



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 9, 1998

Ms. Joni M. Vollman  
Assistant General Counsel  
Office of the Harris County District Attorney  
201 Fannin, Suite 200  
Houston, Texas 77002-1901

OR98-0100

Dear Ms. Vollman:

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# 111506.

The Office of the Harris County District Attorney (the "district attorney") received a request for any records that the Houston Police Department or the district attorney may have regarding a particular 1985 police investigation. You state that the district attorney has released "certain documents" to the requestor, but contend that the remaining requested information is excepted from public disclosure pursuant to sections 552.101, 552.103, and 552.108(a)(3) of the Government Code. We have considered the exceptions you claim and reviewed the submitted documents.

You first contend that the documents you submitted to this office as Exhibit A constitute "work product" that is excepted from public disclosure pursuant to section 552.108(a)(3). Section 552.108(a)(3) provides that information is excepted from public disclosure under the Open Records Act if it is information that is either (A) prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or (B) if it is information that reflects the mental impressions or legal reasoning of an attorney representing the state. You describe the contents of Exhibit A as consisting of handwritten and typed notes of prosecutors and their investigators, the central intake field report, the cover folders of the prosecutor's files, and the Harris County District Attorney Criminal History and Research Information Sheet. Assuming these documents were either created by an attorney representing the state, or by an individual working at the direction of such an attorney, we agree that the district attorney may withhold the documents contained in Exhibit A pursuant to section 552.108(a)(3)(A) or 552.108(a)(3)(B), respectively.

You contend the documents you submitted to this office as Exhibits B through E are excepted from public disclosure pursuant to section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Exhibit B consists of criminal history record information ("CHRI"). We agree that the district attorney must withhold pursuant to statutory law all criminal history information obtained from the TCIC and NCIC. The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 (1990) at 10-12. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 (1990) at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. The district attorney therefore must withhold any criminal history information obtained from the TCIC and NCIC pursuant to section 552.101 of the Government Code.

You next contend that certain reports prepared by the district attorney for the Texas Board of Pardons and Paroles are confidential pursuant to section 18(a) of article 42.18 of the Code of Criminal Procedure. Section 18(a) provides:

Except as provided by Subsection (b), all information, including victim protest letters or other correspondence, victim impact statements, lists of inmates eligible for release on parole, and arrest records of inmates, obtained and maintained in connection with inmates of the institutional division subject to parole, release to mandatory supervision, or executive clemency, or individuals who may be on mandatory supervision or parole and under the supervision of the pardons and paroles division, or persons directly identified in any proposed plan of release for a prisoner, is confidential and privileged.

This provision accords confidentiality to the records of the Board of Pardons and Paroles. Open Records Decision No. 190 (1978) at 2; *see also* Attorney General Opinion H-427 (1974); Open Records Decision No. 33 (1974). It does not, however, make confidential records in the custody of the district attorney. Because you have raised no other exception to required public disclosure with regard to these documents, they must be disclosed.

Exhibit D consists of the medical records of a rape victim. The release of medical records is governed by section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), which provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. The medical records contained in Exhibit D may be released only in accordance with these provisions of the MPA. Open Records Decision No. 598 (1991).

You contend that Exhibit E, which consists of jury information cards, is made confidential by article 35.29 of the Code of Criminal Procedure. Article 35.29 provides as follows:

Information collected by the court or by a prosecuting attorney during the jury selection process *about a person who serves as a juror*, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court *in which the person is serving or did serve as a juror*. On a showing of good cause, the court shall permit disclosure of the information sought. [Emphasis added].

Article 35.29 makes confidential certain personal information pertaining to only those individuals who actually served on the petit jury in a criminal trial. We have marked a representative sample of the categories of information the district attorney must withhold in compliance with the language and intent of the statute. The district attorney may not withhold any additional information contained in Exhibit E pursuant to article 35.29.

You seek to withhold an offense report, excluding the front page, and a sexual assault victim's written statement detailing the sexual assault pursuant to common-law privacy. Section 552.101 of the Government Code also protects information coming within the

common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

Clearly, information pertaining to an incident of sexual assault raises an issue of common-law privacy. Open Records Decision No. 339 (1982). In Open Records Decision No. 339 (1982), this office concluded that "a detailed description of an incident of aggravated sexual abuse raises an issue of common law privacy" and, therefore, any information tending to identify the assault victim should be withheld pursuant to common-law privacy. *See also* Open Records Decision No. 393 (1983).

We have marked a representative sample of the information in Exhibit F that implicates the privacy interests of the rape victim. It is not clear to this office, however, whether this information has been revealed in open court or in public court records. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (information contained in public court records not protected by common-law privacy). *See also Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Consequently, the district attorney must withhold the types of information we have marked only to the extent that the information has not otherwise become public.

We note that some of the information in Exhibit F may be confidential by law. A social security number or "related record" may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the offense reports are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law, enacted on or after October 1, 1990.

Furthermore, the Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

- (a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Therefore, you must withhold driver's license information pursuant to section 552.130.

Finally, you contend that Exhibit G is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

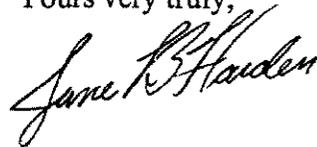
Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a). You inform us that the defendant is presently seeking habeas relief in state court. After reviewing the submitted material, we find that litigation is pending. We also conclude that the documents you have submitted relate to the litigation, and may be withheld.

In so ruling, we note that some of the information in the records at issue has previously been made available to the criminal defendant or his prior attorneys during the course of the criminal prosecution. Generally, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the defendant or his attorneys have seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/alg

Ref: ID# 111506

Enclosures: Submitted documents

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