



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 9, 1998

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

OR98-1624

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# 116555.

The Office of the Harris County District Attorney (the "district attorney") received a request for three district attorney's files pertaining to two named individuals. You submitted to this office for review a representative sample of the requested records.¹ You state that the district attorney has released "certain documents" to the requestor, but contend 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.

You seek to withhold two of the district attorney's files pursuant to section 552.103 of the Government Code because they relate to a pending appeal of the criminal defendant's conviction. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. Based on your representation that the two files relate to a pending appeal, we conclude that you have made the requisite showing that the requested information relates to pending

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 No. 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.

litigation for purposes of section 552.103. Those two files may therefore be withheld, with the following caveat.

In reaching this conclusion, we assume that the criminal defendant or his attorney has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the criminal defendant or his attorney has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now address your other arguments for non-disclosure. You 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, DIMS report², the cover folders of the prosecutor's files, conviction summary sheet, a management systems report, and intra-office memoranda. Assuming these documents were created by an attorney representing the state, we agree that most of the documents contained in Exhibit A may be withheld pursuant to section 552.108(a)(3)(A).

The central intake field reports, however, consist primarily of the types of "basic information about an arrested person, an arrest, or a crime" that is not protected from public disclosure under this section. Gov't Code § 552.108(c). The central intake reports must be released to the extent that they contain "basic information" about the respective offenses in accordance with *Houston Chronicle Publishing Company 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). *But see* privacy discussion *infra* (identity of rape victim). The remaining information in the "central intake field report" may be withheld pursuant to section 552.108(a)(3)(A).

You contend the documents you submitted to this office as Exhibits B through H 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,

²This office could not identify any document in Exhibit A as a "DIMS report."

or by judicial decision,” including the common-law right of 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.

You seek to withhold an offense report and a sexual assault victim’s written statement detailing the sexual assault pursuant to common-law privacy. 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 Exhibits G and H 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. Because you have raised no other exception to disclosure with regard to Exhibits G and H, all remaining portions of the victim’s statement and the offense report must be released.³

Exhibit B consists of criminal history record information. We agree that the district attorney must withhold all criminal history information obtained from the TCIC and NCIC in conjunction with state and federal statutes. 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,

³We assume for purposes of this ruling that the co-defendant in this trial, a juvenile, was tried as an adult and that these records therefore are not confidential under section 51.14 of the Family Code.

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.

It appears to this office, however, that some of the records contained in Exhibit B were not obtained from TCIC or NCIC, but rather from the Harris County computer system. These records are similar to the other records contained in Exhibit B in that they consist of compilations of the criminal defendants' criminal histories. In *United States Department of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749 (1989), the U.S. Supreme Court concluded that where an individual's CHRI is compiled or summarized by a governmental entity, the information takes on a character that implicates individual's right of privacy in a manner that the same individual records in an uncompiled state do not. Accordingly, the district attorney must withhold the other compilations of CHRI pursuant to common-law privacy.

Exhibit C 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 C may be released only in accordance with these provisions of the MPA. Open Records Decision No. 598 (1991).

Some of the requested records relate to the district attorney's prosecution of injury to a child. Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, *the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.* [Emphasis added.]

You have not informed this office of any rules the district attorney has adopted that would permit access to the requested records. Because the information at issue pertains to an investigation of injury to a child, this office concludes that the district attorney must withhold these types of records in their entirety pursuant to section 261.201 of the Family Code.

Exhibit E consists of a consumer credit report of one of the referenced individuals. Section 1681b(f), chapter 41 of the United States Code provides as follows:

A person shall not use or obtain a consumer report for any purpose unless—

- (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and
- (2) the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification.

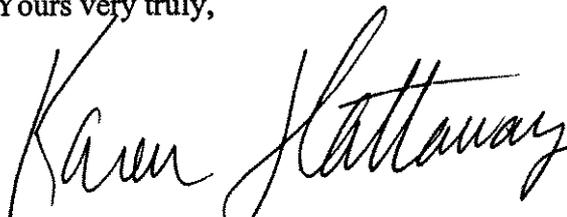
In this instance, this office has no evidence that the conditions authorizing the release of the credit report have been met. *See* 41 U.S.C. § 1681b(a). We therefore conclude that the district attorney must withhold the credit report pursuant to section 1681b.

Exhibit F contains the home telephone numbers and pager numbers of peace officers. Section 552.117(2) provides for the confidentiality of the home addresses, home telephone numbers, and social security numbers of peace officers, as well as information that reveals whether the peace officer has family members. You must withhold the peace officers' home telephone numbers listed in Exhibit F from disclosure. In Open Records Decision Number 506 (1988), this office stated that one purpose of section 552.117 is to protect public officials and employees from being harassed while at home. *Id.* at 5. We agree that the peace

officers' pager numbers must also be withheld from disclosure pursuant to section 552.117(2).⁴

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/RWP/mjc

Ref.: ID# 116555

Enclosures: Submitted documents

cc: Mr. Clarence Walker
P.O. Box 21453
Houston, Texas 77226
(w/o enclosures)

⁴We assume for purposes of granting section 552.117 that the pagers were purchased and are privately owned by the peace officers. See Open Records Decision No-506 (1988) at 5-6 (statutory predecessor to section 552.117 does not apply to cellular mobile phone numbers paid for by county and intended for use at work for county business; different considerations apply if employee pays for purchase and installation of and calls to and from mobile phone in his private vehicle and simply seeks reimbursement for calls made on county business).