ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 26, 2011

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

OR2011-15701

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# 434235.

The Montgomery County District Attorney's Office (the "district attorney") received a request for all information related to a specified incident. You state you have released some information to the requestor. You claim a portion of the submitted information is not subject to the Act and that the remaining information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the information in Exhibit E, which consists of a grand jury oath, is held by the district attorney as an agent of the grand jury and is a record of the judiciary. 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 the information in Exhibit E consists of a record of the judiciary, and therefore is not subject to disclosure under the Act.

Section 552.101 of the Government Code 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 that other statutes make confidential. Article 42.12 of the Code of Criminal Procedure is applicable to pre-sentence investigation reports and provides in part:

> (j) The judge by order may direct that any information and records that are not privileged and that are relevant to a report required by Subsection (a) or Subsection (k) of this section be released to an officer conducting a presentence investigation under Subsection (i) of this section or a postsentence report under Subsection (k) of this section. The judge may also issue a subpoena to obtain that information. A report and all information obtained in connection with a presentence investigation or postsentence report are confidential and may be released only:
>
> > (1) to those persons and under those circumstances authorized under Subsections (d), (e), (f), (h), (k), and (l) of this section;
> >
> > (2) pursuant to Section 614.017, Health and Safety Code; or
> >
> > (3) as directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42.12 § 9(j). Accordingly, the district attorney must withhold the pre-sentence investigation report in Exhibit D pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except 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. *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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565.

Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. Accordingly, the district attorney must withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Next, you claim Appendix B is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:
>
> . . .
>
> (4) it is information that:
>
> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
>
> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

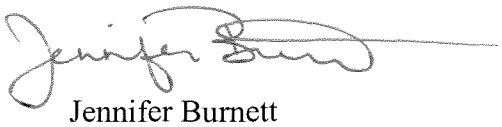
Gov't Code § 552.108(a)(4). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 552. S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You explain the information in Appendix B constitutes information held and prepared by an attorney representing the state in anticipation of or in preparation for trial. Thus, you assert the information reflects the mental impressions and legal reasoning of the prosecutor. Upon review, we agree section 552.108(a)(4) is applicable to Appendix B. Accordingly, the district attorney may withhold Appendix B under section 552.108(a)(4) of the Government Code.

In summary, the grand jury record in Exhibit E is a record of the judiciary and is not subject to disclosure under the Act. The district attorney must withhold the pre-sentence investigation report in Exhibit D pursuant to section 552.101 in conjunction with article 42.12 of the Code of Criminal Procedure and the information in Exhibit C under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code. The district attorney may withhold Appendix B under section 552.108(a)(4) 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 434235

Enc. Submitted documents

c: Requestor
(w/o enclosures)