



February 11, 1999

Mr. James T. Russell  
Administrative Assistant  
27<sup>th</sup> Judicial District of Texas  
P.O. Box 540  
Belton, Texas 76513

OR99-0434

Dear Mr. Russell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 121931.

The Bell County Criminal District Attorney's Office (the "district attorney") received a request for information relating to a crime for which the defendant was convicted. You indicate that she is currently serving a sentence in the Texas Department of Criminal Justice, Institutional Division, but has not yet exhausted her appellate or other post conviction remedies. You contend that the requested information may be withheld from public disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You inform us that the defendant pled guilty and was sentenced to a term of imprisonment. You assert that, until the defendant has exhausted all appellate and post conviction remedies in state and federal court, the information should be withheld from public disclosure under section 552.103. Section 552.103(a) of the Government Code exempts from required public 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.

In order to secure the protection of section 552.103(a), a governmental body must demonstrate that litigation is pending or reasonably anticipated and that the requested information relates to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 5 (1990). Having carefully considered your arguments and the submitted documents, we conclude that you may not withhold the requested information under 552.103(a).

You next argue that the information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 reads in pertinent part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

...

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

You claim that section 552.108 protects the photos and videos from disclosure. You argue that “the photos and videotape were made by investigators and would interfere with prosecution by revealing investigatory techniques and concerns.” You also argue that section 552.108 protects the victim impact information. A governmental body must explain how and why release would interfere with law enforcement if this claim is not apparent on the face of the submitted documents. Open Records Decision No. 434 (1986). We conclude that the photos and videotape as well as the victim impact statement may not be

withheld from disclosure pursuant to section 552.108(a)(1) or (b)(1). Open Records Decisions 216 at 4 (1978), 133 at 3 (1976).

We turn to the criminal history record information in Exhibit Category I. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by chapter 411. *See generally id.* §§ 411.090, -127. Thus, any criminal history record information generated in Exhibit Category I by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990).

Next, you argue that some of information is confidential in Exhibit Category II under the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b. Section 5.08 of the MPA provides in part:

(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.

V.T.C.S. art. 4495b, § 5.08 (b)(c). Section 5.08(j)(3) 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 at 7 (1990). Thus, access to medical records

is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). We conclude that you must withhold medical records in Exhibit Category II pursuant to the MPA.

Exhibit Category III contains pre-sentence investigation reports and information you say was obtained in connection with a pre-sentence investigation. You raise Code of Criminal Procedure article 42.12, section 9(j), which reads as follows:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section and as directed by the judge for the effective supervision of the defendant. Medical and psychiatric records obtained by court order shall be kept separate from the defendant's community supervision file and may be released only by order of the judge.

We have no information that would lead us to conclude that the requestor is entitled to the information in Exhibit Category III pursuant to the subsections listed in section 9(j) that authorize release. Accordingly, we conclude that the presentence materials in Exhibit Category III are confidential by statute and excepted from public disclosure based on section 552.101 of the Government Code.

We will now address section 508.313(a) of the Government Code and common law privacy. You argue that Exhibit III, pre-sentence information, and Exhibit IV, the victim impact statement, are excepted from public disclosure pursuant to 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 pre-sentence information and the victim impact statements are not confidential pursuant to section 508.313 of the Government Code.

However, the pre-sentence information and victim impact statements contain 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. We have marked the information in Exhibit IV that you must withhold under common-law privacy. Exhibit III, the pre-sentence information, is already excepted from public disclosure pursuant to article 42.12 of the Code of Criminal Procedure; thus, there is no need to mark the private information.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Texas courts long have recognized the informer’s privilege, *see Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928), and it is a well-established exception under the Open Records Act. Open Records Decision No. 549 at 4 (1990). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer’s privilege:

What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the informer's privilege aspect of section 552.101 ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 at 1 (1981), 279 at 1-2 (1981); *see also* Open Records Decision No. 208 at 1-2 (1978). This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 at 3 (1988), 391 at 3 (1983). The privilege excepts the informer's statement itself only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990). However, once the identity of the informer is known to the subject of the communication, the exception is no longer applicable. Open Records Decision No. 202 at 2 (1978). For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 515 at 2-5 (1988), 391 (1983). Finally, since the informer's privilege facet of section 552.108 of the Government Code serves to protect the flow of information to a governmental body and does not serve to protect a third person, this privilege, unlike other section 552.101 claims, may be waived by the governmental body. Open Records 549 (1990). You argue that the informer's privilege applies to the identity of the victim's spouse. We conclude that the informer's privilege is not applicable.

We note that the submitted information includes VIN and license plate numbers, as well as driver's license numbers. Section 552.130 of the Government Code excepts from disclosure information that relates to motor vehicle operators licenses or permits or motor vehicle title or registration issued by an agency of the state, except as authorized by chapter 730 of the Transportation Code. The District Attorney is not an "agency" for purposes of section 773.003(1) of the Transportation Code. Thus, chapter 730 of the Transportation Code does not authorize the release of motor vehicle information. We have marked the information in Exhibit Category V and the Supplemental Reports excepted from disclosure based on section 552.130 of the Government Code.

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,

*David Van Brunt Price*  
David Van Brunt Price  
Assistant Attorney General  
Open Records Division

DVP\nc

Ref: ID# 121931

Enclosures: Submitted documents

cc: Ms. Sherry A. Scott  
O'Quinn & Laminack  
2300 Lyric Centre Building  
440 Louisiana  
Houston, Texas 77002  
(w/o enclosures)