



County of TRAVIS STATE OF TEXAS

RECORDED  
JUN 24 1994

CIVIL DIVISIONS

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- CAROL M. V. GARCIA
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RQ-727

June 24, 1994

Gov.

FILE # ML-27170-94

I.D.# 27170

Honorable Dan Morales  
Texas Attorney General  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78701-2548

Attention: Opinion Committee

Re: Request for Information; File No. 14.0

Dear General Morales:

Pursuant to Section 552.301 of the Texas Open Records Act, Travis County, Texas, hereby requests a decision on the information contained in Exhibits A, B and C, attached hereto. With regard to this information, we are raising the following exceptions: Section 552.101, Section 552.103 and Section 552.111. A detailed brief regarding the application of these exceptions to the requested information will follow.

Sincerely,

*Tamara Armstrong*  
 Tamara Armstrong  
 Assistant County Attorney



County of  
TRAVIS  
STATE OF TEXAS

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JUN 27 94

Opinion Committee

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June 27, 1994

Honorable Dan Morales  
State Attorney General  
P.O. Box 12548  
Capitol Station  
Austin, Texas 78701-2548

Attention: Opinion Committee

Re: Request for Information; File No. 14-0

Dear General Morales:

Re: 27170

COO  
FILE # ML-27170-94  
I.D.# 27240

Pursuant to Section 552.301 of the Texas Open Records Act, Travis County, Texas, requested a decision on the status of information contained in exhibits A, B, and C and requested by letter received June 15, 1994, and submitted to your office with the open records request on June 24, 1994. In my letter submitted June 24, 1994, I raised several exceptions to disclosure of the information and indicated that a brief would follow the letter. In the discussion below, I explained the applicability of the exceptions to the requested information.

The requestor is an attorney seeking records of a criminal case file on behalf of his client who is the mother of the victim in the case. He seeks a copy of the District Attorney's file on Mark Kazanoff, the defendant in the case.

This file consists of four categories of information which we have determined are excepted from disclosure under Sections 552.101, 552.103 and 552.111 of the Texas Open Records Act. Section 552.101 of the Texas Open Records Act excepts from disclosure information made confidential by constitutional law, statutory law or judicial decision. Section 552.103 of the Texas Open Records Act excepts from disclosure information relating to criminal or civil litigation to which the State or Political Subdivision is or may be a party.

Hon. Dan Morales

June 24, 1994

Page 2

Section 552.111 of the Texas Open Records Act excepts from disclosure inter-agency or intra-agency memorandums or letters that would not be available by law to a party in litigation with the agency. Tex. Gov't Code Ann. § 552.101 (Vernon Supp. 1994); Tex. Gov't Code Ann. § 552.103 (Vernon Supp. 1994); Tex. Gov't Code Ann. § 552.111 (Vernon Supp. 1994).

Exhibit A consists of a polygraph examination and the results of this examination. We have determined that this information is excepted from disclosure under Section 552.101 of the Texas Open Records Act by virtue of statutory law, specifically, Article 4413(29cc), Section 19A. Article 4413(29cc), Section 19A, Subsection (b) provides:

"Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination."

Tex. Rev. Civ. Stat. Ann. art. 4413(29cc), § 19A(b) (Vernon Supp. 1994). Subsection (d) provides:

"A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions, (1) through (5) of Subsection (c) of this section."

Tex. Rev. Civ. Stat. Ann. art. 4413(29cc), § 19A (d) (Vernon Supp. 1994). Under Subsection (d) of Article 4413(29cc), § 19A, the District Attorney's office may not disclose either the polygraph examination or the results to another person, except as authorized by Subsection (d) which allows disclosure of such information to a person described in Subdivisions (1) through (5) of Subsection (c). None of the categories listed in Subsection (c) are applicable in this case. Because the requestor does not represent the subject of the polygraph examination, category (1) is inapplicable in this case. Categories (2) through (4) are also inapplicable. The only category which could possibly apply in this case is category (5) which allows disclosure to "others as may be required by due process of law." Tex. Rev. Civ. Stat. Ann. art. 4413(29cc), § 19A (c)(5) (Vernon Supp. 1994). However, because category (5) authorizes disclosure to others as may be required by due process of law, it appears that disclosure would be authorized pursuant to discovery in the course of litigation or pursuant to procedures applicable to formal administrative hearings. Because the requestor is not among those persons specified in categories (1) through (5) of Subsection (c), we have determined that the requested information in Exhibit A must be withheld pursuant to Article 4413 (29cc), Section 19A, Subsection (b). Tex. Att'y Gen. ORD-316 (1982). However, the requestor may be able to obtain the information through discovery.

