



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 27, 2004

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

OR2004-4376

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# 201342.

The Travis County District Attorney's Office (the "district attorney") received a request for "all written or electronic correspondence, including but not limited to phone records, emails, letters, faxes, documents and any other available materials, to or from the [district attorney] and any employee of a broadcast, print, Internet or cable media outlet or wire service, in relation to [the district attorney's] investigation of the 2002 elections." The requestor further requested "all budget records that detail how much [the district attorney's] office is spending in taxpayer dollars to further this investigation." You state that the district attorney will release some information to the requestor and assert that other submitted information does not constitute public information subject to disclosure under the Public Information Act (the "Act"), or is not responsive to the request and therefore need not be released to the requestor. For the information that is responsive and subject to the Act, you contend that portions of this information are excepted from disclosure under sections 552.101, 552.107, 552.108, 552.117, 552.136, and 552.137 of the Government Code.<sup>1</sup> We have considered your

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<sup>1</sup>We note you also raised sections 552.103 and 552.111 of the Government Code as exceptions to disclosure of the requested information, but made no arguments in support of these exceptions. See Gov't Code § 552.301. Therefore, this ruling does not address whether any of the submitted information is excepted under sections 552.103 or 552.111.

arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also considered comments submitted to this office by a third party. *See Gov't Code § 552.304.*

First, we address your assertion that portions of the submitted information are not responsive to the request and need not be released. You state that portions of the submitted voice mail message logs are not responsive to the request because they do not reflect calls made to or received from the media regarding an investigation of the 2002 elections. You state that the remainder of the information in these voice mail logs has been released to the requestor. We agree that the remaining information in the voice mail logs that is not responsive to the request need not be released, and therefore, we do not address your arguments under sections 552.101 and 552.108 for this information. You similarly indicate that only certain portions of a submitted telephone bill are responsive as reflecting calls made to a member of the media. We therefore find that the remaining information in the telephone bill at issue is not responsive to the request, and therefore, we need not address your argument for this information under section 552.101 in conjunction with section 261.201 of the Family Code. The remaining information in this bill, which we have marked, must be released to the requestor as you raise no arguments against disclosure of this information. Finally, we note you have submitted a portion of a telephone bill and represent that "this call is possibly responsive but [the district attorney] is not sure because there is no other record pertaining to this call other than perhaps a telephone message that has already been released." This representation raises a fact issue this office is unable to resolve. To the extent the submitted document reflects a call "to or from the [district attorney] and any employee of a broadcast, print, Internet or cable media outlet or wire service, in relation to [the district attorney's] investigation of the 2002 elections," such information must be released to the requestor as you have raised no exceptions to disclosure of this information. To the extent the submitted document does not reflect such a responsive communication, it need not be released to the requestor as it is not responsive to the request.

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<sup>2</sup>We assume that the sample of records submitted to this office is truly representative of the requested records at issue. *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. In this regard, we note that a third party has raised a question as to whether the sample of information submitted to this office for our review is in fact representative of the requested records as a whole. Upon review of the request and of the sample of information provided to this office, and upon consideration of the fact that the district attorney informs us that he has released a portion of the information responsive to the request, we are unable to conclude that the submitted sample is not truly representative of the remaining requested information as a whole. However, to the extent the district attorney holds responsive information that it has not released, and that is not represented by the submitted samples, the district attorney has failed to comply with section 552.301(e)(1)(D) of the Government Code. Accordingly, any such information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *See Gov't Code § 552.302.*

Next, we address your contention that some of the requested information is not public information subject to the Act. First, you assert that personal cellular telephone bills of prosecutors working within the district attorney's office do not constitute public information subject to release under the Act. The Act applies to "public information," which is defined under section 552.002 as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also id.* § 552.021. You explain that occasionally, prosecutors use their personal cellular phones to make or receive calls relating to the business of the district attorney. However, you explain that the cellular telephone bills "are listed in these prosecutors' names, are sent directly to the homes of these prosecutors, and are personally paid for by these prosecutors. These personal cellular telephone bills are never submitted to the district attorney, nor does the district attorney own or have a right of access to these personal cellular phone bills."<sup>3</sup> Based on your representations, we agree that the cellular telephone bills at issue are not "public information" under the Act because the bills are not collected, assembled, or maintained by or for the district attorney. *See id.* § 552.002. As we are able to make this determination, we need not address your arguments concerning sections 552.101, 552.108, 552.117, and 552.136 for this information.

Next, we address your question as to whether certain responsive information consists of grand jury records that are 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 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 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

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<sup>3</sup>Further, you inform us that the representative sample of cellular telephone bills was obtained from an employee of the district attorney's office solely for the purpose of submitting such bills to this office for our review with respect to the public information request.

mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney." *Id.*

Based on your representations and our review of the submitted representative sample records, consisting of invoices prepared and submitted by the stenographer for a grand jury for the preparation of transcripts of witness testimony before the grand jury, we agree that this type of information is in the custody of the district attorney as agent of the grand jury and is not subject to the Act. *See* Code Crim. Proc. Arts. 20.011-20.02.<sup>4</sup>

We turn now to your arguments regarding the remaining information that is responsive to the request. Initially, we note that the submitted documents include attorney fee bills that are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

- (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:

.....

