



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 3, 2005

Ms. Amy Columbus  
Assistant District Attorney  
Criminal District Attorney, Dallas County  
Frank Crowley Courts Bldg.  
133 N. Industrial Blvd., LB-19  
Dallas, Texas 75207-4399

OR2005-09941

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# 235656.

The Dallas County District Attorney's Office (the "district attorney") received a request for all arrest warrants and supporting affidavits, any indictments sought, and any other arrest records related to two specified cause numbers. You state that you have released portions of the requested information. You also state that the prosecution file related to cause number MB87-01387 has been destroyed pursuant to your office's records retention and destruction policy.<sup>1</sup> You argue that the submitted information is not subject to the Act. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111 and 552.130 of the Government Code. We have considered your arguments and reviewed the submitted information.

You assert that the information in Exhibits E through G is in the constructive possession of the grand jury because the district attorney 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

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<sup>1</sup>We note that 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(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 reports 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 reports 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 F and G 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 district attorney 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 district attorney 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 sections 552.101 and 552.130 of the Government Code is “other law” for purposes of section 552.022, we also will address your claims under these exceptions for the information subject to section 552.022 and the remaining information.

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that the requested information contained in Exhibits E through G pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable.

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). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). Thus, with the exception of the basic front page offense and arrest information, you may withhold the submitted information in Exhibits E through G from disclosure based on section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.<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 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).

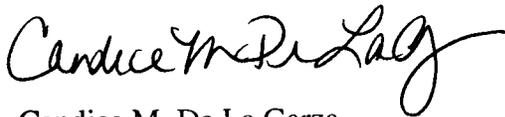
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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments.

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,



Candice M. De La Garza  
Assistant Attorney General  
Open Records Division

CMD/krl

Ref: ID# 235656

Enc. Submitted documents

c: S. Paul Jordan  
1519 Arcady Lane  
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(w/o enclosures)