ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2008

Mr. Robert Vititow
Rains County Attorney
Rains County
P.O. Box 1075
Emory, Texas 75440

OR2008-03671

Dear Mr. Vititow:

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# 304893.

The Rains County Attorney's Office (the "county attorney") received three requests from the same requestor for (1) the names, employer, and positions of all Rains County employees assigned to work on five specified cases pertaining to a named defendant, (2) the estimated costs to Rains County related to the specified cases, (3) the county attorney's budget for fiscal year 2006-2007, (4) the complete criminal file related to the specified cases and named defendant, and (5) any memoranda written by the county attorney pertaining to the specified cases or the named defendant. You state you have no information responsive to the request for estimated costs related to the specified cases.[1] You also state that you have provided to the requestor the requested budget information. You claim that some of the submitted information is not subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code.[2] We have considered your arguments and reviewed the submitted information. We have also

[1] The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

[2] Although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

First, you contend that the request for the names, employer, and positions of all Rains County employees assigned to work on the five specified cases would require the county attorney to create responsive information. We note that the Act does not require a governmental body to create responsive information. *See Bustamante*, 562 S.W.2d 266; Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). You state that by reviewing the submitted documents, "one may be able to . . . possibly determine who worked on [the specified] cases." Based on your statement, we believe that you have made a good faith effort to submit information responsive to the request for the names, employer, and positions of all Rains County employees assigned to work on the five specified cases. Therefore, we will address your arguments for the submitted information.

Next, you inform us that some of the submitted information may constitute grand jury records that are not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). 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* 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). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). The fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. You state that some of the submitted information "deals with information which is the subject of–and also demonstrates–grand jury investigations." You have not explained, however, how any of the submitted information was produced at the direction of the grand jury or is maintained on behalf of the judiciary. *See id.* § 552.301(e)(1)(A) (providing that it is governmental body's burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). Therefore, you have failed to demonstrate that the submitted information was produced or is maintained by the county attorney on behalf of the judiciary. Consequently, we find that the submitted information is subject to the Act.

Next, we address the requestor's contention that the county attorney failed to follow its procedural obligations under the Act. Section 552.301 of the Government Code prescribes

the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). The county attorney informs us that it received the first request for information on December 21, 2007, and that December 24 and 25, 2007 and January 1, 2008 were observed as county attorney holidays. Accordingly, the county attorney's ten-business-day deadline was January 9, 2008. The county attorney's request for a ruling bears a postmark date of January 9, 2008. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Upon review, we find that the county attorney's request for a decision was timely. *See id.* § 552.301(b).

We now address your claimed exceptions to disclosure for the submitted information. You assert that the submitted information is excepted from public disclosure under section 552.108 of the Government Code, which provides, in part:

> (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) reflects the mental impressions or legal reasoning of an attorney representing the state.

Id. § 552.108(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 id.* §§ 552.108(b)(3), .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 that the memorandum submitted as Exhibit B and the spreadsheet of case notes submitted as Exhibit C consist of internal records prepared by prosecutors representing the state. You also state that these records reflect your instructions to staff regarding your mental impressions and the steps to be taken in the prosecution of criminal cases. Based on your representation and our review, we agree that Exhibits B and C reflect the mental processes or legal reasoning of attorneys representing the state. Therefore, we conclude that Exhibits B and C are subject to section 552.108(b)(3).

Furthermore, 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 (Tex. 1993, orig. proceeding), 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. You explain that the information submitted as Exhibit D constitutes the county attorney's entire litigation file for the requested specified cases, and contains all of the information necessary to prosecute those cases. Based on this representation and our review, we agree that, in accordance with the holding in *Curry*, Exhibit D reflects the mental impressions or legal reasoning of an attorney representing the state. Therefore, we conclude that Exhibit D is subject to section 552.108(b)(3).

We note, however, that 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); *see* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the county attorney may withhold the submitted information based on section 552.108(b)(3) of the Government Code.[3]

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

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[3] As our ruling is dispositive, we need not address your remaining argument against disclosure, except 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).

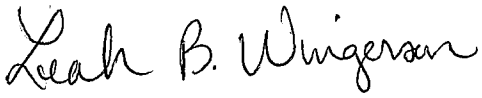
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to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



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 304893

Enc. Submitted documents

c: Mr. Eddie Frankum
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(w/o enclosures)