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<sup>4</sup>The third party asserts that the district attorney has improperly revealed confidential grand jury information pertaining to a particular criminal investigation in violation of the Texas Disciplinary Rules of Professional Conduct. *See also* Code Crim. Proc. article 20.02(a) (providing that "[t]he proceedings of the grand jury shall be secret"). The third party urges this office to find that, due to this alleged improper release of information, the district attorney may not now withhold any such information and must release it to the requestor. The district attorney responds that "the [district attorney] has not improperly released any information to any member of the media or any member of the public." Thus, we are faced with a factual dispute between the district attorney and the third party. We do not resolve disputes of fact in the ruling process. *See* Attorney General Opinions GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). Even if the third party's assertions were true, information in the custody of the district attorney as an agent of the grand jury is not subject to the Act, as such information is considered to be records of the judiciary. *See* Gov't Code §§ 552.003(1)(B). For this reason, this office has no authority to rule that the district attorney must release such grand jury information. However, section 552.007 of the Government Code may prohibit the selective disclosure of any information subject to this ruling that is not in the possession of the district attorney as an agent of the grand jury. Gov't Code § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Act's exceptions to disclosure are waived unless the information is deemed confidential under the Act. *Open Records Decision Nos. 490 (1988), 400 (1983)*. Although protection for information covered by the Act's permissive exceptions, such as section 552.108, can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See Open Records Decision Nos. 490, 400*. If it is established that the district attorney previously released such information to a member or members of the public, the district attorney cannot withhold such information under one of the Act's permissive exceptions. However, if the district attorney previously released confidential information, such information remains confidential and must not be released pursuant to section 552.007.

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. Section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 676 at 6 (2002) (information subject to section 552.022 may not be withheld under section 552.107); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district attorney may not withhold the requested attorney fee bills under section 552.107 of the Government Code.

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).

You inform us that the information you seek to withhold within the submitted fee bills constitutes and documents attorney-client communications that were made for the purpose of facilitating the rendition of professional legal services by an outside law firm to the district attorney regarding certain aspects of a law enforcement investigation. Upon review of your representations and the information at issue, we agree that the fee bills contain information that reflects privileged attorney-client communications protected under Rule 503. We have marked the information that may be withheld from the requestor.

We also note that you have highlighted certain account numbers within the submitted fee bills which you assert are excepted from disclosure under section 552.136 of the Government Code. Section 552.136, which is considered "other law" for purposes of section 552.022, 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. We agree that the district attorney must withhold the account numbers it has marked within the submitted attorney fee bills pursuant to section 552.136. We have also marked an additional account number within the submitted information that must be withheld under section 552.136.

We turn now to your other arguments regarding the information that is not subject to section 552.022. You assert that the cellular telephone number of the Travis County District Attorney is excepted from disclosure under section 552.108(a)(1). Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime."

Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In Open Records Decision No. 506 (1988), this office concluded that cellular phone numbers for individuals with specific law enforcement responsibilities may be withheld under section 552.108. You argue that release of the district attorney's cell phone number would interfere with law enforcement and prosecution by interfering with the district attorney's ability to quickly reach people when carrying out his law enforcement duties in situations that require immediate attention. After reviewing your assertions, we agree that you may withhold the district attorney's cellular telephone number under section 552.108 of the Government Code.

You also assert that an e-mail address within the submitted information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides in relevant part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

....

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. We find that the e-mail address you have marked is excepted from disclosure under section 552.137(a). Accordingly, we conclude that, unless consent to release has been granted, the district attorney must withhold this e-mail address pursuant to section 552.137(a) of the Government Code.

Finally, you note that a portion of the responsive information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish

copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, information that is not responsive to the request for information need not be released to the requestor and this ruling does not reach such information. Personal cellular telephone bills of prosecutors working within the district attorney's office do not constitute public information subject to release under the Act, and need not be released to the requestor. Information that the district attorney maintains for or on behalf of the grand jury is in the custody of the district attorney as an agent of the grand jury and is not subject to the Act. Information that is subject to section 552.022 and that reflects an attorney-client communication may be withheld under Rule 503. Account numbers that the district attorney has marked, as well as an additional account number we have marked, must be withheld under section 552.136. The district attorney's cell phone number may be withheld under section 552.108. The e-mail address the district attorney has marked must be withheld under section 552.137. The remaining requested information must be released to the requestor. In releasing information that is protected by copyright, the district attorney must comply with copyright 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,



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Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 201342

Enc. Submitted documents

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