



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 28, 2009

Mr. Gordon K. LeMaire
Assistant District Attorney
Cherokee County, Texas
P.O. Box 450
Rusk, Texas 75785

OR2009-10394

Dear Mr. LeMaire:

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# 350415.

The Cherokee County District Attorney's Office (the "district attorney") received two requests from the same requestor for copies of an indictment, probable cause statements, long-form complaints, sworn affidavits, and any other evidence presented to the grand jury in connection with a named individual. You state you have no information responsive to the request for probable cause statements or long-form complaints.¹ You claim a portion of the requested information is not subject to the Act. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that you have not submitted information responsive to the request for copies of the indictment of the named individual. To the extent any information responsive to this portion of the request existed on the date the district attorney received the request, we assume the district attorney has released it. If the district attorney has not released any such

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

information, he must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you argue a portion of the requested information consists of grand jury records. The judiciary is expressly excluded from the requirements of the Act. *Id.* § 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 governmental body that 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, 398 (1983). *But see* Open Records Decision No. 513 at 4 (1988) (defining limits of judiciary exclusion). Thus, to the extent that the information at issue is held by the district attorney as agent of the grand jury, it consists of records of the judiciary that are not subject to disclosure under the Act. To the extent the requested information at issue does not consist of records of the judiciary, we will address your exception to disclosure.

Next, we must address the district attorney's obligations under the Act. Section 552.301(b) requires that a governmental body inform this office which exceptions apply to a request for information within ten business days of receiving the request. *See* Gov't Code § 552.301(b). The district attorney failed to raise section 552.108 within the ten-business-day period following the second request. Accordingly, we conclude that the district failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). In failing to comply with section 552.301, the district attorney has waived his claim under section 552.108 and, therefore, may not withhold any of the requested information under this exception. *See* Open Records Decision No. 586 (1991) (governmental body may waive section 552.108). However, because section 552.101

of the Government Code can provide a compelling reason to overcome this presumption, we will consider the applicability of this exception to the submitted information.²

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 section encompasses information protected by other statutes. Section 21.12(a) of the Penal Code provides that "[a]n employee of a public or private primary or secondary school commits an offense if the employee engages in . . . (1) sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works and who is not the employee's spouse[.]" Penal Code § 21.12(a)(1). We further note that section 21.12(d) provides that "[t]he name of a person who is enrolled in a public or private primary or secondary school and involved in an improper relationship with an educator as provided by subsection (a) may not be released to the public and is not public information under Chapter 552, Government Code." *Id.* § 21.12(d). Thus, the name of the student allegedly involved in an improper relationship with an educator is confidential under section 21.12, and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we determine the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

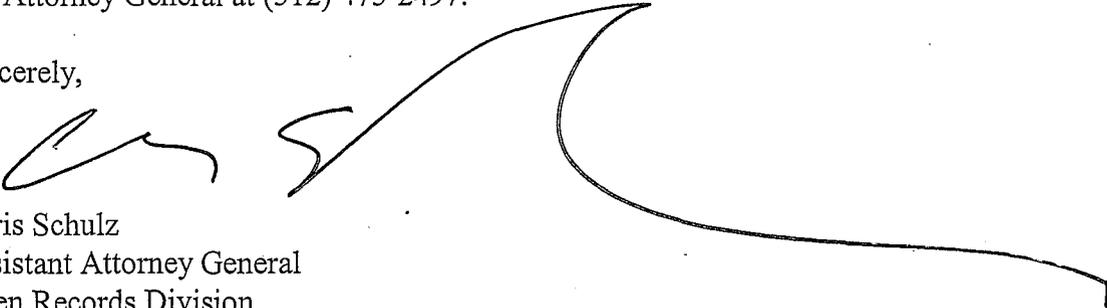
In summary, to the extent that a portion of the requested information is held by the district attorney as agent of the grand jury, it consists of records of the judiciary not subject to disclosure under the Act. The district attorney must withhold the information we have marked under section 552.101 in conjunction with (1) section 21.12 of the Penal Code, and (2) common-law privacy. As you raise no further exceptions against disclosure, the remaining information must be released.

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 350415

Enc. Submitted documents

cc: Requestor
(w/o enclosures)