Holmes sent an open records request to you say this file No., and they just say now we think if disclose this closed file in its entirety would unduly burden the law enforcement, and so forth; you would just write back and say you don't have to do it. And your point is they don't ever say that. Is that right?

MORRIS: Very close to what I'm saying your honor. It's not unduly burden law enforcement. It is unduly interfere with the law enforcement. The burden is a little strange if he is suggesting that it's just too difficult...

BAKER: Well I'm trying to quote Pruett.

MORRIS: Generally when governmental bodies, and other governmental bodies do this, have closed prosecution cases, and they have done it as well, they have prosecution cases that the standard could have been set in their request for an AG's opinion in the first instance, the disclosure of this information, the witnesses we interviewed, it will unduly interfere with law enforcement.

CORNYN: If they had made that contention you would accept it?

MORRIS: Generally your honor these are accepted on face value. We do not go out and investigate and determine on a factual basis in that sense. We are provided with statements that we take for face value.

BAKER: Their brief indicates that they submit what they call representative parts of these files for review by the AG when the opinion is rendered. Do I understand that they say clearly that we don't think this entire matter should be disclosed because it can unduly interfere with law enforcement that you would take that at face value, write them back an opinion letter you don't have to comply. And your point is that they don't say, so that's why you say you've got to comply?

MORRIS: Yes your honor. They believe the standard there should be no showing. They believe that .108, the law enforcement exception compels the exception from disclosure any record dealing with detection, investigation, or prosecution of criminal cases forever.

CORNYN: If they took the position that by diverting employees of the DA's office to respond to open records requests, that it would unduly interfere with law enforcement generally now you would

accept that at face value and not require a production?

MORRIS: Your honor that argument has not been made, that that is how it will unduly interfere with law enforcement. The cases today have discussed the unduly interfering with law enforcement is disclosure of identity of witnesses, disclosure of facts, theories, strategy - where we are going from here, that has not been addressed.

CORNYN: So what is your answer to my question; if that was the basis of the claim of undue interference, is that a good answer? does that close the case?

MORRIS: I'm cautiously saying your honor I do not believe that alone would be the type of unduly interfering because the open records act has not been construed as allowing parties to not comply because it's too much work.

CORNYN: So you do look behind the contention or the conclusion that this would unduly interfere with law enforcement? You look behind the reasons for that contention?

MORRIS: Usually the reasons are given though as it will give out a witness name, a strategy, a position, informants. Those are generally the reasons of why the disclosure of this kind of notes by a prosecutor would unduly interfere with his law enforcement efforts.

CORNYN: Wouldn't production of the litigation file always infringe on any work product privilege that might apply?

MORRIS: The open records act under .103, the work product as they have raised it as well, they claim attorney work product. And frankly it seems that most of the documents at issue here are in that category.

CORNYN: Would they be privileged?

MORRIS: Currently with .103, the litigation exception under the Open Records Act there is a deadline, there is a time limit.

CORNYN: If they complied with the deadline would they be privileged?

MORRIS: The time limit says that the information regarding pending or contemplated litigation is available for pending or contemplated, and as far as the DA's prosecutorial files it says that it is available until all post-conviction remedies, statute of limitations are exhausted. It would not continue...the question is before this court, Holmes has brought the question before the court: would the attorney work product that work of a DA continue past the limitations set in .103.

ABBOTT: And you concede that is different from the standard we apply in civil cases, the standard that you're advocating is different from what we apply in civil cases?

MORRIS: The attorney work product?

ABBOTT: Yes, the longevity of it.

MORRIS: Because of the Open Records Act, this case brings to the court I would say the collision of the Open Records Act and an attorney work product privilege. Certainly this court's opinion in Owens Corning speaks to the attorney work product being so very closely related to the attorney/client relationship and those documents. Of course your honors have rendered opinions subsequent to Owens Corning. However what you have not rendered regarding the attorney work product is any case that

interprets the attorney work product in light of the Open Records Act. And that is what this case is...

BAKER: Your position is that it's part (B) of .103, puts a limitation for work product privilege and whenever the statute runs or all appeals are exhausted then they are subject to release?

MORRIS: Yes sir. Because initially the statutory requirement in the Open Records Act that it be liberally construed for openness. Many opinions have talked about the exceptions or the exception must be read very strictly.

BAKER: So under the status of this case, in your view, that rules out .103 as the reason why Mr. Holmes should prevail, because of part (B) on the closed file?

MORRIS: Yes your honor, that is the issue: how the AG has not been able to disregard the express language of the Open Records Act.

BAKER: I understand that if he says: I think I don't have to give up (C) _____ _____ .103(a)(2), because it's my discretion. And you say: well if it's closed, and the statutes run, you have to give it to us because of (C).

MORRIS: Yes.

BAKER: So if we agree on, that's one exception that's gone, but there's still two more left. And one of them is the law enforcement exception. If I understand what you're saying, you're saying on behalf of General Morales that if DA Holmes uses the magic phrase in the letter saying: Do we have to reveal or release these records, that it would unduly operate against law enforcement or crime prevention, that you would say we agree and you don't have to release them. But he does not say that; is that right?

MORRIS: That is correct and I'm going to qualify your honor as far as magic words. Generally the magic words are accompanied with the simple additional language that it would reveal the strategy...

BAKER: No, no. I am going to pen you down on that phrase because you said in your brief that that is the standard by Pruett and you are relying on Pruett to say this is what they have to say. And I am trying to see if you're saying that General Morales agrees with that, and would say that all DA Holmes has to say if it's a closed file is under Pruett in the transmittal letter and you respond to say you don't have to release it so that it's up to him to just use the magic words?

MORRIS: I am going to be saying that there is some use of the magic words that would allow the exception to be available to him.

