



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2003

Mr. Michael R. Little
District Attorney
Chambers and Liberty Counties
P.O. Box 4008
Liberty, Texas 77575

OR2003-5988

Dear Mr. Little:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186551.

The Office of the District Attorney for Liberty and Chambers Counties (the "district attorney") received a request for "[t]ranscripts or audio tapes of grand jury hearings related to [five named individuals]." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the records at issue indicate that they may be records of the grand jury. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act (the "Act"), so that records that are within their actual or constructive possession are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision No. 513 (1988); Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of Act). 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 chapter 552. Open Records Decision No. 513 at 3. Information that is not so held or

¹We assume that the 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.

maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* However, “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.” *Id.*

In this instance, we are unable to determine whether the district attorney maintains the requested information on its own behalf or as an agent of the grand jury. Therefore, to the extent the requested information is maintained by the district attorney for or on behalf of the grand jury, it is in the custody of the district attorney as agent of the grand jury and not subject to disclosure under the Act. To the extent that it is not so maintained, it is subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which these documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses confidentiality provisions such as article 20.02 of the Code of Criminal Procedure, which provides for secrecy of grand jury proceedings. This article provides:

(a) The proceedings of the grand jury shall be secret.

(b) A grand juror, bailiff, interpreter, stenographer or person operating an electronic recording device, or person preparing a typewritten transcription of a stenographic or electronic recording who discloses anything transpiring before the grand jury, regardless of whether the thing transpiring is recorded, in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, imprisonment not exceeding thirty days, or both such fine and imprisonment.

(c) A disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney’s duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney’s duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person’s duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those

permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

(d) The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.

(e) A petition for disclosure under Subsection (d) must be filed in the district court in which the case is pending. The defendant must also file a copy of the petition with the attorney representing the state, the parties to the judicial proceeding, and any other persons required by the court to receive a copy of the petition. All persons receiving a petition under this subsection are entitled to appear before the court. The court shall provide interested parties with an opportunity to appear and present arguments for the continuation of or end to the requirement of secrecy.

(f) A person who receives information under Subsection (d) or (e) and discloses that information is subject to punishment for contempt in the same manner as a person who violates Subsection (b).

(g) The attorney representing the state may not disclose anything transpiring before the grand jury except as permitted by Subsections (c), (d), and (e).

Code Crim. Proc. art. 20.02.

Thus, article 20.02 establishes a general rule that information that reveals the proceedings of the grand jury is confidential and prohibits an attorney representing the state from releasing such information except in accordance with the article's enumerated release provisions. Code Crim. Proc. art. 20.02(a), (g). The article provides for a limited release of this confidential information to defendants who petition the court and show a particularized need for the information in preparation for or connection with a judicial proceeding. Code Crim. Proc. art. 20.02(d), (e). This release is further limited by the requirement that the defendant who receives confidential information maintain the information's confidentiality or be found to be in contempt of court. Code Crim. Proc. art. 20.02(f). Thus, a "release" under article 20.02(d) does not alter the inherent confidentiality of the information at issue.

Having reviewed the submitted sample audio tapes, we agree that the requested information reveals the proceedings of the grand jury. Thus, it is confidential under article 20.02, and the district attorney is prohibited from releasing it except in accordance with the release provisions enumerated in that article, none of which apply to this requestor. *See* Code Crim.

Proc. art. 20.02(a), (g). Therefore, to the extent these records are subject to the Act, they are confidential under article 20.02(a), and must be withheld pursuant to section 552.101.

In summary, to the extent that the district attorney maintains the requested information for or on behalf of the grand jury, the information is in the custody of the district attorney as an agent of the grand jury and is not subject to disclosure under the Act. To the extent that the information is not so maintained, it is subject to the Act and must be withheld under section 552.101 as information made confidential by law.

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).

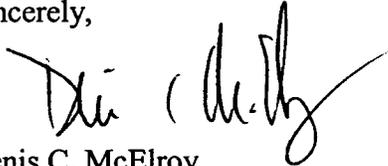
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 186551

Enc. Submitted documents

c: Mr. Matthew Cook
The Baytown Sun
1301 Memorial Drive
Baytown, Texas 77520
(w/o enclosures)