



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2006

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2006-01608

Dear Ms. Lytle:

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# 242664.

The 34th Judicial District Attorney's Office (the "district attorney") received a request for all information relating to a specified case. You state that you have already released the complaint affidavit, the accident report, the indictment, the arrest warrant, the certificate of magistrate, and the basic information in the law enforcement report to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor asserts he has been allowed to inspect many of the requested documents and papers. Whether information has previously been voluntarily released is a fact question that cannot be addressed in the ruling process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. The district attorney informs us that the requestor was only allowed to review the state's case files in compliance with constitutional requirements. *See Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). Based on the district attorney's representation, we conclude that the district attorney has not previously released any of the requested information that it now seeks to withhold to a member of the public and will therefore

address the district attorney's claim that the submitted information is excepted from disclosure under the claimed exceptions. *See generally* Gov't Code § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld unless confidential under law); Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007); 454 at 2 (1986) (where governmental body disclosed information because it reasonably concluded it had constitutional obligation to do so, it could still invoke law enforcement exception).

Next, we note that the submitted information in Attachment G was obtained by means of a grand jury subpoena. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so that 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); 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.* You inform us that the medical records in Attachment G were obtained pursuant to a grand jury subpoena. We agree that information in Attachment G obtained pursuant to a grand jury subpoena is in the custody of the district attorney as an agent of the grand jury and it is not subject to disclosure under the Act.

We also note that section 552.022 of the Government Code governs a portion of the submitted information. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). In this instance, section 552.022(a)(17) makes the submitted court documents public. Therefore, the district attorney may withhold this information only to the extent it is made confidential under other law. Although the district attorney raises sections 552.103 and 552.108 for this information, these exceptions are discretionary and thus, do not make information confidential. *See id.* § 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to

waiver); 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, sections 552.103 and 552.108 are not “other law” that make information confidential for the purposes of section 552.022. You also claim, however, that these documents are excepted from disclosure under sections 552.101 and 552.147 of the Government Code, which are “other law” for purposes of section 552.022. Accordingly, we will consider your arguments under sections 552.101 and 552.147 for the court-filed documents.

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. Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. The fingerprints at issue are confidential under section 560.003. However, the laws making such information confidential are intended to protect an individual's privacy. *See* Gov't Code § 560.002(1)(A) (individual whose biometric identifier is at issue may consent to its release). If the requestor is an attorney for the person to whom this fingerprint information pertains, then he would have a right of access to his client's fingerprint information. *See id.* § 560.022(1). Otherwise, the district attorney must withhold the fingerprint information under section 552.101.

The court filed documents also include a social security number. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Because section 552.147 protects individual privacy interests, if the requestor is the attorney of the individual at issue, the requestor has a right to access his client's social security number under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). Accordingly, if the requestor is the attorney of the individual at issue then the social security number at issue must be released to the requestor. Otherwise, the social security number must be withheld from the court filed documents pursuant to section 552.147.

We now address your arguments under section 552.108 of the Government Code for the remaining submitted information. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the information at issue pertains to a pending criminal prosecution. Based on this representation, we agree that section 552.108(a)(1) is applicable to the information at issue, and it may be withheld on that basis.¹ *See Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases). We note that you have the discretion to release all or part of the information at issue that is not otherwise confidential by law. Gov't Code § 552.007.

¹As our ruling on this issue is dispositive, we need not address your remaining arguments other than to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

In summary, we agree that information in Attachment G obtained pursuant to a grand jury subpoena is in the custody of the district attorney as an agent of the grand jury and it is not subject to disclosure under the Act. The court filed documents must be released pursuant to section 552.022 in their entirety if the requestor is the attorney representing the individual at issue in these documents. Otherwise, the fingerprints within the court filed documents must be withheld under section 552.101 in conjunction with section 560.003 and the social security number must be withheld under section 552.147. The remaining 552.022 information must be released. We agree that section 552.108(a)(1) is applicable to the remaining submitted information, and it may be withheld on that basis.²

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).

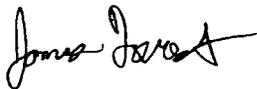
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

²Should the district attorney receive another request from a person who would not have a right of access to the requestor's social security number and fingerprints, the district attorney should resubmit this same information and request another decision. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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,



James Forrest
Assistant Attorney General
Open Records Division

JF/sdk

Ref: ID# 242664

Enc. Submitted documents

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(w/o enclosures)