



April 11, 2002

Ms. Ann-Marie P. Sheely  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2002-1798

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161140.

The Travis County District Attorney's Office (the "district attorney") received a written request for all records pertaining to a particular criminal prosecution. You state that the district attorney has released some responsive information to the requestor. You contend, however, that certain other responsive information is either not subject to the provisions of the Public Information Act or is excepted from required public disclosure pursuant to, among other exceptions, sections 552.101 and 552.108 of the Government Code.<sup>1</sup>

You contend that the records you submitted to us under Tab D are not subject to disclosure under the Public Information Act because those records are in the constructive possession of the Travis County Grand Jury. This office has previously held that where a district attorney, acting as an agent of the grand jury, gathers information pursuant to a subpoena, the information is deemed to be in the constructive possession of the grand jury despite the fact that the information is in the actual possession of the district attorney. Open Records Decision No. 411 (1984); *see also* Open Records Decision No. 513 (1988). Section 552.003(b) of the Government Code specifically excludes the judiciary, of which the grand jury is a part, from the provisions of the Public Information Act.

In this instance, you have demonstrated that the documents submitted under Tab D are in the constructive possession of the grand jury. Accordingly, we conclude that all of the records you submitted to our office under Tab D constitute records of the judiciary and thus may be withheld from the requestor in their entirety.

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<sup>1</sup>Because we resolve your request under sections 552.101 and 552.108, we need not address the applicability of the other exceptions you raised.

We now consider your section 552.101 claims. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Among the documents at issue is a pre-sentence investigation report, which is made confidential under section 9(j) of article 42.12 of the Code of Criminal Procedure, and thus must be withheld pursuant to section 552.101 of the Government Code. Article 42.12, section 9(j), provides 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.

Because none of the circumstances described in subsections (d), (e), (f), (h), (k), or (l) appear to be present here, we conclude that the presentence investigation report is made confidential by statute and is therefore excepted from public disclosure under section 552.101 of the Government Code. Accordingly, the district attorney must withhold this document.

Also among the documents at issue is criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC"). 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. Consequently, the district attorney must withhold pursuant to chapter 411 all CHRI records submitted under Tab B, with the following exception.

The first page under Tab B consists of a compilation of an individual's criminal history created by Travis County. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (concluding that federal regulations which limit access to criminal history record information that states obtain from the federal government or other states recognize privacy interest in such information). Similarly, open records decisions issued by this office acknowledge this privacy interest. See Open Records Decision Nos. 616 (1993), 565 (1990). The district attorney, therefore, must withhold the first page under Tab B pursuant to section 552.101 of the Government Code in accordance with *Reporters Committee*.

Finally, you contend that the documents you submitted to this office under Tab A are excepted from public disclosure pursuant to section 552.108(a)(4). Section 552.108(a)(4) provides that information is excepted from public disclosure 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) information that reflects the mental impressions or legal reasoning of an attorney representing the state. The documents you submitted under Tab A consist of evidence the district attorney gathered during the course of a criminal prosecution, as well as summaries of that evidence. After reviewing your arguments and the submitted documents, we agree that most of the information submitted under Tab A may be withheld in its entirety pursuant to section 552.108(a)(4).

Section 552.108 does not, however, except from required public disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Consequently, the district attorney must release these types of information in accordance with *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

In summary, the documents submitted under Tab D consist of records of the judiciary that are not subject to the provisions of the Public Information Act and therefore need not be released. The CHRI and the presentence investigation report submitted under Tabs B and C, respectively, must be withheld pursuant to section 552.101. Finally, the district attorney may withhold most of the records submitted under Tab A pursuant to section 552.108(a)(4), but basic information regarding the underlying offense must be released to the requestor.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 black ink, appearing to read 'DRS', with a stylized flourish at the end.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/RWP/seg

Ref: ID# 161140

Enc. Submitted documents

c: Ms. Susan Henricks  
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(w/o enclosures)