



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2004

Ms. Melissa L. Barloco
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002-1799

OR2004-8467

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210384.

The Harris County Sheriff's Office (the "sheriff") received two requests for information related to a named deputy, including his application for employment, any use of force reports, and completed internal affairs investigations. You state that you have released a portion of the requested information. You claim, however, that the remaining requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information constitutes grand jury records that are not subject to the Public Information Act (the "Act"). This office has concluded that grand juries are part of the judiciary and are, thus, not subject to the Act. *See* Gov't Code § 552.003 ("governmental body" does not include judiciary). Records that are within the constructive possession of grand juries are not public information that is subject to disclosure under the Act. *See* 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.* We note that a portion of the submitted information, which we have marked, was obtained by the sheriff through the use of a grand jury subpoena at the direction of the grand jury. Thus, we understand that the

sheriff is holding these marked records as an agent of the grand jury. Accordingly, we conclude that this particular marked information is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act.

We now turn to your argument for the remaining submitted information. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to that information. *See* Gov’t Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). We note that most of the remaining submitted information relates to administrative internal affairs investigations that were conducted by the sheriff. One of the requestors contends, and we agree, that section 552.108 is generally not applicable to information relating to administrative investigations that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). However, there is an exception to this general rule. It is possible for an administrative investigation that did not result in a criminal investigation or prosecution to be used during another separate criminal investigation or prosecution as background or supporting information. In that case, section 552.108 would apply to the administrative investigation because it is being used as part of the pending criminal investigation or prosecution. *See* Gov’t Code § 552.108 (law enforcement exception is applicable to all documents that relate to the investigation).

In this instance, the sheriff informs us that the submitted administrative investigations also relate to a pending criminal investigation by the Harris County District Attorney’s Office. The sheriff has submitted an affidavit from Assistant District Attorney Edward D. Porter, in which he states that the deputy at issue is being criminally investigated for shooting someone. He informs us that all police officer involved shootings are required to be presented to a grand jury. Mr. Porter further states that as part of his investigation into the current shooting, he will review any previous internal investigations where the deputy at issue had allegedly used excessive force. He contends that the release of these submitted administrative investigations to the public would interfere with his pending criminal investigation and requests that the sheriff be permitted to withhold the submitted information at this time under section 552.108(a)(1).

Based on the sheriff’s representations, the representations of the district attorney, and our review of the information at issue, we find that section 552.108(a)(1) is applicable to the remaining submitted information. *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); *see also* Open Records Decision Nos. 372 at 4 (1983) (statutory predecessor to section 552.108 may be invoked by any proper custodian of information relating to incident allegedly involving criminal conduct that remains under active investigation or prosecution), 350 at 3-4 (1982) (if complaint against police officer that may result in criminal charges is under active investigation, information may be withheld under statutory predecessor during pendency of investigation); *cf. City of Fort Worth v. Cornyn*, 86 S.W.3d 320, (Tex. App.—Austin 2002, no pet.); Open Records Decision No. 562 at 10 (1990). We note that the submitted administrative investigations do not contain any basic information that relates to the pending criminal investigation of the shooting. Accordingly, the sheriff may withhold the remaining submitted information in its entirety pursuant to section 552.108 of the Government Code.

In summary, a portion of the submitted information, which we have marked, is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act pursuant to section 552.003 of the Government Code. The remaining submitted information may be withheld under section 552.108(a)(1) of the Government Code.

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jev

Ref: ID# 210384

Enc. Submitted documents

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