



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

OR2004-4377

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# 202809.

The Travis County District Attorney's Office (the "district attorney") received a request for 83 categories of information relating to "contacts between [the district attorney's] office and certain persons or entities outside of [the district attorney's] office concerning the 2002 state election cycle or [the Texas Association of Business, BACPAC, and their employees or consultants] from 2001 to the present." You state that the district attorney 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"), 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 exempted from disclosure under sections 552.101, 552.107, 552.108, 552.117, and 552.137 of the Government Code.¹ We have considered your arguments and

¹We note you also raised sections 552.103, 552.111, and 552.136 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 exempted under sections 552.103, 552.111, and 552.136.

reviewed the submitted representative sample of information.² We have also considered arguments submitted to this office by the requestor. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

First, we note your assertion that a portion of the information responsive to the request is the subject to a previous ruling from this office, Open Records Letter No. 2004-4376 (2004), and that you are only seeking a ruling on responsive information not subject to the previous request. If the facts and circumstances surrounding our previous ruling have not changed, and to the extent that the present request seeks information on which we have previously ruled, the district attorney may continue to follow our prior ruling with regard to this information. See Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling).

Next, 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 and that the green highlighted information in the voice mail message logs has been released to the requestor. We agree that the information in the voice mail logs that is not responsive to the request need not be released,

²We 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 the requestor 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, and has not submitted for our review certain grand jury information, see discussion *infra*, pp. 4-5, 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 non-grand jury 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.

and therefore, we do not address your arguments under sections 552.101 and 552.108 for this information.³

Next, we address your argument that 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 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 in this case, the district attorney acted at the direction of one or more grand juries as their agent in preparing or collecting some of the responsive information. You have enclosed an affidavit from the director of the district attorney's Public Integrity Unit attesting to the fact that some of the requested information is in the possession of the district attorney as custodian for grand juries and that such information was prepared and collected in the context of grand jury investigations. You further state that this affidavit has been presented to this office in lieu of the actual information prepared or collected by the district attorney as the grand juries' agent. *See* Open Records Decision No. 513 at 4-5 (providing that, while district attorney need not submit copies of information obtained pursuant to a grand jury subpoena or information collected at the direction of the grand jury, governmental body should submit affidavit stating that requested information was prepared or collected at the express direction of the grand jury). Based on your representations and the submitted affidavit, we agree that information in the custody of the district attorney as agent of the grand jury is not subject to the Act.⁴

³You also state that certain information highlighted in blue in the voice mail logs is excepted from disclosure under sections 552.101 and 552.108. We will address your arguments for this information later in this ruling.

⁴We note in this regard the requestor's assertion 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 requestor 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." The district attorney further asserts

We turn now to your arguments regarding the remaining information that is responsive to the request. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

In addition, this office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review of the information you have marked as confidential under common-law privacy, we agree that some of this information is private, and therefore, this information must be withheld under section 552.101. As we are able to make this determination, we need not address your argument under section 552.117 for the portion of

that "all records released to members of the media have also been released to the requestor," and "the [district attorney] is not seeking to protect any information that has been released to the media." Thus, we are faced with a factual dispute between the district attorney and the requestor. 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 requestor'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.

information you seek to withhold under both exceptions. We find, however, that a portion of the information you seek to withhold under privacy is not intimate or embarrassing, and thus, it is not confidential under common-law privacy. We have marked this information, which must be released to the requestor.

Section 552.101 also encompasses confidentiality provisions such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

You state that a portion of the submitted information, which you have marked, pertains to a case in which a juvenile was alleged to have engaged in delinquent conduct, and that other marked information pertains to juvenile suspects or defendants. We thus find that the information at issue involves juvenile conduct that, we assume, occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, the information you have marked as confidential pursuant to section 58.007(c) of the Family Code must be withheld from the requestor under section 552.101 of the Government Code.

Section 552.108, the "law enforcement exception," provides as follows:

(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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or

(4) 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.

(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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(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.

(c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Section 552.108 is applicable to certain specific types of law enforcement information. Section 552.108(a)(1) is applicable if the release of the information would interfere with a pending criminal investigation or prosecution. *See*

Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state.

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). You state that the information you have marked under section 552.108(a)(1) pertains to ongoing criminal investigations being conducted by the district attorney. On the basis of this assertion and our review of the information at issue, we conclude that the district attorney may withhold this information under section 552.108(a)(1), to include the information highlighted in blue in the submitted voice mail log. You also assert that portions of the submitted information that you have marked are excepted from disclosure under section 552.108(a)(2) as this information relates to closed criminal investigations that did not result in conviction or deferred adjudication. On that basis, we conclude that you may withhold this information under section 552.108(a)(2). As we are able to make these determinations under section 552.108, we need not address your arguments for this information under sections 552.101, 552.107, 552.108(a)(4), 552.108(b)(3), and 552.137.

Finally, we address your argument under section 552.117 for the information that is not excepted from disclosure under section 552.101 and common-law privacy. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the district attorney may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district attorney must withhold the information you have marked under section 552.117(a)(1). The district attorney may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

In summary, information in the custody of the district attorney as agent of the grand jury is not subject to the Act. To the extent that the present request seeks information on which we have previously ruled, and if the facts and circumstances surrounding our previous ruling

have not changed, the district attorney may continue to follow Open Records Letter No. 2004-4376 (2004) with regard to this information. Information that is not responsive to the request need not be released to the requestor and this ruling does not reach such information. The district attorney must withhold the information it has marked pursuant to section 552.101 in conjunction with common-law privacy, except where we have marked otherwise. The district attorney must withhold the information it has marked pursuant to section 552.101 in conjunction section 58.007 of the Family Code. The district attorney may withhold the information it has marked pursuant to sections 552.108(a)(1) and 552.108(a)(2). The district attorney must withhold the information it has marked pursuant to section 552.117 if the employees to whom the information pertains made a timely election to keep such information confidential. The remaining submitted information must be released to the requestor.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 201342

Enc. Submitted documents

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