



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 24, 2008

Mr. David Walker  
County Attorney  
Montgomery County  
207 West Phillips, 1st Floor  
Conroe, Texas 77301

OR2008-05491

Dear Mr. Walker:

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# 306866.

The Montgomery County District Attorney's Office (the "district attorney") received a request for information related to four named individuals' e-mail accounts during a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address your contention that some of the requested e-mail messages are not in the district attorney's possession. The Act does not require a governmental body to disclose information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You indicate that the district attorney does not possess printed copies of some of the requested e-mail messages. You state, and submit an affidavit from the Director for Communication Information Services for the district attorney supporting, that to the extent the e-mail messages exist as computer files, they may be recorded on the tape backup system maintained by the district attorney for disaster recovery or data restoration purposes only.

In general, computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed.

You state that "[i]f an e-mail requires saving, employees must download it to their local hard drive." You further state that the district attorney's mail server archives all e-mail messages that are ninety days old. We understand you to state that some of the e-mail messages at issue are no longer maintained on the hard drives of the computers at issue. You further explain that to restore the information at issue, "the entire post office, with all users and all e-mail, [would need to] be restored" and that the tape backup system is designed for disaster recovery purposes only. Based on your representations that the e-mail messages at issue have been deleted and are no longer maintained by the district attorney for the purposes of transacting official district attorney business, we find that the locations of the files have been deleted from the FAT system. We therefore determine that the e-mail messages at issue were no longer being "maintained" by the district attorney at the time of the request, and are not public information subject to disclosure under the Act. *Econ. Opportunities Dev. Corp.*, 562 S.W.2d at 266; see also Gov't Code §§ 552.002, .021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude that the Act does not require the district attorney to release the deleted e-mail messages at issue in this instance.

Next, you claim that the information in Exhibit D does not constitute public information under section 552.002 of the Government Code. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a).

The district attorney contends that the information in Exhibit D is not collected, assembled, or maintained in connection with the transaction of any official business of the district attorney. You assert that the documents in Exhibit D are simply an incidental use of e-mail by district attorney employees with regards to personal matters. Based on your arguments and our review of the documents at issue, we agree that some of the e-mails do not constitute "public information" that are subject to the Act. See Gov't Code § 552.021; see also Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee

involving *de minimis* use of state resources). Accordingly, this information, which we have marked, need not be released in response to the request.

The district attorney contends that the information in Exhibit I is subject to article 20.02(a) of the Code of Criminal Procedure. Article 20.02(a) provides that “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define “proceedings” for purposes of subsection (a). Therefore, we have reviewed case law for guidance, and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.). The court further stated that the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations.” *Reed*, 227 S.W.3d at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See Reed*, 227 S.W.3d at 276; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80<sup>th</sup> Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

In this instance, you have not submitted any arguments explaining how the matter upon which the submitted subpoena in Exhibit I was based is still “before the grand jury” to warrant keeping the subpoena secret. Therefore, upon review of article 20.02 and related

case law, it is not apparent, and you have not otherwise explained, how this provision makes the submitted grand jury subpoena confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the submitted subpoena in Exhibit I may not be withheld under article 20.02 of the Criminal Code of Procedure.

The district attorney contends that the information in Exhibit F is subject to sections 552.103 and 552.111 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

You state that the information in Exhibit F relates to a pending civil litigation proceeding. However, you have failed to demonstrate that the district attorney is a party to any pending

or anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). Accordingly, you may not withhold any of the information in Exhibit F under section 552.103 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state that the information in Exhibit F is subject to section 552.111. Upon review of your arguments and the information at issue, we find that you have not demonstrated that the information was created or developed for trial or in anticipation of litigation. Therefore, the

district attorney may not withhold any of the information in Exhibit F under section 552.111 of the Government Code.

The district attorney contends that some of the submitted information is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district attorney may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information is at issue timely elected to keep their personal information confidential, the district attorney must withhold the information we have marked in Exhibits F and G under section 552.117(a)(1). The district attorney may not withhold the information we have marked under section 552.117(a)(1) if the employees did not timely elect to keep their information confidential.

The district attorney contends that some of the information in Exhibit H is subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. You inform us that an employee's identification number is an access device number. Thus, the district attorney must withhold account and access device numbers, as well as the credit card number we have marked, under section 552.136 of the Government Code.

We note that some of the remaining information contains information subject to sections 552.1175 and 552.137 of the Government Code.<sup>1</sup> Section 552.1175 provides as follows:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

---

<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). Thus, pursuant to section 552.1175, the district attorney must withhold the information pertaining to a peace officer we have marked if the individual at issue elects to restrict access to his information in accordance with section 552.1175(b) of the Government Code.<sup>2</sup>

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses contained in the submitted information, which we have marked, are not the type specifically excluded by section 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the district attorney must withhold the e-mail addresses we have marked in accordance with section 552.137.

Finally, we note that a portion of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the information that we have marked pursuant to section 552.002 is not subject to the Act. The district attorney must withhold the information we have marked under sections 552.117(a)(1) and 552.136 of the Government Code. The district attorney must also

---

<sup>2</sup>As our ruling is dispositive, we need not address your arguments under section 552.117(a)(2) for the information at issue.

withhold the information we have marked under sections 552.1175 and 552.137 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 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).

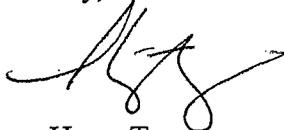
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Loan Hong-Turney  
Assistant Attorney General  
Open Records Division

LH/eeg

Ref: ID# 306866

Enc. Submitted documents

c: Mr. Tom Curry  
P.O. Box 9738  
The Woodlands, Texas 77387  
(w/o enclosures)