



November 19, 1999

Ms. Karla R. Baugh
Assistant County Attorney
Lamar County Attorney's Office
Lamar County Courthouse, 4th Floor
119 N. Main St.
Paris, Texas 75460

OR99-3330

Dear Ms. Baugh:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 129721.

The Lamar County Attorney's Office (the "county attorney") received a request for the "attorney work file of [the] . . . prosecution of Jason Jermaine Gordon." You have released certain documents to the requestor, but contend that the remaining requested information is excepted from public disclosure pursuant to sections 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the documents submitted.

Section 552.103(a), as amended by the Seventy-sixth Legislature,¹ reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

¹Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 6, 1999 Tex. Sess. Law Serv. 4500, 4502 (Vernon) (to be codified as an amendment to Gov't Code § 552.103).

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

You assert that "although appeal was waived by Mr. Gordon, writ relief was not." In this instance, we do not believe that you have established that litigation is pending or reasonably anticipated. The county attorney is merely speculating as to any possible litigation. Thus, you may not withhold the requested information under section 552.103.

You next contend that the documents and handwritten notes in the attorney file constitute "work product" that is excepted from public disclosure pursuant to section 552.108. Section 552.108(a)(3) provides that information is excepted from public disclosure under the Public Information Act if it is information that is either (A) prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or (B) if it is information that reflects the mental impressions or legal reasoning of an attorney representing the state. It appears that most of these documents were either created by an attorney representing the state, or by an individual working at the direction of such an attorney. Thus, we agree that the county attorney may withhold most of the documents contained in Exhibit B pursuant to section 552.108(a)(3). However, Exhibit B contains several documents that neither were prepared by a state attorney in anticipation of criminal litigation nor reflect the mental impressions or legal reasoning of a state attorney. The county attorney may not withhold these latter documents under either section 552.108(a)(3) or under the work product aspect of section 552.111. *See* Open Records Decision No. 647 (1996) (governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that material was 1) created for trial or in anticipation of civil litigation and 2) consists of or tends to reveal attorney's mental processes, conclusions and legal theories). We have marked the information that you must release.

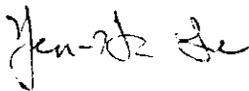
We note, however, that some of the documents contain information excepted from disclosure by section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. One of the documents in

Exhibit B contains criminal history record information ("CHRI"). The county attorney must withhold pursuant to statutory law all criminal history information obtained from the TCIC and 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 CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). 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. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. The district attorney therefore must withhold any criminal history information obtained from the TCIC and NCIC pursuant to section 552.101 of the Government Code. We have marked the document you must withhold.

Section 552.101 of the Government Code also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have marked the information you must withhold under common-law privacy.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ljp

Ref.: ID# 129721

Encl. Marked documents

cc: Mr. Robert L. Clements
Clements & Clements
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Dallas, Texas 75214
(w/o enclosures)