Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

December 23, 1996

The Honorable George W. Bush
Governor
State of Texas
Office of the Governor
P.O. Box 12428
Austin Texas 78711

Letter Opinion No. 96-150

Re: Whether acts of private citizens demonstrating against drug dealers implicate certain sections of the Penal Code (ID# 39178)

Dear Governor Bush:

You have asked this office two questions concerning the activities of a group called Turn Around Texas, which stages marches and protests outside known drug-dealing locations in an effort to discommode and if possible drive away peddlers of illegal narcotics.

Turn Around Texas, as you inform us, routinely receives information from police and other local law enforcement authorities as to the location of known "crack houses"--places for the sale and, sometimes, ingestion of cocaine and other illegal substances--and of the residences of known drug dealers. The group then stages marches down the residential streets where the crack houses or the homes of the pushers are located, and then, generally while under the supervision and protection of local police, demonstrates outside these locations, sometimes vocally and noisily.

The group has expressed concerns about two Penal Code sections which it fears its activities might be construed to violate--section 42.01, which prohibits disorderly conduct, and section 39.03, which prohibits official oppression. Accordingly, you have inquired as to whether the group's activities may implicate either of these statutes, and as to whether the fact that Turn Around Texas is engaging in expressive conduct of the sort protected by the First Amendment provides the group with a defense against criminal charges.

We first address your concerns regarding the offense of disorderly conduct. Because it would require factual determinations of a sort we cannot make in the opinion process, we cannot say whether a particular act by Turn Around Texas might constitute disorderly conduct. We can, however, outline the elements of the offense for your guidance.

The disorderly conduct statute, section 42.01, Penal Code, reads, in relevant part:

> (a) A person commits an offense if he intentionally or knowingly:
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> . . . .
>
> (5) makes unreasonable noise in a public place other than a sport shooting range, as defined by section 250.001, Local Government Code, or in or near a private residence that he has no right to occupy.
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> . . . .
>
> (c) For purposes of this section:
>
> (1) an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence; and
>
> (2) a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance.

As your letter notes, the description of a noise which is presumptively unreasonable was added to the statute by the legislature during the 1995 session. You note that the demonstrations sponsored by Turn Around Texas frequently occur in residential neighborhoods, and are sometimes noisy. Such activities may, therefore, involve offenses under the disorderly conduct statute. Again, whether or not that was the case in any particular instance would require factual determinations of a sort we cannot make in a letter opinion.

You ask, however, if it would be a defense to a charge of disorderly conduct that the demonstrators involved were exercising their First Amendment right of free expression. Whether in particular circumstances the acts of Turn Around Texas were constitutionally protected would depend on the concrete situation involved. But the mere fact that the group is engaging in protected speech does not give its conduct a permanent constitutional shield from civil or criminal liability. In our view, the disorderly conduct statute, at least as written, is a reasonable "time, place, or manner" restriction on free expression of the sort that courts routinely uphold.

The regulation of noise is a substantial governmental interest:

> [I]t can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." . . . . This interest is perhaps at its greatest when government seeks to protect "'the well being,

> tranquility, and privacy of the home,'". . . but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise.

Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 2756 (1989) (citations omitted). In analyzing whether a regulation on the time, place, or manner of protected speech is constitutionally permissible, one must examine whether "the restrictions 'are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 796.

The statute's prohibition of unreasonable noise is certainly content-neutral. Any person who makes such noise has engaged in the prohibited conduct, no matter what he or she may have said or shouted. That the restriction serves a significant interest is, according to the United States Supreme Court, clearly established, as we have already noted. In our view, it is at least as narrowly tailored as the policy upheld in *Ward*, which required rock concert organizers at the band shell in New York's Central Park to use the services of the city's sound equipment and sound technician, and thereby gave the city control of the volume of sound produced at such concerts. It provides other channels of communication as well, since it does not prohibit public demonstrations, but only requires that they not disturb the peace of residential neighborhoods with raucous noise.

Of course it is possible that a particular application of the statute might be found to violate First Amendment rights. But the statute's prohibitions do not facially violate the First Amendment.

The other Penal Code section about which you express concern is section 39.03, which prohibits official oppression. Section 39.03, Penal Code, provides in relevant part:

> (a) *A public servant* acting *under color of his office or employment* commits an offense if he:
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> . . . .
>
> (2) *intentionally* denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, *knowing* his conduct is unlawful;
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> . . . .
>
> (b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity. [Emphasis added.]

As the emphasized language makes clear, acting under color of an official position is a necessary element of the offence of official oppression. *See Blasingame v. State*, 706 S.W.2d 682 (Tex. App.--Houston [14th Dist] 1986). Accordingly, private citizens who are not purporting to act in an official capacity, like the members of Turn Around Texas, who it appears do not claim to be anything but ordinary citizens outraged by the traffic in narcotics, cannot be guilty of this particular offense.

Nor do we believe that a police officer or other law enforcement official who provided Turn Around Texas with information on the location of drug dealers or crack houses would be guilty of the offense. As the statutory language makes plain, a public servant must "intentionally den[y] or impede[] another in the exercise or enjoyment" of his rights, "knowing his conduct to be unlawful." That is, the policeman must intend to violate the rights of some person by providing the information in question, and must know that providing such information is unlawful. Providing this kind of information to citizens, however, is not unlawful.

The provision of certain confidential information to private citizens in certain defined circumstances may violate a related section of the Penal Code, section 39.06. However, we do not believe that providing the locations of crack houses and dope dealers to a citizen's group falls within the ambit of that section.

Section 39.06, Penal Code, reads in relevant part:

> (b) A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that:
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> (1) he has access to by means of his office or employment; and
>
> (2) has not been made public.
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> (c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:
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> (1) the public servant has access to by means of his office or employment; and
>
> (2) has not been made public.
>
> (d) In this section, "information that has not been made public" means any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552, Government Code.

We note that, unlike official oppression, misuse of official information may be committed by private persons as well as public servants. However, the activity you describe is not forbidden by the statute. The identities of known drug dealers and locations of known crack houses may well be law enforcement information of the sort which section 552.108 of the Government Code permits a police agency not to disclose under chapter 552. But the act does not prohibit such disclosure. Section 552.007(a) of the Government Code notes, "This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law." We know of no generally applicable law which makes confidential or prohibits the disclosure of the category of information at issue here. Of course, there may be cases in which the disclosure of particular names or locations may be prohibited, for example by court order. But as a general matter, this kind of information is not prohibited from disclosure so as to fall afoul of section 39.06 of the Penal Code.

S U M M A R Y

Whether a particular demonstration by a group of private citizens would violate section 42.01, Penal Code, which prohibits disorderly conduct, is a question of fact which cannot be determined in the opinion process. However, the fact that demonstrators are engaged in expressive conduct is not by itself a defense against prosecution for such a violation. The disorderly conduct statute's restrictions on protected speech are facially constitutional.

A group of private citizens who receive information from law enforcement about the location of known "crack houses" or the residence of known drug dealers, and who thereupon organize demonstrations at such locations in an attempt to discourage traffic in illegal narcotics cannot, as a matter of law, violate Penal Code section 39.03, which prohibits official oppression. Nor do the provision or receipt of such information violate section 39.06 of the Penal Code, which prohibits misuse of official information.

Yours very truly,

James E. Tourtelott

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