



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 10, 2003

Mr. Scott A. Durfee
General Counsel
Harris County
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2003-8103

Dear Mr. Durfee:

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# 191072.

The Harris County District Attorney's Office (the "District Attorney") received a request for a copy of case file number 20-1936, in its entirety. You assert the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We reviewed the information you submitted and considered the exceptions you claim.

Initially, we note the submitted information includes documents that may not be subject to the Act. This office has concluded that grand juries are not governmental bodies subject to the Public Information Act (the "Act"), so records within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *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 the Act. *Id.* at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to

¹You also raised section 552.103 as a potential exception to disclosure of the requested information. However, you did not supply this office with any arguments explaining why section 552.103 applies to the requested information. Therefore, we find that you have waived this exception. *See* Gov't Code §§ 552.301(e), .302.

disclosure is applicable. *Id.* The information in Appendix 4 relates to a grand jury subpoena. Thus, to the extent this information is maintained by the District Attorney for or on behalf of the grand jury, it is in the custody of the District Attorney as an agent of the grand jury and is not subject to disclosure under the Act. *Id.* at 4. To the extent it is not so maintained, it is subject to the Act and may be withheld only if an exception under the Act is shown to apply. As we are unable to determine the extent to which these documents are maintained for or on behalf of the grand jury, we will also address the exceptions that you claim under the Act for these documents.

First, however, we note that section 552.022 of the Government Code applies to the submitted information. Section 552.022 provides as follows:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1). In this case, the submitted information consists of a completed investigation by the District Attorney's Consumer Fraud Division (the "Consumer Fraud Division"). Thus, the District Attorney must release the information, unless it is expressly confidential under other law or excepted from disclosure under section 552.108. As you claim section 552.101, which constitutes other law for purposes of section 552.022, we will address your arguments under this exception as well as section 552.108.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses confidentiality provisions such as article 20.02 of the Code of Criminal Procedure, which provides that "[t]he proceedings of the grand jury shall be secret." Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and excepted from disclosure under section 552.101 of the Government Code. Having reviewed all of the documents contained in Appendix B-4, we conclude that none of the information reveals the grand jury's proceedings. Therefore, the District Attorney may not withhold any of the information in Appendix B-4 under section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure. As you claim no other exceptions for Appendix B-4, we conclude the District Attorney must release the information at issue in Appendix B-4 to the requestor to the extent it is subject to the Act.

Next, you assert the contents of Appendix B-3 constitute criminal records governed by chapter 411 of the Government Code. Federal law governs and restricts access to criminal history record information ("CHRI") obtained from the National Crime Information

Center ("NCIC"). See 28 C.F.R. §§ 20.1 *et seq.*; Open Records Decision No. 565 at 10-12 (1990). The relevant federal regulations permit each state to follow its own applicable law with respect to the CHRI that it generates. ORD 565 at 11-12. Sections 411.083 and 411.089 of the Government Code authorize a criminal justice agency to obtain CHRI from the Texas Crime Information Center ("TCIC"). However, CHRI obtained from the TCIC network may be released by a criminal justice agency only to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, CHRI generated by the federal government or another state may be obtained only in accordance with the relevant federal regulations, and CHRI obtained from the Texas Department of Public Safety or another Texas criminal justice agency through the TCIC must be withheld in accordance with subchapter F of chapter 411 of the Government Code. However, driving records are not criminal history record information. Gov't Code § 411.082(2)(B). After reviewing the information at issue, we find that Appendix B-3 consists of a driving record, not CHRI. Consequently, the District Attorney may not withhold Appendix B-3 under section 552.101 in conjunction with chapter 411 of the Government Code.

However, we note we note section 552.130 of the Government Code may govern some of the information in Appendix B-3.² This provision excepts from public disclosure information relating to a driver's license or a motor vehicle title or registration issued by an agency of this state. See Gov't Code § 552.130. In this case, the information at issue contains motor vehicle information that may pertain to a motor vehicle title or registration issued by the state of Texas. Therefore, to the extent the information we have marked relates to a Texas motor vehicle title or registration, the District Attorney must withhold such information under section 552.130 of the Government Code.

With respect to Appendix B-1, you assert subsections 552.108(a)(4) and (b)(3). These provisions state the following:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if:

....

(4) it is information that:

² The Office of the Attorney General will raise a mandatory exception like section 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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.

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of 552.021 if:

...

(3) the internal record or notation:

(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), (b)(3). A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 applies to that information. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that the information in Appendix B-1 consists of the District Attorney's work product, including various prosecutorial handwritten and typewritten notes. You indicate that the file developed by the Consumer Fraud Division during a criminal investigation that was ultimately dismissed as a civil case without the filing of any criminal charges. Upon review of your representations and the information in Appendix B-1, we conclude that the information was either prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude that the information in Appendix B-1 may be withheld from disclosure under section 552.108(a)(4).

For Appendix B-2, you claim subsections 552.108(a)(2) and (b)(2), which provide, in pertinent part, as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [and]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). A governmental body claiming section 552.108(a)(2) or (b)(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. In this case, you inform us that Appendix B-2 pertains to an investigation conducted by the Consumer Fraud Division which was ultimately dismissed without the filing of any criminal charges. Based on a review of your representations and the submitted information at issue, we conclude sections 552.108(a)(2) applies to most of the information in Appendix B-2.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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 Open Records Decision No. 127 (1976) (summarizing types of information considered basic information). Thus, the District Attorney must release basic information from Appendix B-2 under section 552.108(c) of the Government Code.

In summary, to the extent that the documents in Appendix B-4 are maintained by the District Attorney for or on behalf of the grand jury, they are records of the grand jury and are not subject to the Act. The District Attorney may withhold the information in Appendices B-1 and B-2 under section 552.108 of the Government Code, with the exception of basic information contained in Appendix B-2. The District Attorney must withhold the information we have marked in Appendix B-3 under section 552.130 if it relates to a Texas motor vehicle title or registration. The District Attorney must release the remainder of the submitted information to the requestor.

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).

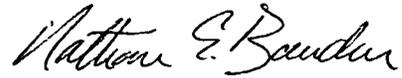
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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 "Nathan E. Bowden".

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/seg

Ref: ID# 191072

Enc: Submitted documents

c: Mr. Dennis L. Berry
5231 Ridgestone Lane
Houston, Texas 77053
(w/o enclosures)