



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 4, 1997

Mr. Bill Dobiyski
Assistant District Attorney
Collin County Courthouse
210 S. McDonald, Ste. 324
McKinney, Texas 75069

OR97-2437

Dear Mr. Dobiyski:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109799.

The Collin County District Attorney (the "district attorney") received a request for six categories of information. The requestor is an attorney who represents the subject of the request for information. You state that you do not possess information responsive to request items one through five. Other Collin County departments have this information and will respond to these requests for information. You claim that the information responsive to request item six, the entire contents of the prosecution files of Eric Lynn Moore, is excepted from required public disclosure by sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. You also are withholding grand jury records which you contend are records of the judiciary and, therefore, are not subject to the Open Records Act. You have submitted the documents you seek to withhold.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

You received the request for information on July 31, 1997. You did not seek a decision from this office until August 12, 1997. Consequently, you have not met your statutory burden. Gov't Code 552.301. The requested information is therefore presumed public.¹ You have, however, demonstrated that some of the requested information is confidential by law or that other compelling reasons exist such that some of the information should not be made public. Thus, we will examine which documents you must withhold.

You argue that some of the requested records are not subject to disclosure because they are confidential grand jury records. The Open Records Act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information. *Id.*

Furthermore, information obtained pursuant to a grand jury subpoena issued in connection with this prosecution is within the grand jury's constructive possession and is not subject to the act. *Id.* See also Gov't Code § 552.003. However, not all of the submitted documents can be deemed to be within the constructive possession of the grand jury. It appears that the district attorney's investigation began before any information was submitted to the grand jury. Additionally, it does not appear that the grand jury formally requested or directed all of the district attorney's actions in this investigation or prosecution. The fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney. *Id.* We find that you may withhold those documents that are within the constructive possession of the grand jury as outlined above. However, because you do not indicate which documents at issue are within the constructive possession of the grand jury nor are we able to identify them, we must consider whether you have made another compelling demonstration to overcome the presumption of openness for any of the information at issue.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and provides a compelling reason to overcome the presumption of openness. Section 552.101 encompasses both common-law constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate

¹Generally, sections 552.103, 552.108, and 552.111 do not provide a compelling demonstration to overcome the presumption of openness. See Open Records Decision Nos. 586 (1991), 551 (1990), 473 (1987), 470 (1987).

public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members. *See* Open Records Decision No. 470 (1987). We have marked the information that must be withheld because of a right of privacy.

Section 552.101 also encompasses information protected by other statutes. You have submitted to this office several documents which contain information about the jurors in the criminal case at issue. Article 35.29 of the Code of Criminal Procedure provides for the confidentiality of information concerning those who serve or have served as jurors:

Information collected by the court or by a prosecuting attorney during the jury selection process *about a person who serves as a juror*, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona

vide member of the news media acting in such capacity to the court *in which the person is serving or did serve as a juror*. On a showing of good cause, the court shall permit disclosure of the information sought. (Emphasis added).

Access to information about a person who serves as a juror is governed by the provisions of this statute rather than chapter 552 of the Government Code. Therefore, information about those who served as jurors is confidential pursuant to article 35.29 and may be released only as provided by statute.

There also appears to be criminal history record information ("CHRI") within the submitted documents. Such information is confidential and not subject to disclosure. 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 of the Government Code 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, you must withhold any CHRI covered by these federal and state provisions.

We also observe that one of the documents you have submitted to this office is an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Open Records Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Open Records Act and may only be released in compliance with the federal laws and regulations governing the employment verification system. Further, the Employee W-4 form in the submitted documents must be withheld. W-4 forms are excepted by federal law. 26 U.S.C. §6103(a); see Open Records Decision No. 600 (1992).

Finally, we note that there are medical and mental health records within the submitted material that must be withheld. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The documents submitted to this office include medical records, access to which is governed by provisions outside the Open Records Act.

Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records that we have marked may only be released as provided by the MPA. In addition, chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002 provides in relevant part as follows:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Some of the information at issue appears to fall within the purview of this statute. You may release these records only as provided by the statute. Health & Safety Code §§ 611.004, .0045; *see* Open Records Decision No. 565 (1990).

In summary, you must release the requested information except for that information which is confidential by law as outlined above. 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/JDB/ch

Ref: ID# 109799

Enclosures: Marked documents

cc: Ms. Sandra Trent
P.O. Box 820818-262
Dallas, Texas 75382
(w/o enclosures)