We have determined that the information contained in Exhibit B is excepted from disclosure under Section 552.101 of the Texas Open Records Act which excepts from disclosure information made confidential by statutory law. Please see Exhibit B.

The remaining documents in the file contained in Exhibit C are excepted from disclosure under Sections 552.101, 552.103 and 552.111 of the Texas Open Records Act for the reasons discussed below. These documents constitute work product of the attorneys and investigators in the Travis County District Attorney's Office and, as such, are excepted from disclosure under Sections 552.101, 552.103 and 552.111 of the Texas Open Records Act. Section 552.111 of the Texas Open Records Act excepts from disclosure inter-agency or intra-agency memorandums and letters which would not be available by law to parties in litigation with the agency. The Court of Appeals in Austin held that exemption eleven protects those documents privileged in the context of civil litigation, Texas Department of Public Safety v. Gilbreath, 842 S.N. 20408 (Tex. App. - Austin, 1992, no writ). The Court stated:

"...Exemption 11 exempts those documents and only those documents normally privileged in the civil discovery context. The language of exemption eleven is clear and unambiguous and we have not read into the statute language which is not textually present. The parties stipulated that if they were in litigation, the information at issue would be discoverable. By so stipulating, the DPS has admitted that there is no privilege, including a deliberative process privilege, which protects the information from discovery. In other words, the inter-agency or intra-agency memorandums or letters would be available by law to a party in litigation with the agency. Thus, Exemption 11 does not apply, and the information is, public information, as a matter of law." [Emphasis added].

Texas Department of Public Safety v. Gilbreath, 842 S.W.2d 408 (Tex. App.-Austin, 1992, no writ). In determining whether or not the information in question was excepted from disclosure under Exemption 11, the Court considered whether such information was discoverable by the parties in the context of civil litigation, had such litigation been conducted by the parties in 1992. The Court noted:

"The parties stipulated that if they were in litigation, the information at issue would be discoverable. By so stipulating, the DPS has admitted that there is no privilege, including a deliberative process privilege, which protects the information from discovery. In other words, these inter-agency or intra-agency memorandums or letters would be available by law to a party in litigation with the agency."

Id. at 413. The Court considered whether the information would be discoverable in the context of civil litigation conducted in 1992. The Court did not determine the availability or unavailability of the information by considering whether it was discoverable or available under Federal Court decisions pre-dating 1973. The Court simply considered whether or not the information in question was discoverable in the context of civil litigation, had such civil litigation been conducted by the parties involved. The attorney work product doctrine protects attorney work product when sought in the context of civil litigation. Therefore,

