



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2005

Mr. Russel W. Malm
Midland County Attorney
Midland County
200 West Wall Street, Suite 104
Midland, Texas 79701

OR2005-11530

Dear Mr. Malm:

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# 238683.

The Midland County District Attorney's Office (the "district attorney") received a request for the entire criminal file for a specified case together with transcribed testimony of the case in front of the Midland grand jury. You state you will make some of the information available to the requestor but claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim the submitted grand jury testimony is confidential under article 20.02(a) of the Code of Criminal Procedure. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." The transcript

of the testimony of grand jury witnesses is part of the record of the grand jury proceeding.¹ *See Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see also* Open Records Decision No. 398 (1983). Therefore, we agree that the submitted grand jury testimony is confidential under article 20.02(a) of the Code of Criminal Procedure and it must be withheld under section 552.101 of the Government Code. *See also* Open Records Decision No. 513 at 4 (1988) (stating that information should be withheld if its release would reveal grand jury's deliberations).

You claim the remaining submitted information is excepted by section 552.108(a)(4) of the Government Code. This sections provides in relevant part:

(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:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

....

¹Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (c). 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 that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state the remaining submitted information was prepared by the district attorney in the course of preparing for the prosecution of the case at issue. You assert this information reflects the mental impressions or legal reasoning of the attorneys representing the state in the case. Based on your representations and our review of the submitted information, we find that section 552.108(a)(4) is applicable to the information at issue and it may be withheld on that basis.

In summary, the submitted grand jury testimony must be withheld under section 552.101 of the Government Code in conjunction with article 20.02(a) of the Code of Criminal Procedure. The remaining submitted information may be withheld under section 552.108 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, 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).

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 238683

Enc. Submitted documents

c: Mr. H. Thomas Hirsch
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(w/o enclosures)