

January 20, 1999

Ms. Joni M. Vollman
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

OR99-0134

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121152.

The Harris County District Attorney received a request for all trial files concerning the state's capital murder case against Robert Alan Fratta. You indicate that you will release some of the requested information to the requestor. You argue, however, that five categories of information, submitted as Exhibits A - E, are excepted from required public disclosure by sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted sample documents.¹

You first argue that the information in Exhibit A is excepted from disclosure by section 552.108. Section 552.108 of the Government Code provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

* * *

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.

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

* * *

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain the documents in Exhibit A constitute the prosecutor's work product. You state that the information you seek to withhold in Exhibit A consists of the "handwritten and typed notes of prosecutors and their investigators, handwritten notes by prosecutors on documents that are copies of documents that will be disclosed, the cover folder of the prosecutor's files, which contain handwritten notes of prosecutors, . . . [and] juror questionnaires and juror cards, which contain handwritten notes" of the prosecutors. After examining Exhibit A, it appears that the information you seek to withhold was prepared by an attorney representing the state in criminal litigation. The information you seek to withhold in Exhibit A is protected from disclosure under section 552.108(a)(3)(A).²

²We also point out that certain information on the jury questionnaires 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.]

You assert that the material in Exhibit B must be withheld because it is confidential grand jury records. The Open Records Act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information. *Id.* Furthermore, information obtained pursuant to a grand jury subpoena issued in connection with this prosecution is within the grand jury's constructive possession and is not subject to the act. *Id.* See also Gov't Code § 552.003. Because Exhibit B consists of the transcription of grand jury testimony and grand jury subpoenas, it appears that the information is within the constructive possession of the grand jury. As such, the information is not subject to disclosure under the Open Records Act.

You next argue that the material in Exhibit C must be withheld under section 552.101. Section 552.101 of the Government Code exempts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any CHRI in your possession that falls within the ambit of these state and federal regulations must be withheld.

You next contend that the victim impact statements in Exhibit D 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.

Notwithstanding the above, the victim impact statement here contains information excepted from public disclosure by another statute. Chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002 provides in relevant part as follows:

- (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. You may release these records only as provided by the statute. Health & Safety Code §§ 611.004, .0045; *see* Open Records Decision No. 565 (1990). We have marked the type of information in Exhibit D that must be withheld under section 552.101 in conjunction with this statutory provision.

You also claim that the remaining information in Exhibit D, not protected by section 611.002, is excepted from disclosure by section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You explain that the requested information relates to pending criminal litigation. You state that the defendant's conviction in this case is currently in habeas corpus proceedings. You have shown the applicability of section 552.103. You may withhold the remaining information in Exhibit D under this section. 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 opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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). We note, however, that some of the requested information in Exhibit D may be confidential by a right of privacy and must not be released even after litigation has concluded. Gov't Code § 552.352 (distribution of confidential information is criminal offense); *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Finally, you claim that the information in Exhibit E is excepted from disclosure under the informer's privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). We have examined the documents in Exhibit E and find that you may withhold them under the privilege.

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,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB\ch

Ref: ID# 121152

Enclosures: Submitted documents

cc: Mr. Richard H. Burr
Burr & Welch
412 Main Street, Suite 1100
Houston, Texas 77002
(w/o enclosures)