



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 4, 1998

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

OR98-0585

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# 112953.

The Office of the Harris County District Attorney (the "district attorney") received a request for the district attorney's files pertaining to five named individuals. You submitted to this office for review the records at issue, or a representative sample thereof.¹ You state that the district attorney has released "certain documents" to the requestor, but contend the remaining requested information is excepted from public disclosure pursuant to sections 552.101, 552.103, 552.108 and 552.111 of the Government Code.²

Section 552.103(a) applies to 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

¹In reaching our conclusion here, 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²As you only raise section 552.111 in later correspondence to this office regarding the instant request, the exception was not raised within the ten day deadline and section 552.111 is deemed waived. Open Records Decision No. 515 (1988).

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that 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. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. You inform us that the requestor represents Mr. Allen Wayne Janecka in his Application for Post Conviction Writ of Habeas Corpus. In this instance, you have made the requisite showing that the requested information under Exhibits A, B, C, E, F, and G relates to anticipated litigation for purposes of section 552.103(a).³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the criminal defendant or any of his prior attorneys in this or related criminal litigation is not excepted from disclosure under section 552.103(a), and must be disclosed unless otherwise excepted from public disclosure. Moreover, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You explain that the items under Exhibit H and Exhibit I are not responsive to the request and consequently these items need not be produced to the requestor. We have examined the documents and on their face, without more information, they do not appear to be responsive to the request. Consequently, as the documents are not responsive to the request, they need not be released.

³We caution, however, that some of the information may be confidential by law. Therefore, if the district attorney receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the district attorney should seek a ruling from this office on the other exceptions raised before releasing any of the requested information. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

Next we note that section 552.101 protects from disclosure information made confidential pursuant to law, including other statutes. We have reviewed the samples submitted to this office for review and agree that some of the documents are made confidential by section 552.101, in conjunction with other statutes.

Exhibit D consists of the medical records of an individual. The release of medical records is governed by section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), which provides:

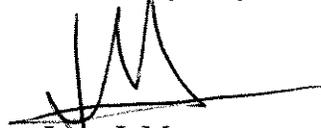
(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(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)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 (1990) at 7. The medical records contained in Exhibit D may be released only in accordance with these provisions of the MPA. Open Records Decision No. 598 (1991).⁴

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

⁴As we resolve the issues in the instant file under sections 552.101 and 552.103 of the Government Code we need not address the remaining exceptions.

JIM/alg

Ref: ID# 112953

Enclosures: Submitted documents

cc: Ms. Rita J. Radostitz
Attorney at Law
P.O. Box 296
Austin, Texas 78767
(w/o enclosures)