Hon. Dan Morales

June 24, 1994

Page 4

information protected by the attorney work product doctrine would fall within the scope of Section 552.111 of the Texas Open Records Act. Because these records are protected by the attorney work product doctrine, they are privileged from discovery in civil litigation, and therefore excepted from disclosure under Section 552.111 of the Texas Open Records Act as inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the County. The attorney work product doctrine shelters the mental processes, conclusions and legal theories of an attorney, thereby providing a privilege whereby the lawyer can analyze and prepare his or her case. In criminal cases, the work product doctrine derives from the common law and protects documents, such as offense reports, police reports, police investigative reports, internal prosecution files and papers, reports containing lab test results, statements prepared by officers after interviewing prospective witnesses, trial notes, witness interview notes, and personal notes reflecting legal research. The work product doctrine protects summaries of witness statements written by attorneys or investigators preparing the case and notes of conversations between attorneys and others regarding the case. Washington v. State, 856 S.W.2d 184 (Tex. Crim. App. 1993); Wood v. McCown, 784 S.W.2d 126 (Tex. App.-Austin 1990); Ott v. State, 627 S.W.2d 218 (Tex. App.-Ft. Worth, 1981, Pet. ref'd). The Attorney Work Product Doctrine extends to materials prepared in anticipation of litigation by agents of the attorney, such as secretaries, paralegals and investigators. Toyota Motor Sales USA, Inc. v. Heard, 774 S.W.2d 316 (Tex. App.-Houston [14th Dist.] 1989).

In Curry v. Walker, the Texas Supreme Court recently held that the Attorney Work Product Doctrine encompasses much of the information contained in a criminal district attorney's criminal case file. In an opinion rendered March 30, 1994, the Texas Supreme Court held that the Attorney Work Product Doctrine applies in criminal as well as civil cases and protects the District Attorney's entire litigation file. In this case, the Texas Supreme Court cited with approval one of its previous decisions on the Attorney Work Product Doctrine: National Union Fire Insurance Co. v. Valdez, 863 S.W.2d 458 (Tex. 1993, Orig. proceeding). In National Union Fire Insurance Co. v. Valdez, the Texas Supreme Court stated:

"[A]n attorney's litigation file goes to the heart of the privileged work area guaranteed by the work product exemption. The organization of the file, as well as the decision as to what to include in it, necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case."

Curry v. Walker, 37 Tex. Supp. Ct. J. 618 (March 30, 1994); Id. at 460. In the Curry case, the Texas Supreme Court considered the extension of the Attorney Work Product Doctrine to documents, such as police reports, court documents, photographs and newspaper clippings. In this case, the Texas Supreme Court considered the District Attorney's criminal case file in its entirety, rather than individual documents. As in National Union Fire Insurance Co., the Texas Supreme Court reasoned that an attorney's litigation file is at the heart of the Attorney

Hon. Dan Morales

June 24, 1994

Page 5

Work Product Doctrine. The organization of the file and the documents included in the file necessarily reveal the attorney's thought processes concerning the prosecution of the case. Based on this reasoning, the Texas Supreme Court held that the Attorney Work Product Doctrine extends to the criminal District Attorney's entire litigation file, not only to documents which, considered individually, are attorney work product. Under Curry v. Walker, the Attorney Work Product Doctrine encompasses all the information gathered and all the documents prepared by attorneys, investigators and paralegals in anticipation of prosecution of the case. In light of Curry v. Walker, the information protected by the Attorney Work Product Doctrine may also be excepted from disclosure under Section 552.101 of the Texas Open Records Act which excepts from disclosure information made confidential by constitutional law, statutory law, or judicial decision. The protection provided by the Attorney Work Product Doctrine continues after termination of the litigation in question.

The protection afforded by the Attorney Work Product Doctrine continues after termination of the case in question. The doctrine protects information gathered and prepared in connection with the case after the case in question has closed. State Farm Mutual Automobile Ins. Co. v. Engelke, 824 S.W.2d 747 (Tex.App.-Houston [1st Dist.], 1992, no writ). The Engelke case concerned the duration of the Attorney Work Product Doctrine in civil cases. The duration of the Attorney Work Product Doctrine in criminal cases was decided prior to the Engelke decision by an Austin Court of Appeals in the case of Wood v. McCown, 784 S.W.2d 126 (Tex. App.-Austin, 1990, no writ). In Wood v. McCown, the Austin Court of Appeals held that documents previously prepared and gathered in a closed criminal case were protected from discovery in a separate, subsequent civil case under the Attorney Work Product Doctrine which endured beyond the termination of the criminal case. The Court distinguished criminal cases from civil cases and held that the Attorney Work Product Doctrine endured beyond termination of criminal cases to protect such case files from discovery in subsequent civil cases. The Court determined that the Attorney Work Product Doctrine continued after conclusion of the criminal case in question, after considering the potential, considerable, chilling effect on an attorney's willingness to record and retain his or her mental impressions, factual investigations, and legal research when the attorney knows that his or her work product will be subject to subsequent scrutiny after termination of his or her client's case. The Court also expressed its concern with the qualitative threat to the judicial process in criminal cases where persons face potential criminal sanctions. Based on these considerations and concerns, the Court determined that the completion of the criminal case should not necessarily abort the work product exemption. Upon rendering this decision, the Austin Court of Appeals affirmed the trial court's decision denying discovery of the documents in question. Considering both Curry v. Walker and Wood v. McCown, we have determined that the Attorney Work Product Doctrine protects the District Attorney's criminal case file in this instance. We do not believe that the Curry v. Walker and the Wood v. McCown decisions are limited to cases involving discovery. There is nothing in the language of either Curry v. Walker or Wood v. McCown which would limit the scope of these decisions to the discovery context. The Courts quote general principals relied upon in

