



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2009

Ms. Deborah F. Harrison  
Assistant District Attorney  
Special Crimes Division - Civil Section  
210 South McDonald, Suite 324  
McKinney, Texas 75069

OR2009-03857

Dear Ms. Harrison:

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# 338352.

The Collin County District Attorney's Office (the "district attorney") received a request for all documents related to the investigation of the requestor's client taking place in 2005-2006 regarding an allegation of theft of gasoline from Royse City Independent School District. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, 552.130, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us that the district attorney holds the information in section IIE as the custodian for the Collin County grand jury. 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 is 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), 398 (1983); *but see* Open Records Decision No. 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* Open Records Decision No. 513 (1998). The district attorney represents that it holds the information in section IIE as an agent of the grand jury, and has provided this office with an affidavit supporting this representation. Based on this representation and our review, we determine that the information in section IIE is in the grand jury's constructive possession and is not subject to the Act.<sup>1</sup>

Section 552.111 of the Government Code exempts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. 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. TEX. R. CIV. P. 192.5; ORD 677 at 6-8 (2002). 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.

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<sup>1</sup>As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure of the information in section IIE.

*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 (2002).

You represent that the information in section IID consists of attorney notes and work product produced during the investigation at issue. Furthermore, you have demonstrated that the documents were created in anticipation of litigation. Therefore, we conclude that the district attorney may withhold the information in section IID under section 552.111 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a driver's license or license plate issued by an agency of this state. *See Gov't Code* § 552.130(a)(1). We have marked Texas driver's license numbers in the remaining submitted information which you must withhold pursuant to section 552.130 of the Government Code.

You also raise section 552.136 of the Government Code. This exception provides that "[n]otwithstanding any other provision of [the Act], 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." *Id.* § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked credit card information which the district attorney must withhold under section 552.136(b) of the Government Code.

Finally, you claim that the social security numbers in the remaining submitted information are excepted from public disclosure under section 552.147 of the Government Code, which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.<sup>2</sup> *Gov't Code* § 552.147(a). We agree that the district attorney may withhold the marked social security numbers under section 552.147 of the Government Code.

In summary, the information in section IIE is in the constructive possession of the grand jury and is therefore not subject to the Act. The district attorney may withhold the information in section IID pursuant to section 552.111 of the Government Code. The marked Texas driver's license numbers must be withheld pursuant to section 552.130 of the Government Code. The credit card information we have marked must be withheld pursuant to section 552.136(b) of the Government Code. Finally, the marked social security numbers

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<sup>2</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

may be withheld pursuant to section 552.147(a) of the Government Code. The remaining submitted information must be released.<sup>3</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/eb

Ref: ID# 338352

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note that some information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the district attorney receives another request for this information from an individual other than this requestor or his client, the district attorney should again seek our decision.