



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 28, 2005

Mr. Brian L. Rose  
Assistant General Counsel  
Office of the District Attorney  
Harris County  
1201 Franklin Street, Suite 600  
Houston, Texas 77002

OR2005-08806

Dear Mr. Rose:

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# 233240.

The Harris County District Attorney's Office (the "district attorney") received a request for the following: (1) information regarding criticism or problems of any division of the Houston Police Department (the "department") crime laboratory or identification division; (2) information regarding improper storage of evidence at the department's crime lab or property room; (3) information related to "drylabbing," or falsification, fabrication, or other faulty processing of evidence by department employees; (4) information related to the credibility of the work or testimony of crime lab or other department employees; (5) information concerning the training of crime lab employees; and (6) information concerning internal audits of the department's crime lab, property room or identification division.<sup>1</sup> You state that the district attorney will release some information to the requestor. You claim that the submitted information is excepted from disclosure under sections

---

<sup>1</sup>The district attorney sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments submitted by an attorney for the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the document you have labeled Exhibit 36, which consists of an affidavit signed by Assistant District Attorney Lester Blizzard, is not responsive to the present request, as it was created after the date the district attorney received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district attorney need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You argue that some of the submitted information was obtained by grand jury subpoena or was presented to and considered by a grand jury and, therefore, such information is not subject to the Act. 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 district attorney 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 district attorney as an agent of the grand jury, we address its public availability under the Act.

---

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we address your argument that the information you have labeled Exhibit 35 is confidential and, therefore, excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by another statute. Article 20.02(a) of the Code of Criminal Procedure provides that “[t]he proceedings of the grand jury shall be secret.” The transcript of the testimony of grand jury witnesses is part of the record of the grand jury proceeding.<sup>3</sup> See *Stern v. State*, 869 S.W. 2d 614 at 621 (Tex. App.—Houston [14th Dist.] 1994, writ denied); see also Open Records Decision No. 398 (1983). Therefore, Exhibit 35, which consists of a transcript of grand jury testimony, is confidential under article 20.02(a) of the Code of Criminal Procedure and it must be withheld under section 552.101 of the Government Code. See also Open Records Decision No. 513 at 4 (1988) (stating that information should be withheld if its release would reveal grand jury’s deliberations).

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

---

<sup>3</sup>Release of such information is governed by article 20.02(c) of this code, which provides:

[a] disclosure of a record made under Article 20.012, a disclosure of a typewritten transcription of that record, or a disclosure otherwise prohibited by Subsection (b) or Article 20.16 may be made by the attorney representing the state in performing the attorney’s duties to a grand juror serving on the grand jury before whom the record was made, another grand jury, a law enforcement agency, or a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist the attorney in the performance of the attorney’s duties. The attorney representing the state shall warn any person the attorney authorizes to receive information under this subsection of the person’s duty to maintain the secrecy of the information. Any person who receives information under this subsection and discloses the information for purposes other than those permitted by this subsection is subject to punishment for contempt in the same manner as persons who violate Subsection (b).

Code Crim. Proc. art. 20.02(c).

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The district attorney maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district attorney must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that “[the remaining submitted information is] all related to numerous pending cases filed by the [department].”<sup>4</sup> You indicate that these prosecutions were pending on the date that the district attorney received this request. You further indicate that the district attorney is a party to the pending criminal litigation. *See Gov't Code § 552.103(a)*; Open Records Decision No. 575 at 2 (1990). We find the district attorney has established that criminal litigation was pending when it received this request for information. We also find that the submitted information is related to the pending litigation for purposes of section 552.103. Therefore, based on the district attorney's representations and our review of the information at issue, we conclude the remaining submitted information is excepted from disclosure at this time under section 552.103.<sup>5</sup>

In reaching this conclusion under section 552.103, we assume that the opposing parties in the criminal cases have not seen or had access to the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing a party seeking information relating to the litigation to obtain such information through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990)*. If the opposing parties have seen or had access to information that relates to the pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982)*. Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See Attorney General Opinion MW-575 (1982)*; Open Records Decision No. 350 (1982).

---

<sup>4</sup>You state that some criminal cases have been filed, and that other cases will be filed that are based on physical evidence that was previously processed by the department's crime lab.

<sup>5</sup> As our ruling is dispositive, we need not consider your remaining claimed exceptions to disclosure.

In summary, to the extent that the district attorney has custody of portions 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. Exhibit 35 is confidential under article 20.02(a) of the Code of Criminal Procedure and it must be withheld under section 552.101 of the Government Code. The remaining submitted information may be withheld under section 552.103 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).

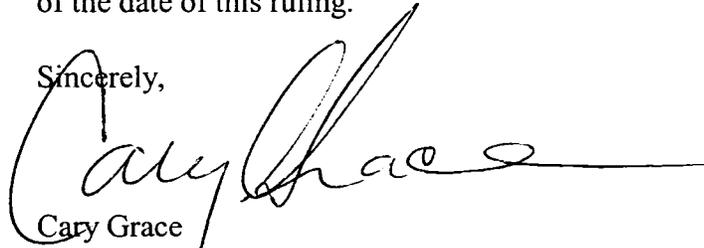
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 Office of the Attorney General 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. 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 "Cary Grace", written over a large, faint circular watermark or stamp.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/sdk

Ref: ID# 233240

Enc. Submitted documents

c: Mr. Steve McVicker  
Senior Reporter  
Houston Chronicle  
P.O. Box 4260  
Houston, Texas 77210  
(w/o enclosures)

Mr. Joseph R. Larson  
Ogden, Gibson, White, Broocks & Longoria, L.L.P.  
711 Louisiana, Suite 2100  
Houston, Texas 77002  
(w/o enclosures)