



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2009

Mr. Bill Delmore  
Assistant District Attorney  
9th Judicial District  
207 West Phillips, Second Floor  
Conroe, Texas 77301

OR2009-11782

Dear Mr. Delmore:

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# 353339.

The Montgomery County District Attorney's Office (the "district attorney") received a request for the prosecution files related to the requestor and another individual. You state that some of the responsive information will be released to the requestor. You claim that a portion of the submitted information is not subject to the Act and that the remaining information is excepted from disclosure under section 552.101 of the Government Code. We have considered the arguments you make and reviewed the submitted information.

You argue that the district attorney constructively holds the information in Appendices B, C, and D on behalf of the 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). You contend that the district attorney holds the information in Appendices B, C, and D for the grand jury. However, we note that Appendix D consists of a letter to the district attorney from a law firm discussing evidence it intends to present to the grand jury on behalf of its client. You have failed to explain how this information constitutes a record in the constructive possession of the grand jury. Accordingly, Appendix D is subject to the Act. Appendix B consists of a recording of grand jury testimony, and Appendix C consists of oaths signed by grand jury witnesses. To the extent that the information in Appendices B and C is held by the district attorney as agent of the grand jury, it constitutes records of the judiciary that are not subject to disclosure under the Act. To the extent the information in Appendices B and C does not consist of records of the judiciary, we will address your exceptions to disclosure.

Next we note, and you acknowledge, that the district attorney has failed to meet its obligation to request a decision from this office within the time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.-- Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 can provide a compelling reason to overcome this presumption, we will address your arguments under this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by statutes, including article 20.02(a) of the Code of Criminal Procedure, which provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). When construing article 20.02 of the Code of Criminal Procedure, the types of "proceedings" Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *In re Reed*, 227 S.W.3d 273, 276 (Tex. App.-San Antonio 2007, no pet.); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.-Houston [14th Dist] 1994, no writ) (stating that anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). Appendix B consists of grand jury testimony, and is therefore confidential under article 20.02(a) of the Texas Code of Criminal Procedure. The district attorney must withhold this information under section 552.101 of the Government Code. However, upon review, we conclude you have not demonstrated, and we are unable to determine, how

Appendices C and D reveal grand jury testimony or deliberations of the grand jury. Accordingly, the district attorney may not withhold Appendices C and D under article 20.02 of the Texas Code of Criminal Procedure.

Section 552.101 also encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* § 411.090-127. Furthermore, any CHRI obtained from the DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Information relating to routine traffic violations is not excepted from release under section 552.101 on this basis. *Cf. id.* § 411.082(2)(B). Upon review, we find a portion of the information in Appendix E constitutes CHRI. We have marked the information in Appendix E that the district attorney must withhold pursuant to section 552.101 in conjunction with section 411.083 of the Government Code.<sup>1</sup> No portion of the remaining information constitutes CHRI for the purposes of chapter 411. Thus, none of the remaining information may be withheld on that basis.

Next, we note some of the remaining information is confidential under section 552.130 of the Government Code.<sup>2</sup> Section 552.130 provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2).

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<sup>1</sup>We note that the requestor can obtain her own CHRI from DPS. *See* Gov’t Code § 411.083(b)(3).

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

Accordingly, the district attorney must withhold the Texas motor vehicle record information we have marked in Appendix E under section 552.130 of the Government Code.

In summary, to the extent that the information in Appendices B and C is held by the district attorney as agent of the grand jury, it constitutes records of the judiciary and is not subject to the Act. To the extent the information in Appendix B is not held the district attorney as an agent of the grand jury, it must be withheld under article 20.02(a) of the Texas Code of Criminal Procedure in conjunction with section 552.101 of the Government Code. The district attorney must withhold the CHRI we have marked within Appendix E under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The district attorney must also withhold the information we have marked within Appendix E under section 552.130 of the Government Code. The remaining 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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/eeg

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<sup>3</sup>We note that this requestor has a special right of access to some of the information being released. See Gov't Code § 552.023(a) (person or person's authorized representative has a 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). Therefore, if the district attorney receives another request for this information from a person who does not have a special right of access to this information, the district attorney should resubmit this same information and request another decision from this office. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

Ref: ID# 353339

Enc. Submitted documents

c: Requestor  
(w/o enclosures)