



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2004

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County - Civil Section
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2004-5647

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204833.

The Bexar County Sheriff's Office (the "sheriff") received a request for information relating to the investigation of Mr. David Harris. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that this office previously ruled on the public availability of information concerning the investigation of Mr. Harris held by the sheriff in Open Records Letter No. 2004-2821 (2004), issued April 7, 2004. Pursuant to that ruling, the sheriff was required to withhold some responsive information and required to release the remaining information. You do not indicate that the relevant facts and circumstances have changed since the issuance of the prior ruling. Accordingly, to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter No. 2004-2821, we determine the sheriff must continue to follow that ruling as a previous determination with respect to such 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 Public

Information Act (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). Consequently, this ruling only addresses the submitted information to the extent such information is not identical to the information at issue in Open Records Letter No. 2004-2821.

Next, before addressing your claimed exceptions for the information at issue, we note your representation that the sheriff obtained a portion of the information pursuant to a grand jury subpoena. This office has concluded that a grand jury, for purposes of the Act, is part of the judiciary and is therefore not subject to the Act. *See* Gov't Code § 552.003 ("governmental body" does not include the judiciary). Further, this office has concluded that records that are within the constructive possession of a grand jury are not public information subject to disclosure under the Act. Open Records Decision No. 513 (1988). 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 Act. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.* You indicate that the information submitted as Exhibits B, C, D, E, and F was obtained by the sheriff as the agent of the grand jury. Based on your representations and our review, we determine that this information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act.¹ However, we will address the public availability of the remaining information at issue, submitted as Exhibit G, to the extent such information is not identical to the information at issue in Open Records Letter No. 2004-2821.

In considering the applicability of your claimed exceptions to the information in Exhibit G, we must first address the sheriff's obligations under section 552.301 of the Government Code. As you acknowledge, the sheriff has not sought an open records decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(a), (b). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest exists when some other source of law makes the information confidential or when third party interests are at stake. *See* Open Records Decision No. 630 (1994).

You contend that the information in Exhibit G is excepted under section 552.103, section 552.108, and pursuant to the attorney work product privilege encompassed by section 552.111. Sections 552.103, 552.108, and 552.111 are discretionary exceptions to

¹ Based on this finding, we need not reach your claimed exceptions with respect to this information.

disclosure that protect a governmental body's interests. As such, they may be waived by the governmental body. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege encompassed by section 552.111), 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). While section 552.108 can provide a compelling reason to withhold information sufficient to overcome the presumption of openness under section 552.302 in certain circumstances, you have not demonstrated a compelling reason to withhold the submitted information pursuant to section 552.108 in this instance. *See* Open Records Decision No. 586 at 3 (1991) (need of a governmental body, other than governmental body that has failed to timely seek an open records decision, may, in appropriate circumstances, be a compelling reason to withhold information pursuant to statutory predecessor to section 552.108). Furthermore, you have not demonstrated a compelling reason to withhold the submitted information pursuant to the attorney work product privilege. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege may be compelling reason to overcome presumption of openness if it is shown that the release of the information would harm a third party). Consequently, we determine that the sheriff may not withhold any portion of the submitted information pursuant to the attorney work product privilege or sections 552.103, 552.108, or 552.111 of the Government Code. We therefore determine the sheriff must release Exhibit G to the requestor.

In summary, to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter No. 2004-2821, the sheriff must continue to follow that ruling as a previous determination with respect to such information. In the event the submitted information is not identical to the information subject to the previous determination in Open Records Letter No. 2004-2821, we make the following determination: the information submitted as Exhibits B, C, D, E, and F is in the constructive possession of the grand jury and is not subject to the Act. Accordingly, the sheriff need not release this information in response to the present request. The information submitted as Exhibit G 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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 204833

Enc: Submitted documents

c: Ms. Deborah L. Leach
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(w/o enclosures)