



May 15, 2000

Mr. Scott Morris  
Assistant District Attorney  
64<sup>th</sup> and 242<sup>nd</sup> Judicial Districts  
Counties of Hale & Swisher  
Hale County Courthouse  
500 Broadway No. 200  
Plainview, Texas 79702

OR2000-1914

Dear Mr. Morris:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 135190.

The Swisher County District Attorney (the "district attorney") received a request for copies of eight specific indictments handed down by the Swisher County Grand Jury in 1999.<sup>1</sup> You claim that five of the requested indictments are not subject to the Public Information Act (the "Act"). Alternatively, you claim that the five indictments at issue are excepted from disclosure under section 552.108 of the Government Code.<sup>2</sup> We have considered the arguments you claim and reviewed the submitted information.

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<sup>1</sup>We note that a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 at 8 (1990). Further, a governmental body may ask a requestor to clarify a request for information if the request is unclear. Gov't Code § 552.222(b); *see also* Open Records Decision No. 304 (1982).

<sup>2</sup>In your initial brief to this office, you raised arguments in regard to only three of the eight requested indictments. You have subsequently acknowledged an error in locating the information and have submitted two additional indictments for us to consider. Because you have not submitted the remaining three requested indictments and have raised no exception to their disclosure, we assume that you have released those documents to the requestor.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). You did not submit to this office two of the requested indictments until March 22, 2000. Thus, as to these two documents, you have failed to meet the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Exception from disclosure under section 552.108 will not overcome the presumption of openness; thus, you have waived your claimed exception under section 552.108, as to the last two indictments the district attorney submitted to this office. We will consider your confidentiality argument as to all of the submitted documents.

You assert that the five indictments submitted are excepted from disclosure under laws governing the confidentiality of grand jury proceedings. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies subject to chapter 552 of the Government Code, so that records within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See Open Records Decision No. 513 (1988)*. When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to chapter 552. *Open Records Decision No. 513 at 3 (1988)*. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.*

You state that the documents at issue are "indictments which name individuals not in custody or under bond" and are therefore in the constructive possession of the grand jury, pursuant to article 20.22 of the Code of Criminal Procedure. Article 20.22 provides:

The fact of a presentment of indictment by a grand jury shall be entered upon the minutes of the court, if the defendant is in custody or under bond, noting briefly the style of the criminal action and the file number of the indictment and the defendant's name. If the defendant is not in custody or under bond

at the time of the presentment of indictment, the entry in the minutes of the court relating to said indictment shall be delayed until such time as the *capias* is served and the defendant is placed in custody or under bond.

Code of Criminal Procedure § 20.22. You represent that these indictments have not been served on the individuals charged. However, based upon notations made on the face of the indictments, it appears that the documents submitted for our review have been presented to and filed with a court. Section 552.022(a)(17) of the Government Code states that information that is also contained in a public court record is not excepted from disclosure under the Act, unless confidential under other law. Moreover, documents filed with a court are generally considered public. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Therefore, if these documents have in fact been filed with the court, you must release the documents to the requestor.<sup>3</sup>

If however, contrary to the markings on the face of the documents, these indictments have not been filed with the court, section 552.108 applies. Section 552.108 of the Government Code states that 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 release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov’t Code §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that there are open warrants for the arrest of the individuals named on the indictments. Thus, the prosecution of these individuals is pending. Therefore, it appears that the release of the information would interfere with the detection, investigation, or prosecution of crime. Thus, you may withhold indictment numbers B3235-99-07CR, B3275-99-07CR, and B3326-99-07CR under section 552.108(a)(1), if these documents have not been filed with the court.<sup>4</sup> However, as discussed above, the district attorney has waived its exception under section 552.108 as to two of the indictments by failing to submit those indictments within the fifteen business day deadline. Indictment

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<sup>3</sup>Thus, if the indictments have been filed with the court, we do not address the application of section 552.108 to the initial three indictments submitted because information that is within the ambit of section 552.022(a)(17) cannot be withheld under section 552.108. *See generally* Open Records Decision No. 665 at 2, n.5 (2000) (explaining that discretionary exceptions are not confidentiality provisions).

<sup>4</sup>The district attorney sought a decision from this office approximately two months ago. Any of the submitted indictments that have been served during this time period are public court documents which must be released to the requestor. Gov’t Code § 552.022(a)(17).

numbers B3562-99-12CR and B3563-99-12CR must be released to the requestor. We note that you have the discretion to release any information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, if the indictments have been filed with the court, they are public information and must be released to the requestor. If they have not been filed with the court, you may withhold the initial three indictments submitted to this office, numbers B3235-99-07CR, B3275-99-07CR, and B3326-99-07CR. In either case, the district attorney must release the two indictments submitted to this office after the deadline, numbers B3562-99-12CR and B3563-99-12CR.

This letter ruling is limited to the particular records 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 records or any other circumstances.

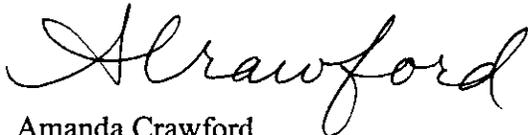
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Crawford".

Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/nc

Ref: ID# 135190

Encl. Submitted documents

cc: Mr. Gary O. Gardner  
Vigo Park Station  
Tulia, Texas 79088  
(w/o enclosures)