



April 12, 2000

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

OR2000-1452

Dear Ms. Vollman:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 134256.

You state that the Harris County District Attorney received a request for disclosure of the file regarding Geno Capoletti Wilson.¹ You claim that portions of the information are excepted from disclosure under sections 552.101, 552.108 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. Gov't Code § 552.301(e). You did not, however, submit to this office a copy of the written request for information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is

¹Because you failed to submit a copy of the written request for information, we can only assume, based upon your representation, that the requestor seeks the information you have submitted.

²In 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.

presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You claim that the documents found in Exhibit A are excepted from disclosure under section 552.108. However, section 552.108 will not overcome the presumption of openness imposed by section 552.302. Therefore, Exhibit A is not excepted from public disclosure under section 552.108(a)(2) and must be released.³ We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352.

However, the fact that information is made confidential by law found outside the Public Information Act constitutes a compelling demonstration that the information should be withheld from the public. *See Open Records Decision No. 150 (1977)*. You claim that section 552.101 excepts from disclosure criminal history report information ("CHRI") found in Exhibit B. 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, as to any CHRI about the defendant in your possession that falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor.

We also note that the district attorney appears to have obtained some of the records in Exhibit B from a local database. As such local information is essentially a compilation of an individual's criminal history, it resembles the other records contained in Exhibit B. To the extent that a local governmental entity has compiled or summarized a particular

³We note that Exhibit A appears to contain information protected from disclosure by sections 552.117(2) and 552.130 of the Government Code. Section 552.117 is discussed on page seven of this letter ruling. Section 552.130 excepts information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold all Texas driver's license numbers, license plate numbers and VIN numbers.

individual's CHRI, the compilation or summary assumes a character that implicates the person's right of privacy, so as to be confidential under section 552.101. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

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 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 C that you must withhold under common law privacy.

You also raise section 5.08 of article 4495b of Vernon's Texas Civil Statutes. We note that the Seventy-sixth Legislature repealed the former Medical Practice Act, article 4495b of Vernon's Texas Civil Statutes, in enacting the new Occupations Code. *See* Act of May 13, 1999, 76th leg., R.S., ch. 388, § 6, 1999 Tex. Sess. Law Serv. (Vernon) (adopting Occupations Code). The former article 4495b now is codified as the Medical Practice Act at

subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified as chapter 159 of the Occupations Code. Article Section 159.002(b) of the Texas Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." The documents you submitted to this office include medical records, access to which is governed by provisions outside the Public Information Act. Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We agree that the documents in Exhibit D fall within the protection of chapter 159 and must be withheld.

You assert that the documents labeled Exhibit E are excepted from disclosure under section 552.101 in conjunction with laws governing the confidentiality of grand jury proceedings. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies subject to chapter 552 of the Government Code, so that records within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. Open Records Decision No. 513 at 3 (1988). Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* You state that the documents in Exhibit E are grand jury subpoenas and documents obtained by the grand jury in response to its subpoenas. To the extent that these materials are in the custody of the district attorney as agent for the grand jury, we conclude that they are in the constructive possession of the grand jury and are therefore not subject to disclosure under chapter 552 of the Government Code.

Finally, you assert that some of the information contained in Exhibit F may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. We have marked the information in Exhibit F which you must withhold under section 552.117(2) of the Government Code. We note that you must also withhold any information protected by section 552.117(2) found in Exhibit A.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "A Crawford". The signature is written in black ink and is positioned above the typed name.

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/nc

Ref: ID# 134256

Encl. Submitted documents

cc: Mr. Robert Morrow
6630 Cypresswood Drive, Suite 200
Spring, Texas 77379
(w/o enclosures)