



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2008

Ms. J.L. Macklin-Milligan
Assistant General Counsel
Harris County District Attorney
1201 Franklin Street, Suite 600
Houston, Texas 77002

OR2008-06130

Dear Ms. Macklin-Milligan:

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# 309458.

The Harris County District Attorney's Office (the "district attorney") received a request for a copy of the entire investigative file pertaining to a specified individual. You state that you have released a portion of the requested information. You claim that some of the submitted information is not subject to the Act. You also claim that the remaining information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code.¹ We have considered your arguments and reviewed the information you have submitted.

Initially, you inform us that Appendix B-3 contains records that are 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 is therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Moreover, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and are therefore not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411

¹Although you raise section 552.228(b) of the Government Code, this section is not an exception to disclosure under the Act. Gov't Code § 552.228(b)(3); *see also id.* § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code).

(1984), 398 (1983). *But see* Open Records Decision No. 513 at 4 (defining limits of judiciary exclusion). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean that such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. In this instance, you state that the information contained in Appendix B-3 is held by the district attorney as an agent for the grand jury. Further, the information in Appendix B-3 was obtained pursuant to a grand jury subpoena. Thus, the information in Appendix B-3 is in the constructive possession of the grand jury. Based on your representation, we agree that Appendix B-3 is not subject to disclosure under the Act. This decision does not address the public availability of such information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that is made confidential by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review of the submitted information, we find that the information we have marked in Appendix B-5 was used or developed in an investigation of alleged or suspected child abuse. *See id.* § 261.001(1)(E) (definition of child abuse includes sexual assault or aggravated sexual assault under Penal Code sections 22.011 and 22.021); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Thus, we find that the information we have marked in Appendix B-5 is within the scope of section 261.201 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information we have marked in Appendix B-5 is confidential pursuant to section 261.201

of the Family Code. Therefore, this information must be withheld under section 552.101 of the Government Code.²

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. We note that because the laws that govern the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. You state that Appendix B-2 contains criminal history record information. Upon review, we find that the information we have marked constitutes CHRI and is confidential under section 411.083. Therefore, the information we have marked in Appendix B-2 must be withheld under section 552.101 of the Government Code. Because the district attorney has not demonstrated how the remaining information in Appendix B-2 constitutes CHRI for purposes of section 411.083, it may not be withheld on that basis.

Next, you claim that the information in Appendices B-1, B-4, and the remaining information in B-5 and the information you have marked in Appendix B-6 are excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 provides in relevant part:

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that deals with the detection, investigation or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state[.]

Gov't Code § 552.108(a)(2), (a)(4), (b)(3). Section 552.108 is applicable to certain specific types of law enforcement information. Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state.

In this instance, you state that the documents in Appendix B-1 and the information you have marked in Appendix B-6 were prepared by the district attorney and reflect the district attorney's mental impressions and legal reasoning. Accordingly, we conclude that section 552.108(a)(4) is applicable to Appendix B-1 and the information you have marked in Appendix B-6. Furthermore, you state that Appendix B-4 and the remaining information in Appendix B-5 consists of records that relate to investigations that concluded in results other than convictions or deferred adjudications. We therefore agree that section 552.108(a)(2) is applicable to Appendix B-4 and the remaining information in Appendix B-5.

We note, however, section 552.108 does not except from disclosure basic information about an arrest, an arrested person, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *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). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Therefore, with the exception of basic information, the district attorney may withhold Appendix B-4 and the remaining information in Appendix B-5 under section 552.108(a)(2) and Appendix B-1 and the information you have marked in Appendix B-6 under section 552.108(a)(4).

In summary, the information contained in Appendix B-3 is not subject to the Act. The district attorney must withhold the information we have marked in Appendix B-5 under section 552.101 in conjunction with section 261.201 of the Family Code. The district attorney also must withhold the information we have marked in Appendix B-2 under section 552.101 in conjunction with section 411.083 of the Government Code. With the exception of basic information, the district attorney may withhold Appendix B-4 and the remaining information in Appendix B-5 under section 552.108(a)(2) and Appendix B-1 and the information you have marked in Appendix B-6 under section 552.108(a)(4). The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 309458

Enc. Submitted documents

c: Ms. Raquel Kelly
14107 Kenson Lane
Cypress, Texas 77429
(w/o enclosures)