



July 12, 1999

Ms. Shari D. Moore
Assistant District Attorney
173rd Judicial District
Henderson County
109 W. Corsicana, Suite. 103
Athens, Texas 75751

OR99-1928

Dear Ms. Moore:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 127507.

The Henderson County District Attorney's Office (the "district attorney") received a request for the district attorney's file in cause no. B-8934. You assert that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted documents.

First, we will consider your section 552.103 claim. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The district attorney 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 (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 district attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an

attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the fact that an individual hires an attorney who makes a request for information establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Litigation is not reasonably anticipated when an individual who was rejected for employment hires an attorney to investigate the circumstances of the rejection. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You contend that litigation is reasonably anticipated based on prior correspondence from the law firm that represents the person who is the subject of the requested information. The prior correspondence states that counsel has been retained to investigate the circumstances leading to his client’s receipt of deferred adjudication. We have considered your arguments and conclude that you have failed to make the requisite showing that litigation is reasonably anticipated and, therefore, you may not withhold the requested information under section 552.103.

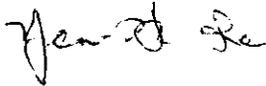
You further assert that the submitted information includes the criminal histories of witnesses which are confidential by law. Generally, criminal history report information (“CHRI”) is confidential and not subject to disclosure. Section 552.101 excepts from disclosure “information deemed confidential 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, assuming that you have CHRI in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

requestor. We note, however, that the person who is the subject of the CHRI may obtain his own CHRI from the Department of Public Safety. Gov't Code § 411.083(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.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is written in a cursive, somewhat stylized font.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 127507

Encl.: Submitted documents

cc: Mr. Greg Glass
Ritchie & Glass
1744 Norfolk
Houston, Texas 77098-4408
(w/o enclosures)