



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2008

Mr. Daniel Bradford
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2008-06527

Dear Mr. Bradford:

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# 309975.

The Travis County District Attorney's Office (the "district attorney") received a request for all records and materials pertaining to a specified murder and the resulting criminal cases. You claim that some of the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor asks that her verbal request to the district attorney on February 14, 2008 be considered the original request for purposes of time limitations imposed by section 552.301 of the Government Code. Section 552.301(a) of the Government Code provides the following:

¹You state that you have submitted a "representative sample" of the requested records. We note that you have only submitted a transcript of grand jury testimony, autopsy photographs, and crime scene photographs. Therefore, to the extent any additional information responsive to this request existed on the date the request was received, which consists of substantially different types of information from the submitted grand jury testimony, autopsy photographs, and crime scene photographs, we assume it has been released. If the district attorney has not released any such records, the district attorney must release them to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000).

A governmental body that receives a *written* request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

Id. § 552.301(a)(emphasis added). The duty to request a decision from this office as to whether information may properly be withheld under the Act does not arise until the governmental body receives a written request for the information. *See id.* Consequently, the verbal request the district attorney received did not trigger the requirements of section 552.301 of the Government Code. The requirements of section 552.301 were not triggered until the district attorney received the requestor's written request on February 25, 2008. Accordingly, we will consider your arguments against disclosure for the submitted information.

We note that the submitted documents contain information subject to section 552.101 of the Government Code.² Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." The submitted transcript of the testimony of a grand jury witness is part of the record of the grand jury proceeding.³ *See Stern v. State*, 869 S.W.2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *see also* Open Records Decision No. 398 (1983). Therefore, the submitted grand jury testimony, which we have marked, is confidential under article 20.02(a) of the Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision

²The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney's duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney's duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person's duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

No. 513 at 4 (1988) (information must be withheld if its release would reveal grand jury's deliberations).

Section 552.101 of the Government Code also encompasses section 11 of article 49.25 of the Code of Criminal Procedure, which governs the disclosure of autopsy photographs. Section 11 provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. There is no indication that the exceptions to confidentiality provided in section 11 are applicable in this instance. Therefore, the autopsy photographs are confidential under article 49.25 of the Code of Criminal Procedure and must be withheld under section 552.101 of the Government Code.

Next, section 552.108(a)(2) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that the requested information relates to a criminal investigation and murder prosecution that was dismissed, but may be re-opened. Based on your representation and our review, we find that you have not sufficiently demonstrated that the remaining submitted information relates to a concluded investigation that did not result in conviction or deferred adjudication. We therefore conclude that the district attorney may not withhold the remaining submitted information under section 552.108(a)(2) of the Government Code.

In summary, the district attorney must withhold the submitted grand jury testimony transcript under section 552.101 of the Government Code in conjunction with article 20.02(a) of the

Code of Criminal Procedure. The district attorney must also withhold the submitted autopsy photographs under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The remaining submitted information must be released.⁴

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

⁴We note that the information that the district attorney must release in this instance may be confidential by law. See *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). Thus, should the district attorney receive another request for this same information from a person who would not have a special right of access to it, the district attorney should resubmit the same information and request another ruling from this office. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests).

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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/jh

Ref: ID# 309975

Enc. Submitted documents

c: Ms. Elizabeth Crecente
c/o Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767
(w/o enclosures)