



May 15, 2000

Ms. Gail Kikawa McConnell  
Assistant District Attorney  
9<sup>th</sup> Judicial District  
301 N. Thompson, Suite 106  
Conroe, Texas 77301-2824

OR2000-1912

Dear Ms. McConnell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135211.

The District Attorney's Office for the 9<sup>th</sup> Judicial District (the "district attorney") received two requests for information related to a 1989 police shooting. We have consolidated the requests and will address both in this ruling. You indicate that you have already made available an autopsy report. You claim that the remaining information which you have submitted for our review is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

As a preliminary matter, we address your statement that the district attorney does not maintain the requested personnel record. The personnel record at issue concerns an employee of the Montgomery County Sheriff's Department. Each elected county official is the county's officer of public information and custodian, and, as such, must make public information available for public inspection or copying. Gov't Code §§ 552.201(b), .203(1); *see* Open Records Decision No. 87 (1975). In this instance, the request for the personnel file should be made to the county sheriff or his designee.

You indicate that, pursuant to Open Records Decision No. 513 (1988), you have not submitted to our office grand jury subpoenas related to the police shooting. You additionally inform us that the sheriff's report submitted for our review was "prepared for presentation to the Grand Jury [sic] was considered by the Grand Jury in its deliberations, and would reveal the nature of their deliberations . . ." The grand jury is an extension of the judiciary for purposes of the Public Information Act (the "act"). Open Records Decision Nos. 513 (1988), 433 (1986), 411 (1984), 403, 398 (1983). The records of the judiciary are not subject to the act. *See* Gov't Code § 552.003(B). The act does not apply to information within the

actual or constructive possession of the grand jury. Open Records Decision No. 513 at 3 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession. *Id.* Thus, information in a district attorney's actual possession may be in a grand jury's constructive possession if the information was prepared at the grand jury's direction. Such records are records of the judiciary, and thus, are not subject to the act. However, the fact that information a district attorney collected or prepared was submitted to a grand jury, taken alone, does not mean that the information is in the grand jury's constructive possession. *Id.*

Here, the information obtained pursuant to grand jury subpoena at the direction of the grand jury is not subject to the act as a record of the judiciary. Other information in the report that was not produced as a result of the grand jury's investigation must be withheld from public disclosure based on section 552.101 of the Government Code. Section 552.101 excepts information that is confidential by law, including information made confidential by statute. Article 20.02(a) of the Code of Criminal Procedure states that "[t]he proceedings of the grand jury shall be secret." *See Stern v. State*, 869 S.W.2d 614, 621 (Tex. App.--Houston [14<sup>th</sup> Dist.] 1994, writ denied); *see also* Open Records Decision No. 513 at 4 (1988). Thus, the information not prepared or collected at the grand jury's direction is protected from required public disclosure by section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure, as information that reveals the proceedings or deliberations of the grand jury.

You assert that the remaining submitted information, consisting of a tracking sheet and correspondence, is excepted from disclosure under sections 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Likewise, section 552.108(b)(2) excepts an internal record or notation of a law enforcement agency or prosecutor only in relation to an investigation that did not result in conviction or deferred adjudication. You assert that the remaining information pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) and (b)(2) are applicable. Thus, you may withhold from disclosure the tracking sheet and correspondence.<sup>1</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

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<sup>1</sup>Since we have determined that the correspondence may be withheld from disclosure pursuant to section 552.108, we do not address you other claimed exception for withholding this information.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson  
Assistant Attorney General  
Open Records Division

CGD/ljp

Ref: ID# 135211

Encl. Submitted documents

cc: Ms. Cynthia Calvert  
Observer & Sun Newspaper  
P.O. Box 1389  
Humble, Texas 77347  
(w/o enclosures)