



February 5, 1999

Mr. Bruce P. Sadler
Assistant District Attorney
Potter County Courts Building
501 Fillmore - Suite 1A
Amarillo, Texas 79101-2449

OR99-0352

Dear Mr. Sadler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 121637.

The Potter County District Attorney (the "district attorney") received a request for "information concerning the investigation and prosecution of Hal Oates in Cause No. 36,858-A and Cause No. 36,839-A." The requestor is an attorney representing the victim and complaining witness in Cause No. 36,839-A. You seek to withhold portions of the requested information from disclosure pursuant to sections 552.101 and .108. We have considered the exceptions you claim and reviewed the documents submitted for our review.

You indicate that the indictments in both cases have been filed as public records with the District Clerk of Potter County, Texas, and you state that you have furnished the requestor with copies of the indictments in which the names of the victims have been redacted. Because the names of the victims of these crimes are already public, they may not be withheld now. Section 552.007 of the Government Code provides:

- (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.
- (b) Public information made available under Subsection (a) must be made available to any person.

Gov't Code § 552.007. *See also Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). (Order entered by criminal court closing files and expunging Jane Doe's true identity

from criminal records (more than three months following criminal trial) could not retroactively abrogate press' right to publish public information properly obtained from open records.) You must release the indictments to the requestor without redactions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Upon reviewing the requested information, we agree that some of the requested information may be confidential pursuant to statute. You argue that three separate statutes, in conjunction with section 552.101, exempt from disclosure portions of the requested information.

First, you argue that section 552.101 of the Government Code in conjunction with sections 411.083 and 411.084 of the Government Code except from disclosure Supplemental Exhibits E and F, containing criminal history record information ("CHRI"). Supplemental Exhibits E and F appear to have been generated by the Texas Crime Information Center ("TCIC") or the National Crime Information Center ("NCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code 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, Gov't. Code § 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 CHRI 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), and 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. In addition, as for CHRI generated within Texas, common-law privacy prohibits the disclosure of such information to anyone other than the subject of the information. *See Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 188 (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 Nos. 616 (1993), 565 (1990). Therefore, all CHRI, Supplemental Exhibits E and F, must be withheld from public disclosure under section 552.101 of the Government Code.

Second, you contend that the victim impact statements in Exhibits A and Supplemental Exhibit G are confidential pursuant to section 508.313 of the Government Code. Section 508.313 of the Government Code provides:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a release; or

(3) a person directly identified in any proposed plan of release for an inmate.

This provision accords confidentiality to the records of the Board of Pardons and Paroles. Open Records Decision No. 190 at 2 (1978); *see also* Attorney General Opinion H-427 (1974); Open Records Decision No. 33 (1974). It does not, however, make confidential records in the custody of the district attorney. Thus, the victim impact statements are not confidential pursuant to section 508.313 of the Government Code.

Third, you assert that subsection 81.006(d) of the Civil Practices and Remedies Code in conjunction with section 552.101 protects Exhibit D and Exhibit F, which contain (1) the report of allegations of sexual exploitation and (2) the report of investigation by the Texas Department of Health in Cause Nos. 96-858-A and 96,839-A. Section 81.006 provides in part:

(a) If a mental health services provider or the employer of a mental health services provider has reasonable cause to suspect that a patient has been the victim of sexual exploitation by a mental health services provider during the course of treatment, . . . the mental health services provider or the employer . . . shall report the alleged conduct . . . to:

(1) the prosecuting attorney in the county in which the alleged sexual exploitation occurred; and

(2) any state licensing board that has responsibility for the mental health services provider's licensing.

(c) A report under this section need contain only the information needed to:

(1) identify the reporter;

(2) identify the alleged victim, unless the alleged victim has requested anonymity; and

(3) express suspicion that sexual exploitation has occurred.

(d) Information in a report is privileged information and is for the exclusive use of the prosecuting attorney or state licensing board that receives the information. A person who receives privileged information 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. . . .

Civ. Prac. & Rem. Code § 81.006. Exhibits D and F contain the report that is required of the mental health services provider or the employer and that is described by section 81.006(c) of the statute. Exhibits D and F also contain a report of investigation performed by the Texas Department of Health and addressed to the Texas State Board of Examiners of Professional Counselors. Only the report required under 81.006(c), which appears in Exhibits D and F in the form of two letters to the District Attorney's office from Quest Hospital dated, March 15, 1999, must be withheld from disclosure pursuant to section 81.006(d) of the Civil Practice and Remedies Code. The Reports of Investigation by the Texas Department of Health in Cause Nos. 96-858-A and 96-839-A, which are part of Exhibits D and F are not subject to section 81.006(d) and may not be withheld from disclosure under section 81.006(d) of the Civil Practice and Remedies Code.

