



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 16, 2003

Mr. Brian L. Rose
Assistant General Counsel
Harris County
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2003-4131

Dear Mr. Rose:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182806.

The Office of the Harris County District Attorney (the "district attorney") received a written request for "the following [seven] cases." The requestor specifically seeks the "offense report[,] photographs[, and] videotapes" from each of the listed cases. You state that information responsive to this request is maintained in the district attorney's files of four criminal defendants, each of whom has been convicted and has filed a notice of appeal. You have submitted to this office information that you represent to be a "representative sample" of the records you seek to withhold pursuant to sections 552.101, 552.103, and 552.108 of the Government Code.

We note at the outset that you have not submitted to this office for review any offense report, photograph, or videotape responsive to the request. Rather, you have submitted records from one of the requested prosecution case files consisting solely of 1) a list of witnesses and a description of the topics on which those witnesses were expected to testify, 2) handwritten notes regarding possible jury members, 3) criminal history information of the criminal defendant, and 4) a grand jury subpoena and the subpoenaed medical records. These categories of information cannot be deemed to be "representative" of the prosecution case files as a whole, nor can these records be deemed "representative" of the requested offense reports, photographs, or videotapes. Accordingly, this ruling addresses the exceptions you raised only with respect to the types of information you submitted to this office. This ruling should not be considered to reach any other types of records coming within the scope of the

request, which the district attorney must now release to the requestor, to the extent the information exists, if he has not already done so. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

We first address your contention that the contents of Exhibit F, which consists of a grand jury subpoena and the documents that were produced to the district attorney in response to that subpoena, are made confidential under article 20.02 of the Code of Criminal Procedure and thus must be withheld from the public pursuant to section 552.101 of the Government Code.¹ Article 20.02 provides for the secrecy of grand jury proceedings. However, this office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Public Information Act (the "Act"). *See* Open Records Decision No. 513 (1988); *see also* Gov't Code § 552.003(B) (excluding "judiciary" from definition of "governmental body" subject to chapter 552). 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 provisions of the Act. *Id.* at 3. We therefore conclude that the submitted grand jury subpoena and the documents gathered pursuant to that subpoena are in the custody of the district attorney as agent of the grand jury and are not subject to disclosure under the Act. *Id.* at 4. The district attorney may therefore withhold Exhibit F in its entirety.

We now address the extent to which the remaining submitted information may be withheld from the public. You contend that the contents of Exhibit D, which consists of 1) a list of witnesses and a description of the topics on which those witnesses were expected to testify, and 2) handwritten notes regarding possible jury members, constitute "work product" under section 552.108 of the Government Code. Section 552.108 provides in pertinent 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 [and]

¹Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(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 required 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.

Gov't Code § 552.108(a)(3), (b)(3). After reviewing the contents of Exhibit D, we conclude that those documents were either "prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation" or reflect "the mental impressions or legal reasoning of an attorney representing the state." Consequently, the district attorney may withhold the contents of Exhibit D in their entirety as "work product" under section 552.108 of the Government Code.

You next contend that the documents you submitted to this office as Exhibit E are excepted from public disclosure pursuant to section 552.101 of the Government Code because the documents consist of "criminal records obtained from the Department of Public Safety." These records consist of criminal history record information ("CHRI") obtained from either the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F. Consequently, the district attorney must withhold Exhibit E in its entirety pursuant to section 552.101 in accordance with chapter 411 of the Government Code.

In summary, the submitted grand jury subpoena and the subpoenaed medical records are not subject to the provisions of the Act and thus may be withheld in their entirety. The district attorney may withhold pursuant to section 552.108 the list of witnesses and a description of

the topics on which those witnesses were expected to testify, and the handwritten notes regarding possible jury members. The submitted criminal history information of the criminal defendant must be withheld in accordance with chapter 411 of the Government Code and federal law. All other records coming within the scope of the records request must be released.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/RWP/sdk

Ref: ID# 182806

Enc: Submitted documents

c: Mr. Clarence Walker
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(w/o enclosures)