



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2014

Mr. Isidro R. Alaniz
District Attorney
49th Judicial District
P.O. Box 1343
Laredo, Texas 78042-1343

OR2014-21018

Dear Mr. Alaniz:

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# 545345.

The District Attorney's Office for the 49th Judicial District (the "district attorney's office") received a request for five categories of information pertaining to a specified grand jury proceeding. The district attorney's office claims the requested information is either not subject to the Act or excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

Initially, you inform us some of the requested information consists of records of a grand jury. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary, and therefore not subject to the Act. 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. Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). Thus, the submitted information that the district attorney's office holds as agent of the grand jury consists of

¹We understand the district attorney's office to raise section 552.101 based on its arguments.

records of the judiciary not subject to disclosure under the Act, and the district attorney's office is not required to release such information in response to the request for information. To the extent the submitted information does not consist of records of the judiciary, we will address your exceptions to disclosure.

Section 552.108(a)(2) of the Government Code 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 the information at issue relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* §§ 552.108(a)(2), .301(e)(1)(A). You state the information at issue pertains to a grand jury proceeding that concluded in a no bill and, thus, "had a final result other than a conviction or deferred adjudication." Nevertheless, you state release of the submitted information "may interfere with a future prosecution if our office decides to resubmit the case to a grand jury" and "[a] no bill action by the grand jury does not prevent the case from being indicted by the same or different grand jury at a later date." You also represent section 552.103 is applicable to the submitted information because that section "protects information related to pending criminal cases[.]" Because you have provided this office with contradictory representations, we find you have failed to demonstrate the applicability of section 552.108(a)(2) of the Government Code to the information at issue. Therefore, the district attorney's office may not withhold the information on that basis.

Section 552.103 of the Government Code provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103. The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation.

The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

As noted in part above, you assert the requested information is excepted from disclosure under section 552.103 because that section “protects information related to pending criminal cases, until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and post-conviction remedies in state and federal court.” However, upon review, we find you have not demonstrated the district attorney’s office was involved in pending criminal litigation pertaining to the grand jury proceeding at issue, or that criminal litigation was realistically contemplated with regard to this proceeding, on the date the request for information was received. Therefore, the district attorney’s office may not withhold the submitted information under section 552.103(a) of the Government Code.

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 section encompasses information protected by other statutes. Chapter 560 of the Government Code provides a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney’s office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses 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). In construing article 20.02 of the Code of Criminal Procedure, the Texas courts have generally stated the types of “proceedings” that are secret consist of testimony presented to the grand jury and the deliberations of the grand jury. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). Upon review, we find you have not demonstrated any of the remaining information reveals grand jury testimony or deliberations of the grand jury. Therefore, we conclude the district attorney’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with article 20.02 of the Code of Criminal Procedure.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.² *See* Gov’t Code § 552.130. The district attorney’s office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

To conclude, the district attorney’s office is not required to release any of the submitted information that it holds as agent of the grand jury. To the extent the district attorney’s office does not hold the submitted information as agent of the grand jury, it must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code and under section 552.130 of the Government Code, but must release the remaining information.³

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

³We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov’t Code § 552.137(b).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 545345

Enc. Submitted documents

c: Requestor
(w/o enclosures)