



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2007

Ms. Christine Womble
Assistant District Attorney
Frank Crowley Courts Building,
133 North Industrial Boulevard., LB-19
Dallas, Texas 75207

OR2007-04126

Dear Ms. Womble:

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# 275640.

The Dallas County District Attorney's Office (the "district attorney") received a request for its criminal files concerning six specific cause numbers involving one individual. You state that you have no responsive information regarding a portion of the request. We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You further state that some of the requested information has been released. You claim that a portion of the submitted information is not subject to the Act and that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See Gov't Code* § 552.304 (interested third party may submit comments explaining why requested information should or should not be released).

Initially, we address your claim that Exhibit B is not subject to 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. *See Gov't Code* § 552.003(1)(B); Open Records Decision

No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). However, “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 Open Records Act’s exceptions, but it is not excluded from the reach of the Open Records Act by the judiciary exclusion.” ORD 513 at 4. We note that the information in Exhibit B was created by the Irving Police Department. The district attorney has failed to demonstrate how the information in Exhibit B is held by the district attorney as an agent of the grand jury. Accordingly, none of Exhibit B is in the constructive possession of the grand jury and all of it is subject to disclosure under chapter 552. Since you make no other arguments against disclosure, the district attorney must release Exhibit B to the requestor.

Next, the district attorney acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the *Government Code*. A governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov’t Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.101 of the *Government Code* can provide a compelling reason to overcome this presumption; therefore, we will address your arguments under this exception.

You contend that Exhibits C and D are confidential pursuant to section 552.101 in conjunction with article 42.12 of the *Code of Criminal Procedure*. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Article 42.12 of the *Code of Criminal Procedure* provides in relevant part:

(j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (I) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information

obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:

- (1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section;
- (2) pursuant to Section 614.017, Health and Safety Code; or
- (3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, the presentence report in Exhibit D must be withheld. However, the documents contained in Exhibit C do not constitute information obtained in connection with a presentence investigation or postsentence report for purposes of article 42.12. Accordingly, Exhibit C may not be withheld on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *See Open Records Decision Nos. 470* (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see Open Records Decision Nos. 600* (1992), 545 (1990); and identities of victims of sexual assault, *see Open Records Decision Nos. 440* (1986), 393 (1983), 339 (1982). We have marked the information that is confidential under common-law privacy and that the district attorney must withhold under section 552.101.

We note the remaining information also contains motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or] a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130. In accordance with section 552.130 of the Government Code, the district attorney must withhold the Texas motor vehicle record information we have marked.

In summary, the district attorney must withhold from public disclosure (1) Exhibit D under section 552.101 of the Government Code in conjunction with article 42.12 of the Code of Criminal Procedure, (2) the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy, and (3) the information we have marked under section 552.130. The remaining submitted information must be released.

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).

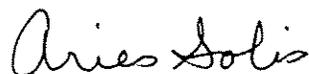
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Aries Solis
Assistant Attorney General
Open Records Division

AS/eeg

Ref: ID# 275640

Enc. Submitted documents

c: Ms. Yolanda M. Torres
Attorney at Law
P.O. Box 515
Huntsville, Texas 77342-0515
(w/o enclosures)