



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2008

Mr. Scott A. Durfee
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

OR2008-13307

Dear Mr. Durfee:

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#322909.

The Harris County District Attorney's Office (the "district attorney") received a request for five categories of information relating to a specific grand jury proceeding. You state that you have no responsive information regarding a portion of the request.¹ You claim that the remaining information constitutes records of the judiciary and is, therefore, not subject to the Act. Alternatively, you claim that the remaining information is excepted from disclosure under sections 552.101 and 552.107(2) of the Government Code.² We have considered your arguments and reviewed the submitted representative sample of information.³

¹We 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you raise section 552.108 of the Government Code, you provide no supporting arguments explaining why this exception is applicable to the information at issue. Accordingly, we find that the district attorney has waived its claim under this exception. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, you state that the remaining information is maintained by the district attorney on behalf of the Harris County Grand Jury and is therefore not subject to the Act. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of 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. Open Records Decision No. 411 (1984). Records kept by a district attorney who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. Open Records Decisions Nos. 513 (1988), 411, 398. *But see* ORD 513 at 4 (defining limits of judiciary exclusion). In Open Records Decision No. 513, this office concluded that information obtained by a governmental body pursuant to a grand jury subpoena issued in connection with a grand jury investigation is within the grand jury's constructive possession and is not subject to the Act. However, if an investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the governmental body's actions in the investigation, then the information is not deemed to be in the grand jury's constructive possession. *Id.* at 4. The mere fact that information collected or prepared by a governmental body 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 governmental body. *Id.* Accordingly, we believe only the portions of the responsive information that were obtained pursuant to a grand jury subpoena issued in connection with the investigation are within the grand jury's constructive possession and therefore subject to the judiciary exclusion and outside the reach of the Act. In this instance, we have no indication that the grand jury subpoenaed the information at issue and we do not believe release of this information implicates the confidentiality provision at article 20.02(a) of the Code of Criminal Procedure ("The proceedings of the grand jury shall be secret."). Thus, to the extent that the information at issue is held by the district attorney as an agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. To the extent the submitted information does not consist of records of the judiciary, we will address your exceptions to disclosure.

You contend that the personal information of the appointed grand jury members is confidential under section 552.101 in conjunction with section 19.42 of the Texas Code of Criminal Procedure. Section 552.101 of the Government Code exempts 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 made confidential by statute, such as Texas Code of Criminal Procedure article 19.24, which provides:

(a) Except as provided by Subsection (b), information collected by the court, court personnel, or prosecuting attorney during the grand jury selection process about a person who serves as a grand juror, including the person's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, court personnel, or prosecuting attorney.

(b) On a showing of good cause, the court shall permit disclosure of the information sought to a party to the proceeding.

Crim. Proc. Code art 19.42. Article 19.42 makes confidential certain "personal information" pertaining to individuals who served grand juries, effective September 1, 1999. This provision does not, however, make confidential the names of such individuals. *See* Open Records Decision No. 478 (1987) (as a general rule, statutory confidentiality requires express language making particular information confidential); *see also* Open Records Decision No. 433 (1986) ("As a practical matter . . . the names of the impaneled grand jurors will already have been publicly divulged, since the impaneling will have taken place in open court."). Accordingly, we find that you must release the requested names of the grand jurors. However, the remaining requested grand juror information must be withheld under 552.101 in conjunction with section 19.42 of the Code of Criminal Procedure.

Finally, you assert that the district attorney is prohibited from releasing the names of the grand jurors pursuant to a court order. Section 552.107(2) excepts information from disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have submitted a copy of the "Order Sealing Grand Juror Names" for our review. The order prohibits the District Clerk of Harris County and his deputies from releasing the names, addresses, and telephone numbers of the grand jurors at issue. Because this order is specifically addressed to the district clerk, we conclude it does not apply to the district attorney. We therefore find that the district attorney may not withhold any of the names of the grand jurors under section 552.107(2) of the Government Code.

In summary, to the extent that the information at issue is held by the district attorney as an agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. The district attorney must withhold the grand jurors' personal information under section 552.101 of the Government Code in conjunction with section 19.42 of the Code of Criminal Procedure. The remaining 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 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). If the governmental body does not file suit over 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/jb

Ref: ID#322909

Enc. Submitted documents

c: Mr. Gunny Thompson
African-American Legal Defense Group
P.O. Box 91212
Houston, Texas 77291-1212
(w/o enclosures)