



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 19, 2005

Ms. Amy Columbus  
Assistant District Attorney  
Dallas County  
133 North Industrial Boulevard, LB-19  
Dallas, Texas 75207-4399

OR2005-08524

Dear Ms. Columbus:

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# 232457.

The Dallas County District Attorney's Office (the "DA") received a request for (1) "one record that will identify [a particular] Assistant [DA,]" (2) "the disciplinary history of that Assistant [DA,]" (3) "a copy of the indictment or record . . . submitted to the grand jury in seeking [a specified] indictment[,]" and (4) a record that establishes that the matter was not billed by the grand jury on or about September 2, 2003." You state that the DA does not have any documents responsive to item two of the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that some of the requested information constitutes records of the judiciary and is, therefore, not subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered your claims and reviewed the submitted information. We have also considered comments submitted by the requestor. *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 you did not submit information responsive to item one of the request for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You assert that "the information in Exhibit B is maintained by the Dallas County District Clerk (the "clerk") in its role as agent of the judiciary. . . ." We note that the Act only applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). We also note that the Act does not apply to records of the judiciary. See Gov't Code § 552.003(1)(B). Information that is "collected, assembled or maintained by or for the judiciary" is not subject to the Act. Gov't Code § 552.0035(a); see also Tex. Sup. Ct. R. 12. Consequently, records of the judiciary need not be released under the Act. See Attorney General Opinion DM-166 (1992). But see *Benavides v. Lee*, 665 S.W.2d 151 (September 19, 2005(Tex. App.--San Antonio 1983, no writ); Open Records Decision No. 646 (1996) at 4 ("function that a governmental entity performs determines whether the entity falls within the judiciary exception to the . . . Act.").

In Open Records Decision No. 646 (1996), this office concluded that a supervision and corrections department, established by criminal district judges under chapter 76 of the Government Code, was a governmental body subject to the Act, and not a part of the judiciary. Open Records Decision No. 646 at 3-4 (1996). The Attorney General concluded that administrative records, such as personnel files and other records reflecting the day-to-day management of the department, were subject to the Act. *Id.* at 5. On the other hand, this office concluded that specific records pertaining to judicial proceedings, such as information about individuals on probation and subject to the direct supervision of a court, were not subject to the Act because such records were held on behalf of the judiciary. *Id.*

You inform this office that the "information in Exhibit B is stored on Dallas County's [the "county's"] mainframe computer system." You state that the public is able to access the information at issue through "public terminals in the district and county clerks' offices, dial up access, and online record searches . . . through [the clerk's] website."<sup>1</sup> Thus, we understand you to indicate that the information in Exhibit B is maintained by the clerk for the judiciary. Therefore, we conclude that the information in Exhibit B is information collected, assembled, or maintained by or for the judiciary. Consequently, the public

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<sup>1</sup>Texas courts have long recognized a common law right to copy and inspect certain judicial records. Attorney General Opinion DM-166 at 2-3 (1992) (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision Nos. 618 (1993), 25 (1974).

availability of this information is not governed by the Act and is instead governed by “rules adopted by the Supreme Court of Texas or by other applicable law and rules” pertaining to information “collected, assembled, or maintained by or for the judiciary.” *See* Gov’t Code § 552.0035(a), Open Records Open Records Decision No. 671 (1992).

You assert that the information in Exhibits E and F is in the constructive possession of the grand jury because the DA holds the information as an agent of the grand jury. *See* Gov’t Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). 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). We find the situation here to be substantially similar to the situation we addressed in Open Records Decision No. 513 (1988). In that decision, a district attorney claimed that all of the information responsive to an open records request and contained in his investigation file was in the constructive possession of the grand jury because the information was held by the district attorney as an agent of the grand jury. The district attorney thus asserted that his entire investigative file was subject to the judiciary exclusion and outside the reach of the Act. In response to this argument, we stated:

Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. Your investigation began before any information was submitted to the grand jury. Moreover, the grand jury did not formally request or direct all of the district attorney’s actions in this investigation. *See generally* Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). *Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury’s constructive possession. On the other hand, 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.* Information not produced as a result of the grand jury’s investigation may be protected from disclosure under one of [the Act’s] exceptions, but it is not excluded from the reach of [the Act] by the judiciary exclusion. [emphasis added]

Open Records Decision No. 513 at 3 (1988). As explained above, we believe that only those portions of the responsive information “obtained pursuant to a grand jury subpoena issued in connection with [the] investigation” are within the grand jury’s constructive possession and therefore subject to the judiciary exclusion and outside the reach of the Act. The information responsive to the request that was not obtained pursuant to a grand jury subpoena is subject to the Act. We have no indication that the grand jury subpoenaed the

offense report or the draft indictment, and we do not believe their release implicates the confidentiality provision at article 20.02(a) of the Code of Criminal Procedure (“The proceedings of the grand jury shall be secret.”). If the offense report and draft indictment were subpoenaed by the grand jury, then as provided above, the information is not subject to the Act. Because it appears that this information was not collected pursuant to a grand jury subpoena, we proceed to address whether this information is subject to release to the requestor.

We next note that the information in Exhibits C through F is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). In this instance, the information at issue consists of a completed investigation made of, for, or by a governmental body. Section 552.111 of the Government Code is a discretionary exception to public disclosure that protect a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived). As such, section 552.111 of the Government Code is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the DA may not withhold any of the information at issue under section 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 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, 337 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the remaining information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue.

The DA also asserts, however, that the information at issue is excepted from disclosure under section 552.108 of the Government Code. Because information that is subject to section 552.022(a)(1) may be withheld under section 552.108, we will address your claims under this exception. Furthermore, because section 552.101 of the Government Code is “other law” for purposes of section 552.022, we also will address your claim under this exception.

Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.[.]” A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See* Gov’t Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706

(Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) is applicable only if the information in question relates to a concluded case that did not result in a conviction or a deferred adjudication. You state that the information in Exhibits C through F relates to a case “that concluded in a grand jury’s decision to ‘no bill’ the suspect, which is a final result other than conviction or deferred adjudication.” Based on your representation, we agree that section 552.108(a)(2) is applicable to the information at issue.

However, 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). See also Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, the DA may withhold the information in Exhibits C through F under section 552.108(a)(2).

In summary, the information in Exhibit B is information collected, assembled, or maintained by or for the judiciary, and is therefore not subject to the Act. If Exhibits E and F are held by the DA as agent of the grand jury, those records are not subject to the Act. With the exception of basic information, which must be released, the DA may withhold Exhibits C through F under section 552.108(a)(2) of the Government Code.<sup>2</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 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

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<sup>2</sup>As our ruling is dispositive, we do not address your remaining claims.

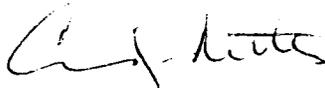
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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); *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 Office of the Attorney General 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. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jpa

Ref: ID# 232457

Enc. Submitted documents

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(w/o enclosures)