



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 15, 2008

Ms. Zindia Thomas  
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P.O. Box 12548  
Austin, Texas 78711-2548

OR2008-06676

Dear Ms. Thomas:

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# 310355.

The Office of the Attorney General (the "OAG") received a request for records relating to the investigation and prosecution of Richard Hernandez and David Goertz, excluding account numbers, social security numbers, and e-mail addresses. The OAG states it will release some of the information and asserts the remainder is excepted from disclosure pursuant to sections 552.101, 552.107, 552.108, 552.111, and 552.130 of the Government Code. We have considered and reviewed the submitted arguments and representative sample of documents.<sup>1</sup>

First, we note the information is a completed investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides a completed investigation is public information unless it is confidential by other law or excepted from disclosure under

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<sup>1</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.

section 552.108. Gov't Code § 552.022(a)(1). Sections 552.107 and 552.111 are discretionary exceptions and do not make information confidential; therefore, the OAG may not withhold the information under these exceptions. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 630 at 4 (1994) (governmental body may waive section 552.107(1)), 473 (1987) (section 552.111 may be waived). Sections 552.101 and 552.130 are other laws for purposes of section 552.022. Therefore, we will consider the OAG's assertions under these exceptions as well as section 552.108. Furthermore, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will also determine whether the OAG may withhold the information under Rule 503.

Section 552.108 of the Government Code provides in relevant part as follows:

(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:

...

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

Gov't Code § 552.108(a)(4), (b)(3). 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* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Because the requested records involve a particular criminal matter and are not internal records, section 552.108(a)(4) is the apposite exception in this instance, not section 552.108(b)(3).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and held that "the decision as to what to include in [the file], necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Id* at 380. (quoting *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)). Accordingly, the court concluded that in such an instance, the district attorney's entire litigation file is privileged attorney work product. We note that if a governmental body seeks to withhold the entire litigation file under *Curry*, the governmental body may not release parts of the file, which would contradict the *Curry* argument. Because the OAG has released some of the requested information and only asserts some of the requested information may be withheld pursuant to *Curry*, we find that the OAG does not seek to withhold the entire prosecution file. As a result, the OAG may not withhold Exhibit C under section 552.108(a)(4) based upon *Curry*.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(D) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

The OAG explains the communications in Exhibit C are confidential communications among OAG attorneys and staff, and they are made in furtherance of the rendition of professional legal services. The OAG states the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG's arguments and the submitted information, we agree the communication we marked constitutes a privileged attorney-client communication that the OAG may withhold under Rule 503. The remaining records in Exhibit C are neither communications nor do they reflect communications. Thus, the rest of Exhibit C is not excepted from disclosure under Rule 503.

Section 552.130 excepts from public disclosure information relating to a Texas driver's license or motor vehicle title or registration. The OAG must withhold the Texas motor vehicle information it and we have marked under section 552.130.

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 exception encompasses information made confidential by other statutes. You assert that the submitted W-9 forms are confidential under section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the

term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of . . . income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or . . . the determination of the existence, or possible existence, of liability . . . for any tax, penalty, . . . or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). W-9 forms are requests for taxpayer identification numbers, and thus do not fall within the definition of “tax return information.” Thus, the OAG may not withhold the W-9 forms under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

Lastly, the OAG argues portions of the information in Exhibit D are not subject to the Act because the information was obtained through a grand jury subpoena. Alternatively, the OAG contends the information is confidential under common-law privacy and article 20.02 of the Code of Criminal Procedure because the information “discusses grand jury testimony and procedures.” 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 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, therefore, are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983); *But see* Open Records Decision No. 513 at 4 (defining limits of judiciary exclusion). 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. The OAG’s marked portions are contained in its own investigative records. Because the OAG holds the records in its own capacity, they are not grand jury records. Hence, the information is subject to the Act.

Next, we consider the OAG’s alternative arguments for this information. Article 20.02(a) provides that “[t]he proceedings of the grand jury shall be secret.” Crim. Proc. Code art. 20.02(a). When construing article 20.02 of the Code of Criminal Procedure, the types of “proceedings” Texas courts have generally stated are secret are testimony presented to the grand jury and the deliberations of the grand jury. *In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.); *see also Stern v. State*, 869 S.W.2d 614 (Tex. App.—Houston [14th Dist] 1994, no writ) (stating that anything that takes place before the bailiffs and grand jurors, including deliberations and testimony, is secret). After reviewing the OAG’s marked portions of Exhibit D, we conclude they do not reveal grand jury testimony or deliberations of the grand jury. Accordingly, the OAG may not withhold this information under article 20.02.

Section 552.101 also encompasses the doctrine of common-law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The OAG argues portions of Exhibit D reflecting the defendant's finances are private; we disagree. Because the OAG investigated this individual's misuse of public funds, his personal finances are of legitimate public interest. Thus, the OAG may not withhold this information under common-law privacy. However, Exhibit C does contain private financial information that is not of legitimate public interest. We have marked the private information in Exhibit C that the OAG must withhold.

In summary, the OAG may withhold the record we marked under Texas Rule of Evidence 503. The OAG must withhold the Texas motor vehicle information under section 552.130 and the private financial information in Exhibit C under common-law privacy. The OAG must release the rest.

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).

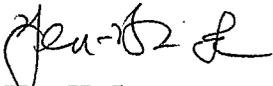
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 310355

Enc. Marked documents

c: Ms. Molly Bloom  
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(w/o enclosures)