



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2016

Ms. Leslie O. Haby
Assistant Criminal District Attorney
Civil Section
The Bexar County Criminal District Attorney's Office
101 West Nueva, 7th Floor
San Antonio, Texas 78205-3030

OR2016-24582

Dear Ms. Haby:

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# 632928 (ORR# 544).

The Bexar County Criminal District Attorney's Office (the "district attorney's office") received two requests for three specified case files and all correspondence pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information consists of a grand jury summons. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary, and 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 are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Thus, to the extent the district attorney's office holds the information at issue as an agent of the grand jury, such information consists of a record of the judiciary that is not subject to disclosure under the Act. Thus, the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office does not hold the information at issue as an agent of the grand jury, we will consider your arguments against its disclosure.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information includes completed investigations that are subject to section 552.022(a)(1). The district attorney's office must release the completed investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains court-filed documents, which we have marked, that are subject to section 552.022(a)(17), and must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(17). You raise sections 552.103 and 552.108 of the Government Code for the information subject to section 552.022(a)(17). You further seek to withhold the information subject to section 552.022(a)(1) under section 552.103. However, sections 552.103 and 552.108 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the information subject to subsections 552.022(a)(1) and (17) may not be withheld under section 552.103. Further, the court-filed documents may not be withheld under section 552.108. However, because section 552.022(a)(1) states information subject to that section may be withheld under section 552.108, we will address your argument under section 552.108 for the information subject to section 552.022(a)(1). You also claim section 552.101 of the Government Code in conjunction with common-law privacy for a portion of a court-filed document. We note common-law privacy is not applicable to information contained in public records. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). Therefore, no portion of the court-filed document may be withheld under section 552.101 in conjunction with common-law privacy. However, we will consider your other argument under section 552.101 because section 552.101 protects information made confidential under law. Further, we will consider your argument under section 552.101 in conjunction with common-law privacy for the information that is not subject to section 552.022(a)(17) of the

Government Code. We will also consider all of your arguments for the information not subject to section 552.022.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information in Case Number 2016-CR-0557 pertains to an active criminal prosecution. Based on your representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue in Case Number 2016-CR-0557.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See Gov’t Code* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate 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)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the remaining case files pertain to closed criminal cases that did not result in conviction or deferred adjudication. Based on your representation, we agree section 552.108(a)(2) is applicable to the information at issue.

However, we note section 552.108 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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the district attorney’s office may withhold the information not subject to section 552.022(a)(17) in Case Number 2016-CR-0557 under section 552.108(a)(1) of the Government Code and the information pertaining to the remaining case files under section 552.108(a)(2) of the Government Code.¹

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information, except to note that basic information may generally not be withheld from public disclosure under section 552.103 of the Government Code. *See* Open Records Decision No. 597 (1991).

Section 552.101 of the Government Code except from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decisions.” Gov’t Code § 552.101. Section 552.101 encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. Upon review, we find you have not demonstrated disclosure of any of the remaining information would create a substantial threat of physical harm to an individual. Therefore, the district attorney’s office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

In summary, with the exception of basic information and the court-filed documents subject to section 552.022(a)(17) of the Government Code we have marked, which must be released, the district attorney’s office may withhold Case Number 2016-CR-0557 under section 552.108(a)(1) of the Government Code and the information pertaining to the remaining case files 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.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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/bhf

Ref: ID# 632928

Enc. Submitted documents

c: Requestor
(w/o enclosures)