



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2004

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2004-8709

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210977.

The Tarrant County District Attorney's Office (the "district attorney") received a request for all information pertaining to a named individual in the possession of the district attorney or the Tarrant County Sheriff's Office. You state you have released some of the requested information, but claim that some of the information is not subject to the Act and that some is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you assert that the submitted records contain information pertaining to a grand jury proceeding. The judiciary is expressly excluded from the requirements of the Public Information Act (the "Act"). Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. Open Records Decision No. 411 (1984). Further, records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion) (defining limits of judiciary exclusion). The fact that information collected or prepared by the district attorney is submitted to the grand jury does not necessarily mean that the information is in the grand jury's constructive

possession when the same information is also held by the district attorney in the district attorney's own capacity. Thus, to the extent that the information at issue is in the custody of the district attorney as agent of the grand jury, it is not subject to disclosure under the Act.

Next, we note that the submitted information contains arrest warrants and arrest warrant affidavits. Article 15.26 of the Code of Criminal Procedure provides in relevant part the following:

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.

Code Crim. Proc. art. 15.26(a). Based on this provision, the submitted arrest warrants and arrest warrant affidavits are deemed public. The exceptions found in the Act generally do not apply to information that is made public by other statutes. *See* Open Records Division No. 525 (1989) (statutory predecessor). Therefore, you must release the submitted arrest warrants and arrest warrant affidavits to the requestor.

The submitted information also contains search warrant affidavits. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc. art. 18.01(b). Because the search warrants have been executed, the district attorney must release their supporting affidavits. *See* Open Records Division No. 525 (1989) (exceptions in Act do not apply to information made public by statute).

Next, we note that the remaining information constitutes the district attorney's completed investigation pertaining to a homicide. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is either excepted under section 552.108 of the Government Code or expressly confidential under other law. You assert that this information may be withheld under sections 552.103 and 552.111 of the Government Code. These sections are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that makes information confidential for the purposes of section 552.022. *See 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); Open Records Decision No. 677 at 8 (2002) (section 552.111 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, this information may not be withheld on the basis of section 552.103 or 552.111. You assert that the information at issue constitutes attorney work product that is privileged under Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure are "other law" for purposes of section 552.022(a)(1); however, these rules only apply to "actions of a civil nature." Tex.

R. Civ. P. 2; *In re Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Civil Procedure and Rules of Evidence are other law for purposes of section 552.022). Accordingly, the attorney work product privilege found in Rule 192.5 does not apply to the criminal information at issue here. Therefore, you may not withhold any of the remaining information under Rule 192.5. Because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will address your section 552.108 assertion.

Section 552.108 provides the following:

(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.

Gov't Code § 552.108(a)(1). 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 id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate that information pertaining to the homicide investigation also pertains to the charge of "Tampering/Fabricating Physical Evidence" that is currently pending against another individual. Based on this representation, we conclude that the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *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).

However, section 552.108 is inapplicable to 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*. Thus, with the exception of the basic front page offense and arrest information, you may withhold the remaining information from disclosure based on section 552.108(a)(1). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. *Id.* § 552.007.

We conclude the following: (1) to the extent that the information at issue is in the custody of the district attorney as agent of the grand jury, it is not subject to disclosure under the Act; (2) the arrest warrants and arrest warrant affidavits must be released pursuant to article 15.26 of the Code of Criminal Procedure; (3) the search warrant affidavits must be released pursuant to article 18.01 of the Code of Criminal Procedure; and (4) except for the basic information that must be released under section 552.108(c), the district attorney

may withhold the remaining information at issue 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).

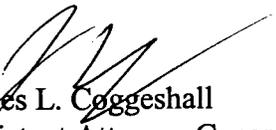
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 210977

Enc. Submitted documents

c: Mr. Dan Malone
Fort Worth Weekly
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Fort Worth, Texas 76102
(w/o enclosures)