



December 27, 2000

Mr. John Schomburger
Assistant District Attorney
Collin County
210 South McDonald, Suite 324
McKinney, Texas 75069

OR2000-4846

Dear Mr. Schomburger:

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# 142587.

The Collin County District Attorney (the "D.A.") received a request for the following information pertaining to a specified incident that occurred in Wylie, Texas on August 24, 1998 and that resulted in the filing of criminal charges against a named individual:

1. Evidence presented to the Grand Jury.
2. Evidence collected and prepared by the D.A.'s office in prosecuting the named individual, including evidence associated with a specified bond reduction hearing and specified examining trial.
3. A copy of any audiotape or electronic recordings of the bond reduction hearing or the examining trial.

You have submitted for our review information that you claim to be responsive to the request, marked "File #1" and "File #2." We understand you assert that "File #1" is not subject to the Act. You also assert that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.130 of the Government Code.

We have considered your arguments, the exceptions you claim, and we have reviewed the submitted information.

We note at the outset that you have submitted for our review much information that does not constitute evidence in the matter. As items 1 and 2 of the request are clearly framed as only seeking *evidence*, we find that those portions of the submitted information that do not constitute evidence in the matter are not subject to required disclosure because they are not responsive to the request.¹ From our review of the submitted information, it appears that the *evidence* in the matter includes an autopsy report, an offense report with attachments, and a peace officer's accident report. We shall proceed to address this information.

You argue that the request should be denied in its entirety pursuant to the attorney work product privilege under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 647 (1996), this office concluded that section 552.111 encompasses the attorney work product privilege. A governmental body may withhold attorney work product under section 552.111 if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), and (2) that the information consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996).

As to item (1) above, we conclude that the D.A. has demonstrated in this instance that the information at issue was assembled or collected for trial or in anticipation of litigation under the test articulated in *National Tank* test. As to item (2) above, you contend that the request essentially seeks the D.A.'s entire litigation file. In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and that, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. Likewise, in applying the attorney work product privilege in the context of the Act, this office has stated that where a requestor seeks an attorney's entire file regarding particular litigation, such a request may be denied in its entirety under the attorney work product aspect of section 552.111. See Open Records Decision No. 647 at 5 (1996). However, we cannot agree with your contention that the present request for *evidence* is tantamount to a request for the D.A.'s entire litigation file, notwithstanding that fact that you have apparently submitted the entire file for our review. Because the request is not framed as seeking the D.A.'s entire litigation file, and because all of the submitted information is not responsive to the request, we do not agree with your assertion that the holding of *Curry v.*

¹You have not submitted information responsive to item 3 of the request. This decision therefore only addresses the information responsive to items 1 and 2 of the request, which we assume is contained in the files you have submitted to this office.

Walker is implicated in this instance. Therefore, the request may not be denied in its entirety under section 552.111. Moreover, as to the information that is itself responsive, you have not demonstrated how the release of the autopsy report, the offense report, or the peace officer accident report would reveal an attorney's thought processes concerning the prosecution of the case. Therefore, the particular responsive information is not excepted by the attorney work product aspect of section 552.111.

Next, we address your argument that the responsive information is not subject to the Act. You also argue the applicability of section 552.101 of the Act² in conjunction with article 20.02 of the Code of Criminal Procedure. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). We understand you to argue that the information contained in "File #1" falls under the Act's judiciary exclusion. You assert that the information at issue is in the constructive possession of the grand jury because the D.A. holds the information as an agent of the grand jury. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). We find the situation here to be substantially similar to the situation we addressed in Open Records Decision No. 513 (1988). In that decision, a district attorney claimed that all of the information responsive to an open records request and contained in his investigation file was in the constructive possession of the grand jury because the information was held by the district attorney as an agent of the grand jury. The district attorney thus asserted that his entire investigative file was subject to the judiciary exclusion and outside the reach of the Act. In response to this argument, we stated:

Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. Your investigation began before any information was submitted to the grand jury. Moreover, the grand jury did not formally request or direct all of the district attorney's actions in this investigation. See generally Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). *Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney.* Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of [the Act's]

²Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

exceptions, but it is not excluded from the reach of [the Act] by the judiciary exclusion. [emphasis added]

Open Records Decision No. 513 at 3 (1988). As explained above, we believe that only those portions of the responsive information "obtained pursuant to a grand jury subpoena issued in connection with [the] investigation" is within the grand jury's constructive possession and therefore subject to the judiciary exclusion and outside the reach of the Act. The evidence responsive to the request that was not obtained pursuant to a grand jury subpoena is subject to the Act. We have no indication that the grand jury subpoenaed the autopsy report, the offense report, or the peace officer accident report, and we do not believe their release implicates the confidentiality provision at article 20.02(a) of the Code of Criminal Procedure. If the autopsy report, offense report with attachments, or peace officer accident report were subpoenaed by the grand jury, then as provided above, the information is not subject to the Act. Because it appears that this evidence was not collected pursuant to a grand jury subpoena, we proceed to address whether this information is subject to release to the requestor.

