



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 24, 2003

Ms. Julie Joe  
Assistant County Attorney  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767

OR2003-6723

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188191.

The Travis County Attorney's Office (the "county attorney") received a request for "any and all of the documents and materials related to a County Attorney investigation or a park-and-ride contract between Capital Metro and Praise Tabernacle church in 1997." You state that you will release some information to the requestor and assert that other requested information does not constitute public information subject to disclosure under the Public Information Act (the "Act"). In addition, you contend that portions of the requested information are excepted from disclosure under sections 552.107, 552.108, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted information.<sup>1</sup>

Initially, we address your contention that some of the requested information is not subject to the Act. This office has concluded that grand juries are not governmental bodies that are subject to 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

---

<sup>1</sup>We 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.

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 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.*

You state that "[i]n this case, the Criminal Law Division of the Travis County Attorney's Office acted at the direction of the grand jury as its agent in preparing or collecting some of the responsive information." Based on your representations and our review of the submitted representative sample records, we agree that this type of information is maintained by the county attorney for or on behalf of the grand jury, is in the custody of the county attorney as agent of the grand jury, and is not subject to disclosure under the Act.

We turn now to your arguments regarding the remaining information, which the county attorney does not maintain as an agent of the grand jury. Initially, we note that this information includes a completed evaluation that is subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov't Code § 552.022(a)(1). You do not claim that this information is excepted under section 552.108. Instead, you assert that it may be withheld pursuant to section 552.107. This section is a discretionary exception and is not "other law" for purposes of section 552.022. Open Records Decision No. 676 at 5 (2002); *see also* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege), 522 at 4 (1989) (discretionary exceptions in general).

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when the attorney-client privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503. ORD 676 at 5-6. As you claim that this information is privileged, we will consider whether it is excepted under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the layer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information). Having considered your representations and reviewed the evaluation at issue, we conclude that you have established that this document reflects a privileged attorney-client communication that is protected under Rule 503 and may be withheld.

We turn now to your other arguments regarding the information that is not subject to section 552.022. You assert that portions of this information are excepted under section 552.107(1), which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of

providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7.

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your arguments and the remaining information you wish to withhold under this exception, we agree that these documents constitute or reflect privileged attorney-client communications and may be withheld under section 552.107(1).

You contend that other requested information may be withheld pursuant to section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that the information you seek to withhold pursuant to this exception “pertains to a closed criminal investigation that did not result in conviction or deferred adjudication.” Based on your

representation and our review of these records, we agree that section 552.108(a)(2) is applicable to such information.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the city must release the types of information that are considered to be front page report information, including a detailed description of the offense, regardless of whether such information is actually located on the front page of an offense report. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Although section 552.108(a)(2) authorizes the county attorney to withhold the remainder of this type of information, it may choose to release all or part of it that is not otherwise confidential by law. See Gov't Code § 552.007.

You also note that the submitted information includes certain account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. Thus, pursuant to this section, the county attorney must withhold the types of account numbers we have marked.

In summary, information that the county attorney maintains for or on behalf of the grand jury is in the custody of the county attorney as an agent of the grand jury and is not subject to disclosure under the Act. Information that is subject to section 552.022 and that reflects an attorney-client communication may be withheld under Rule 503. Attorney-client communications not subject to section 552.022 may be withheld under section 552.107(1). Other than basic information, records pertaining to the closed criminal investigation may be withheld pursuant to section 552.108(a)(2). We have marked the types of account numbers that the county attorney must withhold under with section 552.136. The remaining requested information 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).

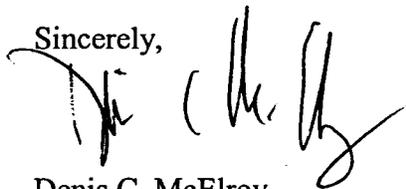
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 188191

Enc. Submitted documents

c: Mr. Michael Serazio  
Houston Press  
1621 Milam, Suite 100  
Houston, Texas 77002  
(w/o enclosures)