



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 17, 1998

Mr. David K. Hudson
Assistant District Attorney
Tarrant County District Attorney
Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201

OR98-1697

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117069.

The Tarrant County District Attorney (the "district attorney") received a request for "all documents and physical evidence concerning any aspect of the investigation and prosecution of Duncan Kyle Walker for [certain] crimes." You state that some of the documents responsive to the request will be made available to the requestor, but assert that the remaining information is excepted from disclosure pursuant to sections 552.101, 52.108, and 552.115 of the Government Code. We have considered your arguments and have reviewed the information submitted.

You informed the requestor that you do not possess some of the requested information. The Texas Open Records Act (the "Act") applies only to information in existence at the time a governmental body receives a request for the information. Open Records Decision Nos. 452 (1986), 342 (1982). The Act does not require a governmental body to create or prepare new information. Open Records Decision Nos. 572 (1990), 342 (1982).

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

(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: . . . (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.

Gov't Code § 552.108. When a governmental body asserts that the information reflects the prosecutor's mental impressions or legal reasoning, we strongly encourage the governmental body, in its request for a ruling, to explain how the information does so. Upon review of the information in Exhibit E, we conclude that most of it was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation, or reflects the mental processes or legal reasoning of an attorney representing the state. However, you have not shown that the telephone messages, which we have marked, are excepted by section 552.108(a)(3). Therefore, except for the telephone messages, we conclude you may withhold Exhibit E under section 552.108(a)(3).

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.2d 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 the basic information under section 552.108(c).

Next, you contend that Exhibits D, F, and G are excepted from public disclosure under section 552.101 of the Government Code in conjunction with several confidentiality statutes. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

You assert that the criminal history records in Exhibit G are protected by state and federal regulations. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history records information ("CHRI") 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 CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI 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 CHRI; 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 Code 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 CHRI 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 CHRI 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. Please note, however, that driving record information is not confidential under chapter 411, Gov't Code § 411.082(2)(B), and must be disclosed.

Section 611.002(a) of the Health and Safety Code makes 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 confidential. Section 611.004(d) provides that “[a] person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information.” We have marked the records in Exhibit D that you must withhold under sections 611.002(a) and 611.004 of the Health and Safety Code.

The remaining records in Exhibit D are neither mental health records nor medical records made confidential by the Medical Practice Act (the “MPA”), article 4495b of Vernon’s Texas Civil Statutes. Article 4495b 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). However, some of the information in the remaining records of Exhibit D is protected by section 552.101 in conjunction with common-law privacy. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have marked the information in Exhibit D that is protected by common-law privacy. The remaining information that is not protected by statute or common-law privacy must be released.

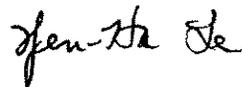
You also assert that the following personal information in Exhibit F is private and excepted from public disclosure under section 552.101: birth dates, home addresses, home telephone numbers, social security numbers, places of employment, work addresses, work telephone numbers, financial information, religious preferences, and marital status information. We have marked the financial information you must withhold under privacy. *See* Open Records Decision Nos. 600 (1992) at 9-12, 545 (1990). We have also marked the inmate’s visitors lists which we conclude are excepted under section 552.101 as information deemed confidential by constitutional law. Open Records Decision No. 430 (1985). The remaining information you seek to withhold is not protected by privacy. *See* Open Records Decision Nos. 600 (1992), 506 (1988), 455 (1987). However, federal law may prohibit

disclosure of the social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the Open Records Act in conjunction with 1990 amendments to the federal Social Security Act, § 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Furthermore, you must withhold the drivers' license numbers contained in Exhibit F pursuant to section 552.130 of the Government Code, which excepts from public disclosure information relating to a driver's license or permit issued by an agency of this state. Lastly, Exhibit F includes a search warrant affidavit. If the search warrant has been executed, then the search warrant affidavit is made public by article 18.01(b) of the Code of Criminal Procedure.

Finally, you assert that the death certificate in Exhibit H is excepted from public disclosure by section 552.115. Section 552.115 provides that a death record maintained by the bureau of vital statistics of the Texas Department of Health is excepted from required public disclosure "except that a death record is public information and available to the public on and after the 25th anniversary of the date on which the record is filed with the bureau of vital statistics or local registration official." Since section 552.115 only applies to a death certificate maintained by the bureau of vital statistics, the district attorney may not withhold the death certificate in its file pursuant to that provision. *See* Open Records Decision No. 338 (1982). This document must be released to the requestor.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 117069

Enclosures: Marked documents

cc: Mr. Jim A. Franklin
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(w/o enclosures)