



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2005

Mr. Nathan C. Barrow
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2005-07584

Dear Mr. Barrow:

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# 230720.

The Fort Worth Police Department (the "department") received a request for a comprehensive investigator's report and statements of witnesses. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information appears to have been obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by an individual or entity as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and therefore are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411 (1984), 398 (1983); *but see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion). The fact that information collected or prepared by an individual or entity is submitted to the grand jury does not necessarily mean that the information is in the grand jury's constructive possession when the same information is also held in the individual's or entity's own capacity. Information held by an individual or entity but not produced at the direction of the grand jury may be protected under one of the Act's specific exceptions, but it is not excluded from the reach of the Act by the judiciary exclusion. *See* Open Records Decision No. 513 (1988). Thus, to the extent that the department has custody of the submitted information as an agent of the grand jury, any such information is in the

grand jury's constructive possession and is not subject to disclosure under the Act. *Id.* at 4. The rest of this decision is not applicable to any such information. To the extent that the submitted information is not held by the department as an agent of the grand jury, we address its public availability under the Act.

We next note that the submitted information includes a custodial death report. In 2003, the Office of the Attorney General (the "OAG") revised the format of a custodial death report. Previously, the report consisted of five sections. In Open Records Decision No. 521 at 5 (1989), we concluded that under article 49.18(b) of the Code of Criminal Procedure in conjunction with a directive issued by the OAG, section one of a custodial death report filed with this office was public information and must be released, but sections two through five of the report, as well as attachments to the report, were confidential. *See* Crim. Proc. Code art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). A custodial death report now consists of two pages and an attached summary of how the death occurred. The OAG has determined that the two-page report and summary must be released to the public; however, any other documents submitted with the revised report are confidential under article 49.18 of the Code of Criminal Procedure. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under Act generally not applicable to information that another statute expressly makes public). Therefore, the department must release the submitted custodial death report and the summary of how the death occurred, which we have marked, under article 49.18 of the Code of Criminal Procedure.

We also note that the submitted documents include an affidavit for a search warrant. A search warrant affidavit is made public by statute if the related search warrant has been executed. *See* Crim. Proc. Code art. 18.01(b). Thus, if the search warrant affidavit that we have marked was submitted in support of a search warrant that has been executed, then the affidavit must be released under article 18.01 of the Code of Criminal Procedure. If the affidavit does not relate to a search warrant that has been executed, then it is not made public by article 18.01 and must be disposed of along with the rest of the submitted information.

The submitted information also includes a document that is subject to section 552.022 of the Government Code. Information that is also contained in a public court record must be released under section 552.022(a)(17), unless the information is expressly confidential under other law. *See* Gov't Code § 552.022(a)(17). Sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). These exceptions are not other law for purposes of section 552.022. Thus, information that also is a matter of public court record may not be withheld under section 552.103 or section 552.108. Therefore, the department must release the court-filed document that we have marked under section 552.022(a)(17).

Next, we address your claim under section 552.108 with respect to the rest of the submitted information. Section 552.108(a)(1) 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 that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In this instance, the remaining information relates to an internal investigation. Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to Gov’t Code § 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You state, however, that the information in question relates to an open criminal case that is being investigated by the department and is pending possible prosecution by the Tarrant County District Attorney’s Office. Based on your representations, we find that section 552.108(a)(1) is applicable in this instance. *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). We therefore conclude that the department may withhold the rest of the submitted information under section 552.108(a)(1).¹

In summary: (1) any information held by the department as an agent of the grand jury is in the grand jury’s constructive possession and is not subject to disclosure under the Act; (2) the department must release the custodial death report and the summary of how the death occurred under article 49.18 of the Code of Criminal Procedure; (3) the search warrant affidavit must be released under article 18.01 of the Code of Criminal Procedure if it was submitted in support of a search warrant that has been executed; (4) the document that has been filed with a court must be released under section 552.022(a)(17) of the Government Code; and (5) the department may withhold the rest of the submitted information under section 552.108(a)(1).

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

¹As we are able to make this determination, we do not address your claim under section 552.103.

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).

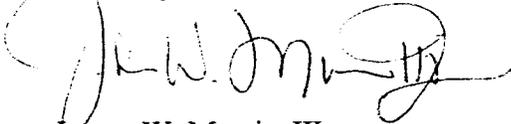
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Tex. 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 black ink, appearing to read "J.W. Morris III", written in a cursive style.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 230720

Enc: Submitted documents

c: Ms. Robin E. Snelson
P.O. Box 260169
Plano, Texas 75026-0169
(w/o enclosures)