



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 9, 1996

Mr. John L. Schomburger
Assistant District Attorney
Collin County Courthouse
210 S. McDonald, Suite 324
McKinney, Texas 75069

OR96-0511

Dear Mr. Schomburger:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37777.

The Collin County District Attorney (the "district attorney") received a request for all documents relating to the charges brought against Dennis Raymond, M.D., including "all signed affidavits obtained and/or presented to the Grand Jury, the Grand Jury Hearing transcript, all evidence presented to the Grand Jury, any complaint filed against Dr. Raymond, all records relating to the investigation of this matter." You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.111, the informer's privilege as applied through section 552.101 of the Government Code, as work product, and is information in the possession of the judiciary and therefore not subject to the act. We have considered the exceptions you claimed and have reviewed the documents at issue.

Article 20.02 of the Code of Criminal Procedure makes confidential information revealing the substance of grand jury deliberations.¹ Further, this office has concluded

¹We note that article 20.02 was amended in the last legislative session and now provides that grand jury *proceedings* are confidential. Act of May 24, 1995, 74th Leg., R.S., ch. 1011, § 2, 1995 Tex. Sess. Law Serv. 5066 (Vernon). However, the act applies only to grand jury proceedings occurring on or after September 1, 1995, the effective date of the act. *Id.* §§ 3, 4, 1995 Tex. Sess. Law Serv. at 5067. Therefore, as the grand jury proceeding at issue here occurred before the effective date of the act, we apply the old law. We do not address in this ruling what effect the amendment may have on subsequent requests for similar information.

that the grand jury is an extension of the judiciary for purposes of the Open Records Act. Open Records Decision Nos. 433 (1986), 411 (1984). Information held by a grand jury, therefore, is not itself subject to the Open Records Act. When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession. Open Records Decision No. 513 (1988). Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. You do not indicate that the grand jury formally requested or directed all of the district attorney's actions in this investigation. See generally Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney. Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of the Open Records Act's exceptions, but it is not excluded from the reach of the Open Records Act by the judiciary exclusion. You may withhold information obtained pursuant to grand jury subpoena and information collected at the express direction of the grand jury.

Additionally, there is some information contained in the submitted documents which reveals the names of witnesses who may appear before the grand jury and related information. This information is confidential under article 20.02 of the Code of Criminal Procedure. We have marked the information that must be withheld under this statute.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The following types of documents are confidential by statute: medical records or communications between a physician and patient under the Medical Practice Act, V.T.C.S. art. 4495b, § 5.08 (b), (c), which may be disclosed only as permitted under section 5.08(b), and communications between a patient and a mental health professional or records concerning the identity, diagnosis, evaluation, or treatment of a patient under Health and Safety Code section 611.002(a), which may be disclosed only as permitted by section 611.002(b). We have marked the type of information that must be withheld as confidential information under these statutes.

Section 552.101 also encompasses both the common-law and constitutional right of privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable

person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. The identity of an alleged victim of sexual assault is confidential under privacy. Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the documents submitted for our consideration and have marked a sample of these documents, indicating the type of information that must be withheld under common-law privacy.

Section 552.108(a) excepts from disclosure records of law enforcement agencies or prosecutors that deal with criminal investigations and prosecutions. When applying section 552.108, this office distinguishes between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Once a case is closed, information may be withheld under section 552.108 only if its release “will unduly interfere with law enforcement or crime prevention.” See *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 444 (1986), 434 (1986). The grand jury considered this offense in December of 1994, and returned a no-bill. You have not indicated that this investigation is still open. The documents do not indicate, nor have you explained how release of the requested information will unduly interfere with law enforcement; therefore, the district attorney may not withhold the requested information under section 552.108.

You next claim that section 552.101 excepts from disclosure criminal history report information (“CHRI”). Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, the district attorney must withhold CHRI in the submitted information. Please note, however, that

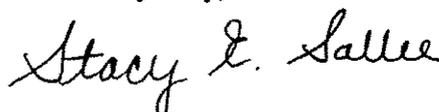
driving record information is not confidential under chapter 411, *see* Gov't Code § 411.082(2)(B), and must be disclosed.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We conclude that the submitted documents relate to the policy functions of the district attorney. However, most of the information contained in these documents is purely factual. We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111. The remaining information may not be withheld under section 552.111.

In summary, the district attorney must withhold documents that are confidential by law; namely, the documents made confidential under article 20.02 of the Code of Criminal Procedure, medical records, CHRI, and the information protected by privacy. Further, the district attorney may withhold information excepted under section 552.111 of the Government Code. The district attorney may not withhold the remainder of the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 37777

Enclosures: Marked documents

cc: Mr. Robert L. Harris
Passman & Jones, P.C.
2400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(w/o enclosures)