PHILLIPS: You're surely not encouraging district attorneys to use the magic word if they don't in good conscience think that's true?

MORRIS: No. Your honor that's why I do not want to be pinned down. I don't want that. But I am trying to answer his question.

PHILLIPS: It sounds in your brief and today like you're kind of blaming DA Holmes for you know why are you giving us all this trouble? Why didn't you just say that and we would leave him alone? If the DA doesn't honestly believe that it falls within that standard he certainly shouldn't say it if he thinks there are other grounds if he can allege.

MORRIS: I'm under the impression as Mr. Delmore has stated that this is really a culmination of the position of years. And right or wrong they don't believe that's the standard. They believe that .108

is inviolate. Our response to that is given Pruett and even given A&T now, this court and other courts have used the term "unduly interfere with law enforcement."

SPECTOR: Do these same exceptions apply to the prosecutors in the AG's office?

MORRIS: Yes. And routinely the AG's office is finding itself requesting opinions.

SPECTOR: Now who do they request them?

MORRIS: Well the AG's office has a division called the Open Records Division, and there is a separate individual that is responsible for receiving open records request, that individual receives them, they disseminate the request to...

SPECTOR: For the AG's records?

MORRIS: Yes.

CORNYN: So are you routinely making your litigation files available to open records requests based on the position you're advocating here?

MORRIS: We urge the exceptions as well.

BAKER: On closed files?

MORRIS: Yes on our closed files that are exceptions.

CORNYN: So you are not revealing closed file information just as Mr. Holmes is saying they need not reveal closed files?

MORRIS: Under the concern of unduly interfering with law enforcement I understand...your honors I may have to correct this and I request that opportunity to request this fact I'm telling you. But I am understanding that within the office of the AG, if exceptions are available we will claim them.

CORNYN: And you do make that claim under the undue interference of law enforcement exception; is that what you're saying?

MORRIS: I want to check on that your honor. I am not aware that we don't avail ourselves to any particular exception if it is available to us.

BAKER: Under .108 DA Holmes makes the argument that it doesn't specify anything about whether the file is open or closed. It just says that if it has to do with the record law enforcement agency or prosecutor, that it's not disclosable, and where do you get the difference between closed or unclosed under .108?

MORRIS: I'm sorry I didn't follow.

BAKER: Section .108 says that a DA doesn't have to disclose a record of a law enforcement agency or prosecutor that deals with detection, investigation or prosecution of a crime. And it doesn't say only if it's an active file. And his argument is how can you read into that exception that if it's a closed file he has to reveal it?

MORRIS: We are relying upon the language in Ex Parte Pruett that was an active investigation. In the Houston Chronicle case that referred to active on-going investigation. Even in the Heard v. Houston

Post case, that also talked about unduly interfere with law enforcement. The reliance is found in that certainly if it is an open pending case, notwithstanding the .103 litigation exception, but .108 would be available. The distinction comes and the issue is here whether .108 the law enforcement exception should be applied at all or available at all to closed files. And our response is it is available only if it is shown to unduly interfere with law enforcement.

BAKER: Because of Pruett and Houston Chronicle?

MORRIS: Yes your honor, the cases we cite in the brief.

BAKER: Interpretation of those cases because they dealt with active _____?

MORRIS: Yes.

BAKER: But there's no direct statement in _____judgment file the closed _____?

MORRIS: N.

BAKER: So that's our issue?

MORRIS: That is your issue.

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REBUTTAL

PHILLIPS: It's my recollection that the Open Records Act predates the Texas Rules of Evidence, now Texas Rules of Civil Evidence, correct?

DELMORE: The Open Records Act predates the rules?

PHILLIPS: Predates our codification of the rules?

DELMORE: I can't say for certain. The Texas Open Records Act was promulgated in the early 1980s. I am not certain when the Rules of Civil Evidence were promulgated by this court.

PHILLIPS: Assuming they do if there is a conflict between our work product doctrine as we interpret that arising out of the rules, under the Open Records Act if we did not repeal or modify the Open Records Act in promulgating our rules doesn't it control?

DELMORE: I think that the court needs to resolve the conflict in favor of avoiding separation of powers problem by recognizing the DA's work product privilege. I think that the significant issue of whether the legislature can compel the DA to disclose his _____ confidential work product ought to be the guiding focus in resolving any statutory conflict or any conflict between statutes and rules in this matter.

ABBOTT: Can't they compel that though because you were created under 43.180 of the Texas Gov't Code?

DELMORE: I totally disagree with that argument, and I'm glad you reminded me. Because the Texas Constitutions of many years past specifically created the existence of the office of the District Attorney, and stated that the voters of each district shall elect a DA and so forth in the constitution. I think we argued at some length in our brief and the court below and perhaps in our application of writ of error

that as years went by and the various constitutions were reenacted that the provision creating the DA faded out of the constitution and now we are left only with Art. 5, §21, which recognizes the existence of a district and county attorney. So the CCA had little difficulty in finding that the office of the DA was constitutionally created and has always existed in Texas government as a product of the Texas constitution. The legislature has only defined the geographical limits of particular district in which the voters will elect their district attorney to his fulfill his constitutional function.

OWEN: Could the legislature pass a statute and say in all criminal cases your file is open to the defendant; we waive for you attorney/client and work product; your records are open?

DELMORE: Absolutely not because in Meschell the CCA held that the legislature cannot infringe upon the exclusive area of discretion that's constitutionally allowed the constitutional office of the DA. And one of his core functions that is protected by separation of powers doctrine is his preparation of trial. And all of these issues go to his preparation for trial. Because if you tell a lawyer that his own litigation file will subsequently be opened to disclosure, then every decision he makes as to what goes into the file and what areas of information he needs to go look at, that decision will be made in light of the fact that he's worried about how his file will look to somebody that reads it.