



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2006

Mr. Bob D. Odom
Assistant District Attorney
27th Judicial District of Texas
P.O. Box 540
Belton, Texas 76513-0540

OR2006-00996

Dear Mr. Odom:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 241122.

The District Attorney for the 27th Judicial District (the "district attorney") received a request for the prosecutor's file pertaining to a named individual. You state that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, 552.132, 552.1325, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released)

Initially, we note that some of the submitted information relates to grand jury proceedings. This office has concluded that a grand jury is not a governmental body that is subject to the Act, chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See Gov't Code § 552.003(1)(B)* (definition of governmental body does not include judiciary); *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 disclosure only if a specific

exception to disclosure is shown to be applicable. *Id.* In this instance, we are unable to determine whether the district attorney has custody of any of the submitted information as an agent of the grand jury. Thus, to the extent that the district attorney has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. *Id.* at 4. To the extent that the district attorney does not have custody of the submitted information as agent of the grand jury, we address your arguments against disclosure.

We also note that a portion of the submitted information is subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(b). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the information that constitutes mental health records, and that may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

The remaining submitted information consists of an investigation made of, for, or by the district attorney. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. You claim that these documents are excepted from disclosure under section 552.103. However, section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. As such, section 552.103 is not other law that make information confidential for the purposes of section 552.022(a)(1). *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos., 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver).

However, since section 552.022(a)(1) provides that information made public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the district attorney's section 552.108 claim as it pertains to the remaining submitted information. Furthermore, because sections 552.101, 552.130, 552.132, 552.1325, and 552.147 of the Government Code constitute "other law" for purposes of section 552.022, we will also address these provisions for the remaining submitted information.

Section 552.108 provides in pertinent 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) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

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

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). 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* 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).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. In this instance, the requestor seeks the district attorney's entire case file. You assert that the information and

its organization reflects the mental impressions and legal reasoning of the attorneys representing the state. You also contend that the information was gathered by attorneys in preparation for trial, and therefore constitutes attorney work product. Based on your representations and our review of the remaining information, we agree that section 552.108(a)(4) is applicable in this instance.

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*. See *Houston Chronicle*, 531 S.W.2d at 186-187; see also Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). The district attorney must release basic front-page information even if this information does not literally appear on the front page of an offense or arrest report. Although section 552.108 authorizes you to withhold the remaining submitted information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007. As we are able to make these determinations, we need not address your other arguments against disclosure.

In summary, we conclude that 1) to the extent that the district attorney has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act; 2) we have marked the information that may be released only in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; and 3) with the exception of basic information, which must be released, the district attorney may withhold the remaining submitted information 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

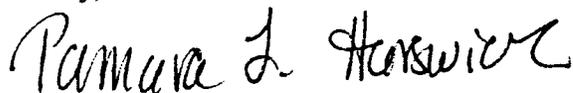
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 241122

Enc. Submitted documents

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(w/o enclosures)