

January 11, 1999

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

OR99-0051

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# 121436.

The Harris County District Attorney's Office (the "district attorney") received a request for the "entire case file regarding the criminal prosecution" of Reginald Lavert Hatter. You have released certain documents to the requestor, but contend that the remaining requested information is excepted from public disclosure pursuant to sections 552.101, 552.108(a)(3), and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of documents submitted.¹

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 screening report, the cover folder of the prosecutor's file, the D.I.M.S. sheet, and draft copies of subpoenas containing handwritten notations. 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).

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.



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You contend that the documents in Exhibit B 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 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). 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 the victim impact statements in Exhibit C are confidential pursuant to section 18(a) of article 42.18 of the Code of Criminal Procedure. Section 18(a) of article 42.18 of the Code of Criminal Procedure has been recodified and is now section 508.313 of the Government Code. Section 508.313 of the Government Code provides:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a release; or

(3) a person directly identified in any proposed plan of release for an inmate.

This provision accords confidentiality to the records of the Board of Pardons and Paroles. Open Records Decision No. 190 at 2 (1978); *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. Thus, the victim impact statements are not confidential pursuant to section 508.313 of the Government Code.

However, the victim impact statement contains information excepted from public disclosure by 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. Although Exhibit C contains information protected by common-law privacy, the requestor has a special right of access to the information because the requestor represents the individual who is the subject of the information in Exhibit C. Gov't Code § 552.023 (governmental body may not deny access to information to person, or person's representative, to whom information relates on grounds that information is considered confidential by privacy principles). Accordingly, you must release Exhibit C to the requestor in this instance.

Exhibit D consists of medical records. Access to medical records is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA. We note that the requestor represents the individual who is the subject of the medical records. Section 5.08(g)(2) provides that an exception to confidentiality exists when "the patient or someone authorized to act on his behalf submits a written consent to the release of any confidential information."

Exhibit E contains peace officers' home telephone numbers that are excepted from disclosure under section 552.117(2). The district attorney must withhold the officers' home telephone numbers from disclosure under section 552.117(2).

Finally, you seek to withhold Exhibit F, an offense report, pursuant to common-law privacy in accordance with Open Records Decision Nos. 339 (1982) and 393 (1983). As we stated above, in this instance, the requestor has a special right of access to the information that is otherwise protected by common-law privacy. Gov't Code § 552.023. Thus, you must release most of the information in Exhibit F to the requestor.

Exhibit F includes social security numbers that may be confidential under federal law and a Texas driver's license number that is excepted from public disclosure by section 552.130 of the Government Code. A social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994).* Section 552.130 excepts from public disclosure information that relates to a driver's license issued by an agency of this state. We have marked the information in Exhibit F that you must withhold.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 121436

Enclosures: Marked documents

cc: Mr. Jay D. Hirsch
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(w/o enclosures)