ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

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

Mr. Bill Delmore
Assistant District Attorney
Montgomery County
207 West Phillips, 2nd Floor
Conroe, Texas 77301

OR2009-15537

Dear Mr. Walker and 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# 360031.

The Montgomery County Sheriff's Office and the Montgomery County District Attorney (collectively the "county") received two requests from the same requestor for information relating to a specified incident. You state the sheriff does not have some of the responsive information.[1] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

[1]We note the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd).

Initially, we note that some of the submitted information consists of a grand jury oath and subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined that for the purposes of the Act, a grand jury 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 a governmental body that 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. *See* Open Records Decision Nos. 513 (1988), 411 (1984), 398 (1983). *But See* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, we find that this information, which we have marked, consists of records of the judiciary, and therefore is not subject to disclosure under the Act.

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 section encompasses common-law privacy and excepts from disclosure private facts about an individual. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by a common-law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See id.* at 685.

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. *See* Open Records Decision Nos. 393 at 2 (1983), 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). The remaining submitted information pertains to a charge of sexual assault. The requestor in this case knows the identity of the alleged victim. In this instance, withholding only the identifying information from the requestor would not preserve the victim's common-law right to privacy. Therefore, the county must withhold the remaining information in its entirety pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the grand jury records we have marked are records of the judiciary and are not subject to disclosure under the Act. The remaining information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.[2]

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[2]As our ruling is dispositive, we do not address your other argument against disclosure.

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, 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, toll free, at (888) 672-6787.

Sincerely,

Pam Wissemann

Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/eb

Ref: ID# 360031

Enc. Submitted documents

c: Requestor
(w/o enclosures)