



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 16, 1996

Ms. Tamara Armstrong
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR96-0553

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 36244 and ID# 36853.

Travis County (the "county") received two requests for the offense report and any supplemental reports in the prosecution of Eric Estaville, Jason Dowell, and Brad Carlson in cause number 95-0929. The second requestor also seeks the complete files regarding the investigation and prosecution of these persons in this cause and of Eric Estaville and Bradley Carlson in cause number 95-2777. She also seeks any files kept by the prosecutor working on these cases and the files of any police officers investigating the cases. You claim that the requested information is exempted from disclosure under sections 552.101, 552.111, and 552.107 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

You contend that the information contained in Exhibit "A" to both requests is confidential by law. We have reviewed the documents and conclude that they contain confidential information that must be withheld under section 552.101 of the Government Code.

In connection with ID# 36853, you claim that the presentence investigation reports and all information obtained in connection with a presentence report, submitted as Exhibit "B" are confidential under article 42.12 of the Texas Code of Criminal Procedure. We agree. Section 9(j) of article 42.12 provides, in part:

A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant.

None of the exceptions appear to apply here. Therefore, the county must withhold the information in Exhibit "B" submitted in connection with ID# 36853.

You next claim that one document, submitted as Exhibit "C," is excepted from disclosure under a right of privacy. Section 552.101 encompasses both the common-law and constitutional rights of privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the common-law right of privacy, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). We have reviewed the information in Exhibit "C" and conclude that it is not highly intimate or embarrassing. Therefore, the county may not withhold the marked information in Exhibit "C."

You contend that the documents in Exhibit "D" submitted in connection with ID# 36853 are excepted from disclosure under section 231.108 of the Family Code. Section 231.108(a) provides:

(a) Except as provided by Subsection (c), all files and records of services provided under this chapter, including information concerning a custodial parent, noncustodial parent, child and an alleged or presumed father, are confidential.

Chapter 231 of the Family Code addresses the provision of Title IV-D services relating to child support. We conclude that these documents are made confidential by section 23.108 of the Family Code and must be withheld.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. You claim that section 552.107(1) excepts from disclosure the information in Exhibit "E" in ID# 36853. We agree that this information falls within the protection of section 552.107(1) and the county may withhold the information in Exhibit "E."

We next address your contention that section 552.111 in conjunction with the attorney work-product doctrine excepts the information in Exhibit "B" to ID# 36244 and Exhibits "D" and "F" to ID# 36853 from disclosure. In the past, this office has concluded that in the context of the Open Records Act the work-product doctrine applies only upon a showing that section 552.103(a) applies. *See* Open Records Decision No. 575 (1990). However, the issues you raise with respect to attorney work product are the subject of pending litigation which is now on appeal to the Texas Supreme Court. *See Holmes v. Morales*, 906 S.W.2d 570 (Tex. App.--Austin 1995, writ granted). In light of the pendency of this litigation, ruling on your claims regarding work product would be inappropriate for this office. At this point, the outcome of the *Holmes* case may resolve your claims and may moot any decision this office might reach on those claims. For these reasons, we decline to rule on the issues you raise regarding attorney work product, and you may withhold the requested information pending the outcome of the *Holmes* case.

We also remind you that even if section 552.103 or section 552.111 excepts attorney work product from required public disclosure under the Open Records Act, both exceptions are discretionary. *See* Gov't Code § 552.007; Open Records Decision Nos. 542 (1990) at 4, 464 (1987) at 5. Section 552.007 provides as follows:

(a) 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.

(b) *Public information* made available under Subsection (a) must be made available to any person. [Emphasis added.]

The county attorney may, therefore, choose to release to the public some or all of the requested records that may be work product.

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

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Ref.: ID# 36244
ID# 36853

Enclosures: Submitted documents

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