



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 11, 1998

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

OR98-0428

Dear Ms. Vollman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Texas Open Records Act. Your request was assigned ID# 112662.

The Office of the Harris County District Attorney (the "district attorney") received a request for all of the district attorney's files and records "pertaining to the arrest, investigation, and trial of Gerald Cornelius Eldridge." You indicate that various documents have already been provided to the requestor. You assert that the remaining responsive documents are excepted from disclosure pursuant to section 552.103(a) of the Government Code. You also assert that some of the documents are "work product" and excepted from disclosure pursuant to section 552.108(a)(3), and that other documents are protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with various federal and state statutes. Section 552.101 protects from disclosure information made confidential pursuant to law, including other statutes. Representative samples of the documents at issue were provided to this office.<sup>1</sup>

Some of the information submitted is subject to access provisions outside of the Open Records Act. *See* Open Records Decision No. 598 (1991) at 1 (Open Records Act exceptions are not applicable to medical records). You submitted to this office for review medical

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<sup>1</sup>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 No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

records of some of the victims and the medical and mental health records of the defendant. Access to the submitted medical records is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. These medical records are confidential, with access provided only as outlined under the MPA. Open Records Decision No. 598 (1991).

Access to the submitted mental health records is governed by chapter 611 of the Health and Safety Code. Section 611.002(a) provides:

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. Although these records are generally confidential, sections 611.004 and 611.0045 provide for access to mental health records by certain individuals, including the patient.<sup>2</sup> See Open Records Decision No. 565 (1990).

You submitted to this office photographs and other information that was used and developed in child abuse investigations made under chapter 261 of the Family Code. Subsection (a) of section 261.201 of the Family Code provides:

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<sup>2</sup>We note that the requestor has represented that he is the attorney for the defendant, whose medical and mental health records are at issue.

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with . . . [the Family] code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under . . . chapter [261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under . . . chapter [261 of the Family Code] or in providing services as a result of an investigation.

The records at issue are from the Department of Protective and Regulatory Services (the "department"). Section 261.201(f) provides that the department, upon request and subject to its own rules:

shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect information concerning the reported abuse or neglect that would otherwise be confidential under this section if the department has edited the information to protect the confidentiality of the identity of the person who made the report and any other person whose life or safety may be endangered by the disclosure.

The information at issue is generally confidential, but we note that the department's rules may provide the defendant [who is the father of one of the children who was allegedly abused] access to some of the department's records.

You submitted to this office photographs from the autopsy reports. Section 11 of article 49.25 of the Texas Code of Criminal Procedure provides that autopsy reports, including the full report and detailed findings of an autopsy, are public records. *See* Open Records Decision No. 529 (1989) at 4.<sup>3</sup> These photos must therefore be released.

You also submitted to this office education records of the defendant that you contend are made confidential under the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g. We note that the district attorney is not an educational agency or institution and FERPA is thus inapplicable to these records. We also note that the defendant has an affirmative right of access to his own education records held by a school district. 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). *See also* Open Records Decision No. 431

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<sup>3</sup>You had asserted that the photographs are protected from disclosure in order to protect the common-law privacy of the individuals. We note that common-law privacy would be inapplicable in any event because an individual's privacy rights lapse upon the death of the individual. Open Records Decision No. 271 (1981).

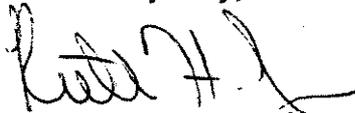
(1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student). We will address your argument that section 552.103(a) is generally applicable to these records and the remaining documents.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *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. Based upon the information provided to this office, we agree that litigation is reasonably anticipated. Our review of the documents shows that the records at issue are related to the litigation at issue. Thus, you have shown the applicability of section 552.103(a) to the records at issue.<sup>4</sup>

In making this determination, we assume that the defendant has not had access to the remaining records. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103(a) also ends once the litigation has concluded.<sup>5</sup> Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 any questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 112662

Enclosures: Submitted documents

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<sup>4</sup>We assume that these documents were not filed with the court. Documents filed with a court are generally considered to be public. See *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992); see also Open Records Decision No. 287 (1981).

<sup>5</sup>We note that some of the information is confidential by law and must be withheld from disclosure even after litigation has concluded.

cc: Mr. Lee Wilson  
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(w/o enclosures)