



October 12, 2000

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
5805 North Lamar Blvd
Box 4087
Austin, Texas 78773-0001

OR2000-3947

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 140054.

The Texas Department of Public Safety (the "department") received a request dated July 21, 2000 for all records pertaining to a criminal investigation which resulted in criminal charges being filed against Mr. Lonnie Davis. Previous to this request, on July 10, 2000, the department received a request for the following information from Carol Proctor Davis, Mr. Davis' wife:

I am again seeking the tape recorded conversations of my husband Trooper Lonnie R. Davis and other DPS Special Crimes Agents including attorney Charles Soechting [sic] during the Spring and Summer months of 1997 and specifically May 1997. . . .

. . . .

. . . I am also seeking any tape recordings you have on me as well and the investigative files that correspond with the criminal investigation against me.

Through an inspection of the submitted correspondence, we find that you have released a portion of the requested information to the requestors. You claim, however, that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure. You have

submitted representative samples of the requested information for our review.¹ We have considered the exception you claim and reviewed the submitted information.

You acknowledge that, in regards to the July 10 request, you have failed to timely submit a request for a decision as required by Government Code section 552.301. Subsections 552.301(a) and (b) provide as follows:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

In this case, this office did not receive the request for a decision within the ten business day period mandated by section 552.301(b). Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). Your assertion of the applicability of article 20.02 of the Code of Criminal Procedure provides a compelling reason to overcome the presumption of openness. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

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

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 Act, and that records within the constructive possession of grand juries are not public information subject to disclosure under the Act. *See* Gov't Code § 552.003.

You explain that a portion of the submitted materials was obtained by grand jury subpoena. Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession and is not subject to the Act. *See* ORD 513; Gov't Code § 552.003. Thus, because the documents at issue were obtained pursuant to a grand jury subpoena, they are not subject to the Act.

The remaining information consists of files of the State Bar of Texas which were released under a court order. The court order directs that the information is to be maintained consistent with grand jury rules set forth in article 20.02. You explain that the information was obtained pursuant to the court order for grand jury review. When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *See id.* Thus, we conclude that the information is within the grand jury's constructive possession and, therefore, is not subject to the Act. The court ordered information is also confidential under article 20.02.

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 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/pr

Ref: ID# 140054

Encl. Submitted documents

cc: Mr. Charles Soecting
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