



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 1, 1996

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

OR96-0651

Dear Ms. Armstrong:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38698.

The Travis County District Attorney received an open records request for records relating to an investigation into Medicaid fraud. You have submitted Exhibits A through I for our review and contend that sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code except them from required public disclosure. You further explain that you intend to release one record to the requestor. Finally, you claim that certain other records submitted for our review are not subject to chapter 552 because they are records of the judiciary.

You contend that section 552.111 in conjunction with the attorney work product doctrine excepts Exhibits A through I 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, 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.

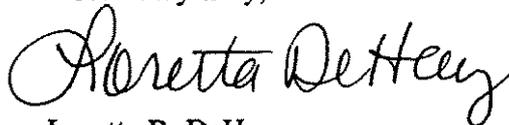
(b) *Public information* made available under Subsection (a) must be made available to any person. [Emphasis added.]

You may, therefore, choose to release to the public some or all of the requested records that may be work product.¹

With respect to your arguments regarding grand jury records, this office has previously held that where a district attorney, acting as an agent of the grand jury, gathers information pursuant to a subpoena, the information is deemed to be in the constructive possession of the grand jury despite the fact that the information is in the actual possession of the district attorney. Open Records Decision No. 411 (1984). Because section 552.003(b) of the Government Code specifically excludes the judiciary, of which the grand jury is a part, from the provisions of the Open Records Act, we conclude that the subpoenas and the subpoenaed materials are not subject to the Open Records Act and therefore need not be disclosed.

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

¹Because we conclude that you may withhold the requested records under section 552.111 pending the outcome in *Holmes*, we do not address your arguments regarding the applicability of other exceptions to disclosure under the Open Records Act. We note, however, that some of the records submitted for our review are confidential under section 552.101 of the Government Code in conjunction with various other statutory provisions. Should you choose to release to the public some or all of the requested records that may be work product, we recommend that you exercise caution prior to releasing the information.

LRD/LBC/rho

Ref.: ID# 38698

Enclosures: Submitted documents

cc: Mr. Robert Bryce
3812 Brookview
Austin, Texas 78722
(w/o enclosures)