You also assert that the Reports of Investigation prepared by the Texas Department of Health are protected from disclosure by common-law privacy under section 552.101 of the Government Code. And, you argue that section 552.101 applies to exempt from disclosure the Prosecution Submission Form, Warrant Worksheet, and Amarillo Police Department incident reports in Cause No. 36,858-A. We find that portions of the Reports of Investigation and of other requested information are confidential under the common law. Information must be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld on the basis of common-law privacy, if:

- (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and
- (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685. In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that 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. 540 S.W.2d at 683; *see also*, Open Records Decision Nos. 438 (1986) (common law privacy protects identity of a complainant who is victim of serious and embarrassing crime.), 438 (1982), (common law privacy permits withholding of name of every victim of serious sexual offense.)

Section 552.101 of the Government Code in conjunction with common-law privacy exempts from disclosure the following: marked portions of Exhibit C, the written statement of the non-requestor; marked portions of Exhibit D; marked portions of Exhibit E, the Prosecution Submission Form, Warrant Worksheet, and Amarillo Police Department incident reports in Cause No.96,858-A; marked portions of Exhibit F; marked portions of Exhibit G; and marked portions of Supplemental Exhibit G, the victim impact statement of the victim who is not the requestor. You must release the unmarked portions of these exhibits.

The victim impact statement and written statement of the requestor, Exhibits A and B, must be released to the requestor pursuant to section 552.023 of the Government Code. Section 552.023 of the Government Code provides an individual with a limited special right of access to information about that individual. It states in pertinent part:

(a) a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

Subsections (a) and (b) of section 552.023 prevent a governmental body from asserting an individual's own privacy as a reason for withholding records from that individual. *See* Open Records Decision No. 481 (1987) (determining that common-law privacy does not provide basis for withholding information from its subject). However, the individual's right of access to private information about that individual under section 552.023 does not override exceptions to disclosure in the Open Records Act or confidentiality laws protecting some interest other than that individual's privacy. *See* Open Records Decision No. 556 at 2 (1990). Since the only impediment to disclosure of the requestor's statements to the requestor is the requestor's own privacy, and the district attorney cannot use the requestor's privacy as a basis for withholding these documents from her, the documents must be released to the requestor.

In addition to the exceptions from disclosure available under section 552.101, you argue that section 552.108(a)(1) applies to Exhibit C, the written statement of the non-requestor, and that section 552.108(b)(3)(A) exempts from disclosure records and notations prepared by an attorney in anticipation of or in the course of preparing for criminal litigation in Cause Nos. 36,839-A and 36,858-A.

Section 552.108 of the Government Code provides in part:

(a) 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 the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [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.

* * *

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

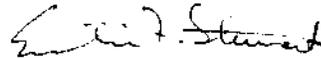
Gov't Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You do not explain how and why section 552.108(a)(1) applies to Exhibit C, the written statement of the non-requestor. You do not explain how the disclosure of Exhibit C would interfere with the detection, investigation, or prosecution of crime when the perpetrator has been sentenced already. Exhibit C may not be withheld from disclosure pursuant to section 552.108(a)(1).

You explain that records and notations in Supplemental Exhibits C and D were prepared by an attorney in anticipation of or in the course of preparing for criminal litigation in these two matters. We agree that the documents marked Supplemental Exhibits C and D contain prosecutors' work product, and are exempt under section 552.108 of the Government Code. Therefore, you may withhold Supplemental Exhibits C and D under section 552.108(b)(3)(A) of the Government Code.

To summarize, you must release to the requestor Exhibit A, Exhibit B, Supplemental Exhibit A, and Supplemental Exhibit B. You may withhold from the requestor in their entirety Supplemental Exhibit C and Supplemental Exhibit D pursuant to section 552.108 of the Government Code. You must withhold Supplemental Exhibit E, Supplemental Exhibit F and the letters from Quest Hospital in Exhibits D and F on the basis of section 552.101. You must release to the requestor, after redacting or withholding the marked information under section 552.101, Exhibit C, Exhibit D, Exhibit E, Exhibit F, Exhibit G, and Supplemental Exhibit G.

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,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 121637

Enclosures: Submitted documents

cc: Mr. William E. Kelly, III
P.O. Box 533
Canyon, Texas 79015
(w/o enclosures)