



February 8, 1999

Mr. John A. Olson  
Assistant County Attorney  
Cameron County Courthouse  
974 East Harrison Street  
Brownsville, Texas 78520

OR99-0394

Dear Mr. Olson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 122109.

The Cameron County Criminal District Attorney's Office received an open records request for information regarding a particular individual tried for capital murder. The requestor seeks the information on behalf of said individual. You indicate that the defendant is currently serving a sentence in the Texas Department of Criminal Justice, Institutional Division, but has not yet exhausted his federal appellate or other post conviction remedies. You contend that the requested information may be withheld from public disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.103(a) of the Government Code 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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that litigation is pending or reasonably anticipated and that the requested information relates to

that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1994, writ ref'd n.r.e.); Open Records Decision No. 551 at 5 (1990). Having carefully considered your arguments and the submitted documents, we do not believe that litigation is realistically contemplated. You may not withhold the requested information under 552.103(a).

Section 552.108 reads in pertinent part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted [ from required public disclosure] if:

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

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(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 the requirements of section 552.021 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 [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

The records at issue pertain to a criminal case in which the defendant was convicted of capital murder and his conviction and death sentence were affirmed by the Court of

Criminal Appeals in 1995. You state that the defendant has not exhausted all appellate and post conviction remedies in state and federal court. We assume that you are releasing all of the "basic information about an arrested person, an arrest, or a crime" that must be disclosed pursuant to Gov't Code § 552.108(c). We also assume that you are releasing documents filed with a court. They are generally considered public and must be released. See *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992); Attorney General Opinion DM-166 (1992). We conclude that you may withhold the records at issue that were prepared by state attorneys for the litigation pursuant to section 552.108.

Next you argue that some of information is confidential by law, either constitutional, statutory or by judicial decision pursuant to section 552.101 of the Government Code. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We conclude that you must withhold information on the jury questionnaires.

Some of the enclosed documents consist of criminal history record information ("CHRI"). Section 552.101 of the Government Code excepts from disclosure information made confidential by law, either constitutional, statutory, or by judicial decision. CHRI obtained from the National Crime Information Center or the Texas Crime Information Center is generally confidential by law. 28 C.F.R. § 20; Gov't Code § 411.083. CHRI that has been compiled by a governmental entity is protected by the common-law right to privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Therefore, you must withhold CHRI from disclosure under section 552.101 of the Government Code as information deemed confidential by law.

Some of the enclosed documents were presented to, subpoenas issued by and testimony given before the grand jury. These documents are confidential by law. Article 20.02(a) of the Code of Criminal Procedure states that "[t]he proceedings of the grand jury shall be secret." Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and excepted from disclosure under section 552.101 of the Government Code. Additionally, in Open Records Decision No. 513 (1988), this office concluded that grand juries are not subject to the Open Records Act, and that records within the constructive possession of grand juries are not public information subject to disclosure under the Open Records Act. See Gov't Code § 552.003. Based upon these considerations, we conclude that you must withhold this information.

Some of the documents consist of medical records. 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) 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 at 7 (1990). These documents may be released only in accordance with these provisions of the MPA. Open Records Decision No. 598 (1991).

We note that the submitted documents include an autopsy report. Autopsy reports prepared by a medical examiner are expressly made public by the Code of Criminal Procedure. Code Crim. Proc. art. 49.25, § 11. Therefore, you must release the autopsy report to the requestor.

Some of the documents are confidential and must be withheld because they involve juvenile conduct that occurred before January 1, 1996. Section 51.14(d) of the Family Code was repealed by the Seventy-fourth Legislature. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2590. Currently, section 58.007 of the Family Code provides that law enforcement records concerning a child must not be publicly disclosed. Family Code Ann. § 58.007(c). However, the amending bill provides that “[c]onduct that occurs before the effective date of this Act is covered by the law in effect at the time the conduct occurred, and the former law is continued in effect for that purpose.” Act of June 2, 1997, 75th Leg., R.S., ch. 1086, § 53(b), 1997 Tex. Sess. Law Serv. 10, 4199. It appears that at the time the conduct occurred here, the applicable law in effect was former Family Code section 51.14 which provides, in pertinent part:

(d) Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records [concerning a child] are not open to public inspection nor may their contents be disclosed to the public.

Act of May 22, 1993, 73d Leg., R.S., ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852, *repealed by* Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 100, 1995 Tex. Gen. Laws 2517, 2590. In Open Records Decision No. 181 at 2 (1977), this office held that former section 51.14(d) excepts police reports which identify juveniles or furnish a basis for their identification. *See also* Open Records Decision No. 394 at 4-5 (1983) (applying former

Fam. Code § 51.14(d) to “police blotter” and related information). You do not indicate that the records at issue here relate to charges for which the juvenile was transferred under section 54.02 of the Family Code to a criminal court for prosecution, or that article 15.27 of the Code of Criminal Procedure applies. Moreover, it does not appear that any of the exceptions to former section 51.14(d) apply to the requestor. *See* Act of May 22, 1993, 73d Leg., R.S., ch. 461, § 3, 1993 Tex. Gen. Laws 1850, 1852 (repealed 1995) (formerly Fam. Code § 51.14(d)(1), (2), (3)). Accordingly, we conclude that you must withhold the records under section 552.101.

We address your claim that the request is “overly broad, unduly burdensome... and the letter is couched in broad and global terms that are subject to ambiguity and vagueness...” as well as “whether the request is pursuant to the authority of Chapter 552 of the Government Code and whether the request is appropriate under the circumstances”. Here, the requestor seeks all documents pertaining to the arrest, investigation, and trial of the defendant for capital murder. “These records should include, but are not limited to, all records and documents pertaining to or arising from: (1) the investigation of the crime; (2) the arrest; (3) the trial of the underlying matter or plea negotiations; (4) the investigation or prosecution of any proceedings after trial, including motions for new trial and direct appeal.” You made a good faith effort to relate the request to information which you hold as illustrated by the information you mailed to us. We conclude that the request is appropriate under the circumstances.

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,

*David Van Brunt Price*  
David Van Brunt Price  
Assistant Attorney General  
Open Records Division

DVP\nc

Ref: ID# 122109

Enclosures: Submitted documents

cc: Ms. Susan L. Karamanian  
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(w/o enclosures)