



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 23, 2004

Ms. Johanna H. Kubalak  
Assistant District Attorney  
County of Dallas  
133 N. Industrial Blvd., LB-19  
Dallas, Texas 75207-4399

OR2004-7178

Dear Ms. Kubalak:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208206.

The Dallas County District Attorney's Office (the "DA") received a request for "all files, records, and any other documents in the possession of the [DA]" pertaining to a named individual in cause numbers F86-85320, F87-94285, F87-79988, F99-36815, and F87-78952.<sup>1</sup> You state that you do not have any information pertaining to the named individual and one of the listed cause numbers.<sup>2</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we address your contention that some of the information at issue constitutes records of the grand jury. 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

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<sup>1</sup>With regard to the questions raised by the requestor in his request for information, we note that the Public Information Act (the "Act") does not require a governmental body to answer questions or perform legal research. See Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to attempt to relate a request to information it holds. See Open Records Decision No. 561 at 8 (1990).

<sup>2</sup>We note that the Act does not require the DA to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

<sup>3</sup>We assume that the representative 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.

possession are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision Nos. 513 (1988); 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 the Act. Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act 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 DA maintains the requested information on its own behalf or as an agent of the grand jury. Therefore, to the extent the submitted information is maintained by the DA for or on behalf of the grand jury, it is in the custody of the DA 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 the submitted information is maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for this information.

We also note that the submitted information contains arrest warrants and supporting affidavits. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Code Crim. Proc. art. 15.26 (emphasis added). This provision makes the submitted arrest warrants and supporting affidavits presented to the magistrate in support of the issuance of the warrant expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the DA must release the submitted arrest warrants and supporting affidavits, which we have marked.

We next note that the submitted information consists of a completed investigation made of, for, or by the DA. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. Although you claim that this information is excepted from disclosure under sections 552.103

and 552.111 of the Government Code, we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Act that do not constitute “other law” for purposes of section 552.022.<sup>4</sup> Accordingly, we conclude that the district attorney may not withhold any portion of this particular information under section 552.103 or 552.111. We note that the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. 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).

We note that the Texas Rules of Civil Procedure only apply to “actions of a civil nature.” See TEX. R. CIV. P. 2. In this instance, you inform us that the requested information pertains to a pending federal habeas proceeding, which, you state, is a civil matter to which the federal rules of civil procedure apply. For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204.

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<sup>4</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

In this case, you note that the requestor is seeking “access to [the DA’s] entire capital murder litigation file.” We think it clear that the submitted litigation file was prepared in anticipation of and in preparation for the criminal litigation and prosecution. Although it can arguably be anticipated in any criminal matter that a habeas proceeding may ensue, we find a defendant’s ability to contest his or her conviction does not establish that a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance a habeas proceeding would ensue, nor can we agree that the submitted materials were prepared in preparation for this proceeding. Accordingly, because you indicate that the submitted information was prepared for the criminal litigation and prosecution, not the civil habeas proceeding, we find that Rule 192.5 does not apply in this instance. *See* TEX. R. CIV. P. 2.

However, because information subject to section 552.022(a)(1) may also be withheld as provided by section 552.108 of the Government Code, we will address your section 552.108 assertion for the submitted information. Section 552.108 states in pertinent part:

(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:

....

(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 [and]

(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:

....

(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 [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (b)(3), (c). When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to section 552.108 and the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in the file necessarily reveals prosecutor's mental impressions or legal reasoning). In this instance, we agree that the request encompasses the DA's entire case file. *Curry* thus provides that the release of the information would reveal the DA's mental impressions or legal reasoning. Accordingly, the DA may withhold most of the remaining submitted information pursuant to subsections 552.108(a)(4)(B) and (b)(3)(B) of the Government Code.

We note, however, that section 552.108 does not except from disclosure 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 Company 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). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. See Open Records Decision No. 127 at 4 (1976). This information must be released, whether or not the information is found on the front page of an offense report. Although section 552.108(a)(1) authorizes the DA to withhold the remaining information from disclosure, the DA may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007.

In summary, to the extent the submitted information is maintained by the DA for or on behalf of the grand jury, it is in the custody of the DA 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. In the event the information is not maintained by the DA for or on behalf of the grand jury, we conclude that the DA must release the submitted arrest warrants and affidavits to the requestor, as well as basic information about the incident in question. The remaining information may be withheld pursuant to section 552.108 of the Government Code.<sup>5</sup>

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

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<sup>5</sup>Because our ruling is dispositive, we need not address your remaining arguments.

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

SIS/krl

Ref: ID# 208206

Enc. Submitted documents

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(w/o enclosures)