Autopsy reports must be disclosed, in that they are expressly made public by the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.25, § 11. The Act's exceptions do not, as a general rule, apply to information expressly made public by other statutes. Open Records Decision No. 525 (1989). Therefore, the autopsy report must be released to the requestor.

The peace officer accident report was evidently completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413. Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.³ In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth

³Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.

However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of article 6701d, V.T.C.S.⁴, which therefore governs the availability of accident report forms completed pursuant to chapter 550 of the Transportation Code. Section 47(b)(1) of article 6701d provides that:

The Department [of Public Safety] or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1) (emphasis added). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.⁵ Under this provision, the Department of Public

⁴ Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. Gov't Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

⁵ We note that the text of amended section 47 of article 6701d is not found in Vernon's Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 1995 Legislature at chapter 894, section 1.

Safety or a law enforcement agency employing a peace officer who made an accident report “is required to release” a copy of an accident report to a person who provides two or more pieces of the information specified by the statute. *Id.* In the situation at hand, the requestor has provided the D.A. with the date of the accident, the name of a person involved in the accident, and the location of the accident. However, because the D.A. is neither the Department of Public Safety nor a law enforcement agency employing a peace officer who made the report, the peace officer accident report contained in the D.A.’s files is not subject to release to the requestor.

As to the offense report and any remaining information that is actually responsive to the request, you additionally assert section 552.108. Section 552.108 excepts from disclosure certain “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime[.]” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977).* Your comments regarding section 552.108 alternatively argue that release of the information would interfere with law enforcement, and that the information reflects the mental impressions or legal reasoning of an attorney representing the state. *See Gov’t Code § 552.108(a)(1), (a)(3)(B), (b)(1), (b)(3)(B).* You do not explain how release of the responsive information would interfere with law enforcement, and we note that both the investigation and prosecution of the matter have evidently concluded. Those portions of the submitted information that appear to have been evidence in the matter do not reveal on their face how release would interfere with law enforcement. As explained above with regard to the section 552.111 assertion, you also have not demonstrated that any of the evidence, by itself, reveals “the mental impressions or legal reasoning of an attorney representing the state.” Because you argue no other aspect of section 552.108, we conclude that the information responsive to the request is not excepted under section 552.108.

You also assert section 552.103, the “litigation exception.” The D.A. has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a 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, 481 (Tex. App.--Austin 1997, no pet.); Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990).* The D.A. must meet both prongs of this test for information to be excepted under 552.103. You have provided no comments in support of the applicability of section 552.103. We therefore conclude that the responsive information is not excepted from disclosure by the litigation exception.

You also assert section 552.101 in conjunction with the common law right to privacy. Common law privacy protects information 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You have marked none of the particular information as excepted by section 552.101 in conjunction with the common law right to privacy. *See* Gov't Code § 552.301(e)(2). We do not find in the responsive documents information that meets both prongs of the above-described test and that therefore must be withheld as implicating an individual's right to privacy.

The social security numbers in the remaining responsive documents may be subject to required withholding under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the D.A. pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.130 of the Act provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers, vehicle identification numbers, and license plate numbers contained in the responsive records under section 552.130.

In summary, information that the D.A. obtained pursuant to a grand jury subpoena issued in connection with the investigation is not subject to the Act and therefore the Act does not require release of this information to the requestor. Much of the submitted information clearly does not constitute evidence in the matter and therefore is not subject to release

because it is not responsive to the request. The responsive information, evidence in the matter, that was not obtained pursuant to a grand jury subpoena, is subject to the Act. Such evidence apparently includes an autopsy report, an offense report with attachments, and a peace officer accident report. The autopsy report must be released in its entirety. The peace officer accident report, contained in the D.A.'s file, is not subject to release to the requestor. The D.A. has not demonstrated that any of the remaining responsive records are excepted from required public disclosure in their entirety. The offense report with attachments is therefore subject to release, but the D.A. must redact from the remaining responsive information Texas driver's license numbers, license plate numbers, and vehicle identification numbers. In addition, the D.A. may be required to redact the social security numbers in the remaining responsive records, as provided above.

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).

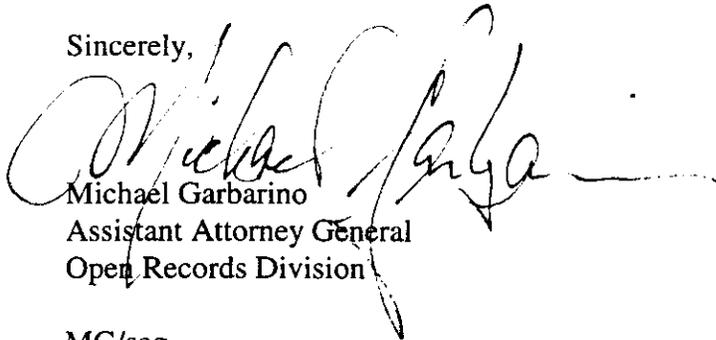
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID#142587

Encl. Submitted documents

cc: Ms. Karen Tracy
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(w/o enclosures)