



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2005

Ms. Pamela Smith
Senior Assistant General Counsel
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

OR2005-00664

Dear Ms. Smith:

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# 217240.

The Texas Department of Public Safety (the "department") received a request for two administrative investigations conducted by the department concerning certain actions taken by the requestor while he was an employee of the department. You state that the department will release one of the administrative investigations to the requestor. You claim that the second investigation is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information constitutes grand jury records that are not subject to the Act. This office has concluded that grand juries are part of the judiciary and are, thus, not subject to the Act. *See* Gov't Code § 552.003 ("governmental body" does not include judiciary). Records that are within the constructive possession of grand juries are not public information that is 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. *See id.* Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *See id.* We note that a portion of the submitted information was obtained by the department through the use of a grand jury subpoena at the direction of the

grand jury. Thus, we understand that the department is holding these records as an agent of the grand jury. Accordingly, we conclude that this particular information is in the constructive possession of the grand jury and is, therefore, not subject to disclosure under the Act.

Next, we note that the remaining submitted information includes a search warrant affidavit. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc art. 18.01(b). Because the submitted search warrant has been executed, the department may not withhold the supporting affidavit. *See generally* Open Records Decision No. 525 (1989) (stating that exceptions to disclosure do not, as general rule, apply to information made public by other statutes).

Section 552.108 excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . if: (1) 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 section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

This office has determined that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). In such a situation, the agency that is acting as proper custodian must demonstrate that the information relates to the pending case and provide this office with a representation from the law enforcement entity that is investigating or prosecuting the incident indicating that it wishes to withhold the information.

You state that, although the department has completed its investigation, the investigation file has been turned over to the Bexar County District Attorney’s Office (the “district attorney”), and that the district attorney is reviewing it to determine whether criminal charges should be filed. Additionally, the department has submitted a letter from Assistant Criminal District Attorney Clifford C. Herberg, Jr. in which he states that the district attorney is currently reviewing the investigation file pertaining to the requestor for possible criminal conduct. Mr. Herberg further states that no decision has been made regarding prosecution of the requestor. Upon review of the representations made by both the district attorney and the department, we conclude that the release of the submitted information 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), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, we agree that section 552.108(a)(1) is applicable to the submitted information. *See* Open Records Decision No. 372 at 4 (1983) (law enforcement exception can apply to information held by proper custodian of information relating to

incident allegedly involving criminal conduct that remains under active investigation or prosecution); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

We note, however, that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, 531 S.W.2d 177. *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, you may withhold the remaining submitted information from disclosure pursuant to section 552.108(a)(1). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, a portion of the submitted information is in the constructive possession of the grand jury and it, therefore, is not subject to disclosure under the Act pursuant to section 552.003 of the Government Code. The search warrant affidavit must be released in accordance with section 18.01(b) of the Code of Criminal Procedure. With the exception of basic information, which must be released, the department may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code.

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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 217240

Enc. Submitted documents

c: Mr. Ralph Sramek
12860 East Pittman Road
Adkins, Texas 78101
(w/o enclosures)