



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 23, 2005

Ms. Sara Lynn Hayes  
Victim Assistance Coordinator  
Twenty-First Judicial District  
100 West Buck, Suite 407  
Caldwell, Texas 77836

OR2005-04443

Dear Ms. Hayes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224666.

The Washington County District Attorney (the "district attorney") received a request for information pertaining to a specified DPS/Texas Ranger investigation. You claim that the requested formation is not subject to disclosure under the Act pursuant to section 552.003(1)(B) of the Government Code. Alternatively, you claim that the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the requested information constitutes records of the grand jury. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See Gov't Code §§ 552.003(1)(B) (Act's definition of governmental body does not include judiciary), .0035 (access to information collected, assembled, or maintained by or for judiciary is governed by rules adopted by Supreme Court of Texas or other applicable laws and rules); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act).* When an individual or an 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* 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 the public only if a specific exception to disclosure is shown to be 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 district attorney maintains the requested information on its own behalf or as an agent of the grand jury. Therefore, to the extent that the submitted information is in the custody of the district attorney as an agent of the grand jury, it is not subject to disclosure under the Act. The rest of this decision is not applicable to such information. However, to the extent that the information is not in the custody of the district attorney as an agent of the grand jury, it is subject to disclosure under the Act and the ruling below.

Next, we address the district attorney’s obligations under section 552.301 of the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state that the district attorney received the present request for information on February 28, 2005. The district attorney’s request for a decision from this office was postmarked on March 15, 2005. Consequently, the district attorney failed to comply with the requirements of section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.108 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). *But see* Open Records Decision No. 586 at 2-3 (1991) (claim of another governmental body under statutory predecessor to section 552.108 can provide compelling reason for non-disclosure). The district attorney’s claim under section 552.108 is not a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). Therefore, the district attorney may not withhold any of the submitted information under section 552.108. However, section 552.101 of the Government Code can provide a

compelling reason to overcome this presumption; therefore, we will address your arguments under this exception.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information made confidential by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we agree that the submitted information consists of reports, records, and working papers used or developed in an investigation made under chapter 261 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the submitted information is confidential in its entirety pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, the district attorney must withhold this information under section 552.101 of the Government Code on that basis.<sup>1</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>1</sup> We note, however, that if the Texas Department of Family and Protective Services has created a file on this alleged abuse, the children’s parents may have the statutory right to review that file. *See* Fam. Code § 261.201(g); Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 (“A reference in law to the Department of Protective and Regulatory Service means the Department of Family and Protective Services.”).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/seg

Ref: ID# 224666

Enc. Submitted documents

c: Mr. Larry C. Wiese  
Attorney at Law  
9727 F.M. 1371  
Chappell Hill, Texas 77426  
(w/o enclosures)