



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2006

Mr. Paul J. Stewart
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469-3108

OR2006-09987

Dear Mr. Stewart:

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# 257948.

The Fort Bend District Attorney's Office (the "district attorney") received a request for "all files, records, and any other documents in the possession of the [district attorney] pertaining to" a named individual. You state that the district attorney has released some of the requested information to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted to this office by the requestor. *See* Gov't Code § 552.304.

Initially, we note your assertion that the documents submitted in Exhibit K constitute grand jury records not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. 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. Open Records Decision No. 411 (1984). Further, records kept by a district attorney

¹We 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.

who is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. 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). You indicate that the records in Exhibit K are in the custody of the district attorney as agent of the grand jury. Accordingly, we conclude that these records are not subject to the Act and need not be released to the requestor.

We also note that the submitted information also includes fingerprints of the requestor's client. The public availability of this information is governed by sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. These sections are intended to protect the privacy of a living individual to whom a fingerprint or other biometric identifier pertains. *See id.* § 560.002(1)(A). In this instance, the requestor identifies himself as an attorney for the individual to whom the submitted fingerprints pertain. Therefore, the requestor has a special right of access to his client's fingerprint information under section 560.002(1)(A) of the Government Code and it must be released to him. We have marked the fingerprint information that must be released.

Next, we note that the remaining information contains documents that have been filed with a court. Pursuant to section 552.022(a)(17) of the Government Code, documents filed with a court must be released, except to the extent that they are confidential under other law. You claim that these documents are excepted from disclosure under sections 552.101 and 552.103 of the Government Code. Section 552.103 is a discretionary exception that protect a governmental body's interests and may be waived. *See 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 section 552.103); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(17). However, you claim that the information subject to section 552.022(a)(17) is confidential under section 552.101 in conjunction with section 35.29 of the Code of Criminal Procedure. Because section 35.29 constitutes "other law" for purposes of section 552.022, we will address your arguments under that statute.

Information collected about jurors in the jury selection process is governed by article 35.29 of the Code of Criminal Procedure, which provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, *including the juror's home address, home telephone number, social security number, driver's license number, and other personal information*, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought. [Emphasis added].

Crim. Proc. Code art. 35.29. Article 35.29 makes confidential certain personal information pertaining to only those individuals who actually served on the petit jury in a criminal trial. In addition to the confidential information listed in article 35.29, "other personal information" which is confidential pursuant to article 35.29 includes the juror's present employer, business telephone number, and spouse's employer. Juror names, however, are not made confidential by article 35.29, and are not "other personal information" that is confidential pursuant to article 35.29. Article 35.29 does not, however, preclude the provision of juror information to trial counsel for the purposes of voir dire in a criminal case.

Attorney General Opinion JC-405 (2001). The trial in this case has concluded. Thus, the requestor is not seeking the information for the purposes of voir dire. Therefore, he does not have a special right of access to this information. We have marked the information that the district attorney must withhold under section 552.101 of the Government Code in conjunction with article 35.29 with regard to jurors who served on the petit jury. The district attorney must release the remaining information subject to section 552.022(a)(17) to the requestor. For the remaining submitted information, we address your argument under section 552.103.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated on the date of the receipt of a request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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). We also note that section 552.103(b) provides that "[f]or 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."

The documents at issue relate to the prosecution of the named individual for murder, for which he was convicted. You inform us, and provide documentation demonstrating, that a federal writ of habeas corpus contesting the named individual's capital murder conviction was pending in federal court against the state when the district attorney received the request for information. We find that the district attorney is a party to this pending litigation. Upon review, we also find that the submitted documents relate to the pending federal proceeding

for purposes of section 552.103. Therefore, you may withhold the remaining documents from disclosure under section 552.103(a).

In reaching this conclusion however, we assume that neither the opposing party in the litigation nor any of his previous attorneys has had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

To conclude, the grand jury records in Exhibit K are not subject to the Act and need not be released to the requestor. The fingerprint information we have marked must be released to the requestor pursuant to section 560.002(1)(A). The court-filed information must be released to the requestor under section 552.022(a)(17), with the exception of the information we have marked to be withheld under section 35.29 of the Code of Criminal Procedure and section 552.101. The remaining submitted information may be withheld under section 552.103. As we are able to make this determination, we need not address your remaining arguments.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/krl

Ref: ID# 257948

Enc. Submitted documents

c: Mr. James G. Rytting
Hilder and Associates, P.C.
Attorneys at Law
819 Lovett Boulevard
Houston, Texas 77006-3905
(w/o enclosures)