



September 6, 2001

Ms. Ann-Marie P. Sheely  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2001-3964

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151650.

The Travis County District Attorney's Office (the "district attorney") received a request for thirty-one categories of information regarding the Austin Police Department and a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You inform us that the district attorney has no information which is responsive to categories 11 - 21, 23 and 25 of the request<sup>2</sup>, and that categories 5, 7 and 9 request

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<sup>1</sup>We 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.

<sup>2</sup>The Public Information Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988).

information in a format that the district attorney's office does not maintain.<sup>3</sup> In addition, you maintain that categories 6, 8 and 10 are a request for research, and not a request for open records.<sup>4</sup> You further inform us that the district attorney will release "all court-filed records and other records previously released as press releases or in response to prior open records requests" which are responsive to the request.

Further, you state that the requested information was previously the subject of a ruling from this office in Open Records Letter No. 2001-1039 (2001). To the extent that the elements of law, fact, and circumstances have not changed from those existing when the prior rulings issued, the district attorney may rely on the previous ruling regarding that same information. Open Records Decision No. 673 (2001). To the extent that there has been a change in the elements of law, fact, or circumstances since the issuance of those rulings, we will address your claimed exceptions.

We first address your representation that the submitted information includes records relating to grand jury proceedings. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act, so that records 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). 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 the Act. *See* ORD 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *Id.* In this instance, you represent to this office that one group of responsive records was prepared by or for the prosecuting attorneys for presentation to the grand jury and "was, in fact, presented to and reviewed by grand jurors." Based on your representations and our review of the records in question, we conclude that they are in the constructive possession of the grand jury and therefore are not subject to disclosure under chapter 552 of the Government Code.

Next, we must consider whether the remaining records must be released under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

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<sup>3</sup>The Act does not require a governmental body to prepare new information in response to a request. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>4</sup>A governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 at 8 (1990). However, the Act does not require a governmental body to prepare answers to questions or to do legal research. *See* Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations), 555 at 102 (1990) (considering request for answers to fact questions).

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). You indicate that all of the remaining records pertain to a completed report or investigation. Those records thus are subject to required disclosure under section 552.022(a)(1), except to the extent that they are expressly confidential under other law or excepted from disclosure under section 552.108. Sections 552.103 and 552.111 are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived; as such, they are not "other law" that makes information expressly confidential for the purposes of section 552.022(a)(1). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 470 at 7 (1987) (governmental body has discretion to release information protected by statutory predecessor to section 552.111).

You claim, however, that all of the records encompassed by section 552.022(a)(1) are excepted from disclosure under section 552.108, the "law enforcement exception." Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(3) it is information that:

(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.

Gov't Code § 552.108(a)(3). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information.

See Gov't Code § 552.301(a)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You represent to this office that all of the records at issue were gathered, organized, and prepared at the direction of the district attorney as a review of pending homicide cases. Based on these representations and our review of the records in question, we conclude that they may be withheld from the requestor under section 552.108(a)(3), except for the one document which you have marked for release. As we are able to make this determination under section 552.108, we need not address your other claimed exceptions.

In summary, the records in the constructive possession of the grand jury are not subject to disclosure under chapter 552 of the Government Code. With the exception of the one document that the district attorney has marked for release, the remainder of the submitted documents may be withheld from public disclosure under section 552.108.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 151650

Enc. Submitted documents

c: Mr. Jeffery Mundy  
Brobeck  
4801 Plaza on the Lake  
Austin, Texas 78745  
(w/o enclosures)