



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 8, 1998

Ms. Susan J. Barnett
Assistant District Attorney
Collin County
210 S. McDonald, Suite 324
McKinney, Texas 75069

OR98-0086

Dear Ms. Barnett:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 111470.

The Collin County District Attorney (the "district attorney") received a request for various information related to the following files: State of Texas v. Kerry Recer, Cause No. 001-1169-81, State of Texas v. Kerry Recer, Cause No. 002-46-82, State of Texas v. Kerry Recer, Cause No. 002-82408-92, and State of Texas v. John Hargett, Cause No. 199-80516-96. You assert that the requested information is excepted from required public disclosure based on sections 552.101, 552.103, 552.108, 552.111, 552.117 and 552.130 of the Government Code. We have considered your arguments and reviewed the information submitted.

Section 552.108, the "law enforcement exception," provides:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of [s]ection 552.021 information that is basic information about an arrested person, an arrest, or a crime.

You inform this office that the requested information relating to cause number 199-80516-96, contained in Exhibit D, is part of a felony case for which the defendant was acquitted on May 24, 1997. As this information deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication, we conclude you may withhold the information in Exhibit D pursuant to section 552.108(a)(2).¹ However, we note that "basic information about an arrested person, an arrest, or a crime" is not excepted from required public disclosure. Gov't Code § 552.108(c). Basic information is the type of information that is considered to be front page offense report information even if this information is not actually located on the front page of the offense report. *See generally Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.3d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release basic information from the arrest report contained in Exhibit D.

You assert that some of the documents in Exhibits B and C were prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation, and also reflect the mental impressions or legal reasoning of an attorney representing the state. We have marked the information in Exhibits B and C that may be withheld under section 552.108(a)(3). With regard to the remainder of the information contained in Exhibits B and C, you have not demonstrated how release of this information would interfere with the detection, investigation, or prosecution of crime and thus, this information may not be withheld under section 552.108(a)(1) or section 552.108(b)(1).

You also seek to withhold certain criminal history information contained in Exhibits B and C under section 552.101. Section 552.101 excepts from required public disclosure

¹As we resolve your request for the information in Exhibit D under section 552.108(a)(2), we need not address your arguments for withholding this information under sections 552.101, 552.111, 552.117 and 552.130.

information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. The release of a compilation of offense reports in which an individual is listed as the suspect implicates that individual's common-law right to privacy. *See United States Dept' of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749 (1989), *Houston Chronicle Publishing Co.*, 531 S.W.2d at 179. Accordingly, the district attorney must not release such a compilation. Gov't Code § 552.101; *see also Industrial Found.of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Exhibit B and C also include information that appears to have been generated by the Texas Crime Information Center or the National Crime Information Center. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any criminal history record information generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and,
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

When asserting section 552.103(a), a governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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 (1990) at 4.

You state that the information in Exhibits B and C relates to pending litigation to which the state is a party. We note that section 552.103(b) provides that "[f]or purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court." However, based on the submitted information, there is no indication that there is an active or pending appeal in either cause number 002-46-82 (Exhibit B) or in cause number 002-82408-92 (Exhibit C), which would implicate section 552.103. We therefore conclude that you have failed to meet the requisite showing necessary for section 552.103, and thus, you may not rely on section 552.103 to withhold the information in Exhibits B and C from the requestor.

You also assert that the information in Exhibits B and C is protected under section 552.111 as an interagency or intraagency memorandum. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 (1987) at 14, 298 (1981) at 2. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

Upon review of the information in Exhibits B and C, we conclude that it may not be withheld under section 552.111.

The Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

* * * *

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Upon review of the information contained in Exhibits A, B and C, we agree that you must withhold the information which you have marked to be withheld under section 552.130. In addition, we note other information in Exhibits B and C contains an individual's driver's license number which must also be withheld under section 552.130.

Finally, you assert that article 42.12 of the Code of Criminal Procedure makes confidential the pre-sentence investigation reports contained in Exhibit C. Section 9(j) of article 42.12 provides, in pertinent part:

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.

It does not appear that any of the exceptions to release of the documents contained in Exhibit C are applicable in this instance. We therefore conclude that the district attorney must withhold from disclosure the pre-sentence investigation reports contained in Exhibit C.

We are resolving this matter with this 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 may 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 111470

Enclosures: Submitted documents

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(w/o enclosures)