



June 12, 2001

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

OR2001-2481

Dear Mr. Schomburger:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148270.

The Collin County District Attorney's Office (the "D.A.") received two requests for the written, audiotaped, or videotaped witness statements made or taken by the Collin County Sheriff's office prior to the D.A.'s involvement in a specified case. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered your claims and reviewed the submitted information.

We first note that much of the submitted information is not responsive to the two requests for information. Therefore, in this ruling, we will only address the required public disclosure of the requested witness statements.

We first address your arguments under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law 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 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. After review of the

requested statements, we find that none of the information is excepted from required public disclosure under common law privacy in conjunction with section 552.101.

Section 552.101 of the Government Code also excepts from disclosure certain information under article 20.02(a) of the Code of Criminal Procedure. Article 20.02 provides that “[t]he proceedings of the grand jury shall be secret.” Information that reveals the deliberations of a grand jury is confidential under article 20.02(a). *See* Open Records Decision No. 513 (1988) (stating that information held by a governmental body that is not within the grand jury’s constructive possession may be withheld from disclosure *if* releasing the information would reveal the grand jury’s deliberations). You do not indicate which of the submitted documents would, if released, reveal the grand jury’s deliberations. We therefore have no basis to conclude that the information at issue reveals the deliberations of a grand jury. Thus, the D.A. has not established that any of the requested information is excepted from disclosure under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

We now turn to your argument under section 552.103. Section 552.103 provides 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The D.A. has the burden of providing relevant facts and documents to show that the section 552.103(a) 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 (1990). The D.A. must meet both prongs of this test for information to be excepted under 552.103(a). You inform us that multiple defendants were convicted by pleas or by trial. You state that the “[defendants] have the ability to litigate writs of habeas corpus to contest the legality of their convictions.” The defendants’ ability to contest their convictions does not establish that litigation is either pending or reasonably

anticipated in this instance. You have therefore not adequately demonstrated the requisite showing for the application of section 552.103 and may not withhold any of the submitted information under section 552.103.

We next address your arguments under 552.108. Section 552.108(b)(1) provides:

An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

This section excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Open Records Decision No. 531 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would interfere with law enforcement or prosecution. Open Records Decision No. 434 (1986). Whether disclosure of particular records will interfere with law enforcement or prosecution must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981). The prosecutions in this case are completed. You do not indicate how release of the information would interfere with law enforcement or prosecution. Therefore, we have no basis to conclude that any of the submitted information may be withheld under section 552.108(b)(1).

In addition, you state that the submitted documents “reflect the mental impressions and legal reasoning of an attorney representing the state.” Section 552.108(b)(3) provides in part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if:

...

- (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

In this instance, the requestors are asking for information that was created before the D.A.’s involvement in the case. Because the requested information was created before the D.A.’s involvement and you have not otherwise shown how the statements reflect the prosecutor’s

mental impressions or legal reasoning, section 552.108(b)(3) is not applicable in this instance and therefore none of the requested information may be withheld under section 552.108(b)(3).

We next address your argument 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. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615. After review of the submitted information, we do not find any information that consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of the D.A. Therefore, none of the submitted information may be withheld under section 552.111.

In summary, because none of the cited exceptions are applicable to the requested information in this instance, all of the requested information must be released to the requestors. 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,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/DKB/seg

Ref: ID# 148270

Encl. Submitted documents

cc: Mr. Robert D. Burns III
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(w/o enclosures)