



February 1, 2001

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

OR2001-0382

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# 143875.

The Collin County District Attorney (the "D.A.") received a request for "all documents" relating to the investigation of a March 24, 1999 burglary at a specified address involving the property of a named individual. You have submitted for our review information responsive to the request, which we have marked as exhibits A, B, and C. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument that responsive information is not subject to the Act. You also argue the applicability of section 552.101 of the Act¹ 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 assert

¹Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

that the information 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] 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 information held by the D.A. that is responsive to the request and that was not obtained pursuant to a grand jury subpoena is subject to the Act. We have no indication that the grand jury subpoenaed any of the information at issue here. Because it appears that this information was not collected pursuant to a grand jury subpoena, we have no basis for concluding that any of the submitted information is subject to the judiciary exclusion and therefore outside the reach of the Act. Accordingly, we next address whether the information is excepted from disclosure.

As to exhibits B and C, you assert section 552.101 in conjunction with section 58.007 of the Family Code. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The information in exhibits B and C constitutes juvenile law enforcement records and pertains to juvenile conduct that occurred after September 1, 1997. We have also marked records in exhibit A that constitute juvenile law enforcement records pertaining to juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the records we have marked in exhibit A as well as the entirety of exhibits B and C are confidential pursuant to section 58.007(c) of the Family Code and must be withheld pursuant to section 552.101 of the Government Code.

With respect to exhibit A, you argue that the request should be denied in its entirety pursuant to the attorney work product privilege and as information subject to section 552.108 because the information "reflects the mental impressions or legal reasoning of an attorney representing the state." Gov't Code § 552.108(a)(3)(B), (b)(3)(B). You also assert the applicability of section 552.111. Section 552.111 excepts from disclosure "an interagency or intra-agency 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 the first prong of the work product test, we conclude that the D.A. has demonstrated in this instance that the information in exhibit A was assembled or collected for trial or in anticipation of litigation under the test articulated in *National Tank*. As to the second prong

of the work product test, 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 under the attorney work product aspect of section 552.111. See Open Records Decision No. 647 at 5 (1996). Here, the request seeks "all documents" in the matter, including "all notes, reports, memoranda, or other documents . . ." We thus agree with your assertion that the request essentially seeks the D.A.'s entire litigation file, thus implicating the attorney work product privilege. Except as otherwise noted below, we therefore conclude that the D.A. may withhold the information contained in exhibit A, pursuant to the attorney work product privilege aspect of section 552.111 of the Government Code.

We note that section 552.022 of the Government Code provides that "information that is also contained in a public court record" is "public information [that is] not excepted from required disclosure under [the Act] unless . . . expressly confidential under other law." Gov't Code § 552.022(a)(17). We do not believe that the attorney work product privilege in the context of the Act constitutes "other law" that makes information "expressly confidential." See Open Records Decision No. 575 at 2 (1990) (section 552.101 of the Act does not encompass the attorney work product privilege). The D.A.'s assertion of section 552.108 on its own behalf is a discretionary exception under the Act and does not constitute other law that makes information expressly confidential.² Exhibit A contains documents that are indicated to have been filed with a court, and that evidently are also contained in a public court record. We conclude that the information in exhibit A that is also contained in a public court record must be released to the requestor pursuant to section 552.022(a)(17). See also *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992).

In summary, the D.A. must withhold exhibits B and C in their entirety as well as the records we have marked in exhibit A pursuant to section 552.101 in conjunction with section 58.007 of the Family Code. The D.A. may withhold exhibit A pursuant to the attorney work product privilege aspect of section 552.111, except that the D.A. must release to the requestor the information in exhibit A that is also contained in a public court record.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

Because we are able to resolve the matter as provided above, we do not address your additional arguments and assertions.

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).

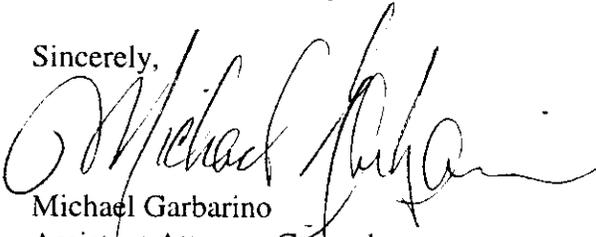
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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# 143875

Encl. Submitted documents

cc: Mr. N. Scott Carpenter
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(w/o enclosures)