



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 26, 1998

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

OR98-0254

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# 112090.

The Harris County District Attorney (the "district attorney") received a request for "files in [the district attorney's possession] which relate to the investigation and prosecution of (1) the capital offense and (2) the offenses relied on at punishment in [the] case [involving Willie Marcel Shannon in Cause Nos. 639095 and 71805]." You state that the district attorney will release certain documents to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. You have submitted a representative sample of the requested information for our review.¹

Section 552.103(a) applies to 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.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. You inform us that the requestor has been appointed to represent Mr. Shannon "in an [a]rticle 11.071 [of the Code of Criminal Procedure] habeas review, which demonstrates that the [district attorney] can anticipate impending litigation involving the files the [requestor] seeks to review." In this instance, you have made the requisite showing that the requested information relates to anticipated litigation for purposes of section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the criminal defendant or any of his prior attorneys in this or related criminal litigation is not excepted from disclosure under section 552.103(a), and must be disclosed unless otherwise excepted from public disclosure. Moreover, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because section 552.103 may not protect some of the information in Exhibit A, we will specifically address your claim that the documents contained in this exhibit are excepted from disclosure as "attorney work product" under section 552.108. 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.

In this instance, you specifically quote the pertinent language from the provision cited above in arguing that these records constitute the work product of the prosecutors for the district attorney. We have reviewed the documents in Exhibit A. We find that these records deal with the prosecution of crime and reflect the mental impressions or legal reasoning of

an attorney representing the state. *See* Gov't Code § 552.108(a)(3)(B). You may, therefore, withhold from disclosure the documents contained in Exhibit A under section 552.108(a)(3). We note, however, that "front page" information is not protected from required public disclosure pursuant to section 552.108(c) ("basic information about an arrested person, an arrest, or a crime" not excepted from required public disclosure).² Therefore, except for front page information, you may withhold the records contained in Exhibit A under section 552.108(a)(3).³

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,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 112090

Enclosures: Submitted documents

²Basic information is the type of information that is considered to be front page offense report information even if this information that is considered to be front page offense report information is not actually located on the front page of the offense report. *See generally Houston Chronicle Publ'g 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) (summarizing types of information considered to be basic information).

³As we resolve this matter under sections 552.103 and 552.108, we need not address your other arguments against disclosure. We caution, however, that some of the information may be confidential by law. Therefore, if the district attorney receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the district attorney should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. *See* Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

cc: Mr. Joseph W. Barbisch, Jr.
Attorney at Law
1912 Santa Clara, No. 4
Austin, Texas 78757-2425
(w/o enclosures)