Hon. Dan Morales

June 24, 1994

Page 6

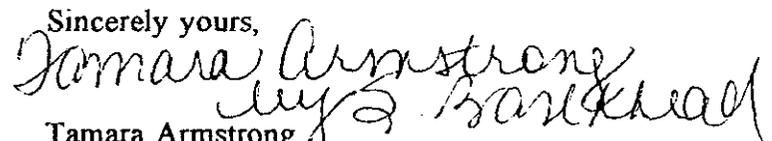
determining that the Attorney Work Product Doctrine protected the documents in question. Limiting the scope of these decisions to situations involving discovery would, in effect, make these decisions meaningless because the party which could not obtain attorney work product through discovery would simply obtain the same information through the Open Records Act, in cases where the governmental entity was not involved in such litigation. Even if these decisions were limited to the discovery context, it is precisely those documents privileged from discovery which are also excepted from discovery under Exemption 11, § 552.111 of the Texas Open Records Act.

*In light of prior decisions rendered by your office, I am also raising the Section 552.103 exception with regard to the materials contained in Exhibit C. Tex. Att'y Gen. ORD-574 (1990). This case has been classified as a case closed pending further investigation. However, the statute of limitations has not run for this particular case; therefore, the case could be re-opened if the District Attorney's office received new evidence in the matter. Therefore, Section 552.103 is still applicable in this case. Even when this case is closed, the materials contained in the file would still be protected under Sections 552.111 and 552.101 by virtue of Curry v. Walker and Wood v. McCown.*

The entire criminal case file contained in exhibits A, B, and C is also protected by Section 34.08 of the Family Code which makes confidential the reports, records and papers used or developed in an investigation conducted under Chapter 34 of the Family Code. Tex. Fam. Code Ann. § 34.08 (a) (Vernon Supp. 1994). This particular case did involve an investigation conducted by the Department of Human Services. It also involved an investigation conducted by the Travis County District Attorney's office in the matter. Therefore, the materials contained in the file are protected by Section 34.08 of the Family Code and are therefore excepted from disclosure under Section 552.101 of the Texas Open Records Act. Please note that this file contains medical records prepared in the course of the investigations discussed above. These medical records would therefore be protected under Section 34.08, subsection (a), Family Code. However, the requestor would be entitled to these records under Article 4495b, Section 5.08(g), the Medical Practice Act. There appears to be a conflict between these two statutes. However, I believe that Section 34.08 of the Family Code would prevail in that it is a special law which protects only medical records gathered and prepared in the course of an investigation into child abuse. The Medical Practice Act, on the other hand, is more general in scope than Chapter 34 of the Family Code in that it protects medical records generally and provides for the disclosure of such records to specific persons in most cases.

Hon. Dan Morales  
June 24, 1994  
Page 7

We respectfully request a decision on the status of the information contained in exhibits A, B, and C. If you have any questions, please contact me.

Sincerely yours,  
  
Tamara Armstrong  
Assistant County Attorney

TA:clt

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