



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 3, 2011

Mr. Elton R. Mathis
Waller County District Attorney
846 Sixth Street, Suite #1
Hempstead, Texas 77445

OR2011-01753

Dear Mr. Mathis:

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# 408111.

The Waller County District Attorney's Office (the "district attorney") received a request for the statements and reports reviewed by the grand jury for a case involving the death of a named individual. You claim the submitted information 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 representative sample of information.¹

Initially, we note the judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and, therefore, is 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* ORD 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

¹We assume 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.

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* ORD 513.

In this instance, you state the responsive records you have not submitted for our review were obtained by the district attorney pursuant to grand jury subpoena. We agree information obtained pursuant to a grand jury subpoena is in the custody of the district attorney as agent of the grand jury and it is not subject to the Act. Therefore, based on your representation, we agree the records you have not submitted are not subject to the Act, and this decision does not address their public availability. However, you state the submitted documents were not obtained as a result of a grand jury subpoena. Thus, the submitted information is not held by the district attorney as an agent of the grand jury, and is subject to the Act.

You claim the submitted information is excepted under section 552.101 of the Government Code. 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 information protected by other statutes. You claim that because the grand jury reviewed the submitted documents, they constitute the deliberations of the grand jury that may not be released. Thus, we understand you to raise article 20.02(a) of the Code of Criminal Procedure, which provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). When construing article 20.02(a), 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); *In re Grand Jury Matter*, 682 F.2d 61, 64 (3rd Cir. 1982) (Third Circuit Court of Appeals explained that disclosure of information obtained by governmental body during its independent investigation that is later presented to grand jury does not violate rule 6(e)). The court in *Stern* also stated, "The requirement of secrecy should be imposed only to the extent that it contributes to the effectiveness of the grand jury as that institution carries out its investigative and screening functions." 869 S.W.2d at 623. We also note that information may not be withheld simply because the grand jury considered the information. ORD 513 at 4.

You state the submitted information was presented to the grand jury and a no bill was returned. However, you have not explained how the information presented to the grand jury falls into the categories of information that Texas courts have construed as "proceedings" for the purposes of article 20.02. Additionally, because the grand jury returned a no bill, you have not explained how release of the information presented to grand jury would interfere with the effectiveness of the grand jury. Thus, upon our review of your arguments and the relevant law, it is not apparent, and you have not otherwise explained, how article 20.02 makes the submitted information presented to the grand jury confidential. *See id.* Therefore,

the district attorney may not withhold this information under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

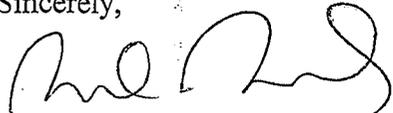
You also raise section 552.108 of the Government Code for the submitted information. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming 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. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You represent the submitted information pertains to an investigation that did not result in a conviction or deferred adjudication. Thus, based on your representation and our review, we conclude that section 552.108(a)(2) is generally applicable to the submitted documents.

However, section 552.108 of the Government Code does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which must be released, the district attorney may withhold the submitted information under section 552.108(a)(2) of the Government Code.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

Ref: ID# 408111

Enc. Submitted documents

c: Requestor
(w/o enclosures)