



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2005

Mr. A. Dale Stroud
Burlington County Sheriff
Burlison County Sheriff's Department
1334 Hwy. 21 E.
Caldwell, Texas 77836

OR2005-03626

Dear Mr. Stroud:

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# 222911.

The Burlison County Sheriff's Department (the "sheriff") received a request for various police records concerning the requestor. You contend that the information at issue does not constitute public information subject to disclosure under the Act. In the alternative, you claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered your arguments. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address your contention that the information at issue constitutes records of the grand jury. This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within their actual or constructive possession are not subject to disclosure under the Act. *See* Gov't Code §§ 552.003(1)(B), .0035(a); *see also* Open Records Decision Nos. 513 (1988); 398 at 2 (1983) (grand jury is part of judiciary for purposes of Act). 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. Information that is not so held or maintained is subject to chapter 552 and may be withheld from disclosure only if a specific exception to disclosure is applicable. *Id.* Furthermore, "the fact that information collected or prepared by the district attorney is submitted to the grand

jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney." *Id.* at 4.

You state, "[a]s this case is currently pending before the Grand Jury, these documents are part of a case file of the Burleson County Grand Jury records, and therefore is an exception to public disclosure." In addition, you indicate that these documents are being held on "behalf" of the grand jury. However, not all of the information at issue here can necessarily be deemed to be within the constructive possession of the grand jury. Your investigation into the requested reports and complaints began before any information was submitted to the grand jury. Moreover, you do not inform us that the grand jury formally requested or directed the sheriff's actions in this investigation. *See generally* Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). Therefore, to the extent the requested information is maintained by the sheriff for or on behalf of the grand jury, it is in the custody of the sheriff as agent of the grand jury and not subject to disclosure under the Act. To the extent that 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.

We turn now to the sheriff's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why any stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. In this instance, you have not submitted to this office a copy of the requested information or a representative sample thereof.

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). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994).

You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. This section is a discretionary exception that protects a governmental body's interests and may be waived. As such, it does not generally constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision

No. 522 (1989) (discretionary exceptions in general); *but see* Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under predecessor to section 552.108 provided compelling reason to withhold information). Therefore, the requested information may not be withheld pursuant to section 552.108 and must be released to the requestor.

In summary, to the extent the requested information is maintained by the sheriff for or on behalf of the grand jury, it is in the custody of the sheriff as agent of the grand jury and not subject to disclosure under the Act. To the extent that it is not so maintained, it is subject to the Act and must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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,



Kazzye W. Martens
Assistant Attorney General
Open Records Division

KWM/krl

Ref: ID#222911

Enc. Submitted documents

c: Richard Surovik
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(w/o enclosures)