



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2009

Ms. Claire Yancey
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2009-13095

Dear Ms. Yancey:

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# 355509.

The Denton County Criminal District Attorney (the "district attorney") received a request for information pertaining to a specified investigation. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You state that the information requested is maintained by the district attorney on behalf of the Denton County Grand Jury and is therefore not subject to the Act. *See* Gov't Code §§ 552.003(B), .0035(a); *see also* Open Records Decision No. 398 at 2 (1983) (grand jury is part of judiciary for purposes of the Act). 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 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

¹We note that although you initially raised sections 552.103, 552.107, and 552.111 of the Government Code, you have submitted no arguments in support of these exceptions. Therefore, we do not address sections 552.103, 552.107, or 552.111. *See* Gov't Code §§ 552.301 (e)(1)(A), .302.

(1988), 411, 398. *But see* ORD 513 at 4 (defining limits of judiciary exclusion). We find the situation here to be substantially similar to the situation we addressed in Open Records Decision No. 513. In that decision, a district attorney claimed that all of the information responsive to an open records request and contained in his investigation file was in the constructive possession of the grand jury because the information was held by the district attorney as an agent of the grand jury. The district attorney thus asserted that his entire investigative file was subject to the judiciary exclusion and outside the reach of the Act. In response to this argument, we stated:

Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. Your investigation began before any information was submitted to the grand jury. Moreover, the grand jury did not formally request or direct all of the district attorney's actions in this investigation. *See generally* Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). *Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney.* Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of [the Act's] exceptions, but it is not excluded from the reach of [the Act] by the judiciary exclusion. [emphasis added]

ORD 513 at 3. As explained above, we believe that only those portions of the responsive information "obtained pursuant to a grand jury subpoena issued in connection with [the] investigation" are within the grand jury's constructive possession and therefore subject to the judiciary exclusion and outside the reach of the Act. *Id.* We have no indication that the grand jury subpoenaed the submitted investigation files of the district attorney, and we do not believe release of this information implicates the confidentiality provision at article 20.02(a) of the Code of Criminal Procedure ("The proceedings of the grand jury shall be secret."). Nevertheless, to the extent the submitted information was obtained pursuant to a grand jury subpoena issued in connection with an investigation, the information is within the grand jury's constructive possession and is not subject to disclosure under the Act. To the extent the submitted information is not held by the district attorney as an agent of the grand jury, the information is subject to the Act and must be released unless it falls within an exception to disclosure.

We note the submitted information contains a court-filed document that is subject to section 552.022 of the Government Code. Information filed with a court is generally a matter of public record under section 552.022(a)(17) of the Government Code and may only be withheld if expressly made confidential under other law. *See* Gov't Code

§ 552.022(a)(17). Although you assert that this information is excepted under section 552.108 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Therefore, section 552.108 does not constitute other law for purposes of section 552.022(a)(17). Accordingly, the district attorney may not withhold the court-filed document, which we have marked, under section 552.108 of the Government Code. As you raise no other exception to disclosure for this information, it must be released to the requestor.

With respect to the remaining information not subject to section 552.022, we will address your claim under section 552.108 of the Government Code. Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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.[.]” Gov’t Code § 552.108(a)(2). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the remaining information is related to a concluded criminal case that was no-billed by a grand jury. Based on your representation, we conclude that section 552.108(a)(2) is generally applicable to the remaining information.

We note that section 552.108 does not except from disclosure “basic information about an arrested person; an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing 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 Houston Chronicle*, 531 S.W.2d at 186-88. The district attorney must release basic information, including a detailed description of the offense, even if the information does not literally appear on the front page of an offense or arrest report. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The district attorney may withhold the remaining information under section 552.108(a)(2).²

In summary, to the extent that the submitted information is held by the district attorney as an agent of the grand jury, such information is in the grand jury’s constructive possession and is not subject to disclosure under the Act. The district attorney must release the marked court-filed document pursuant to section 552.022(a)(17) of the Government Code. With the exception of basic information, the district attorney may withhold the remaining information under section 552.108(a)(2).

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

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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/eeg

Ref: ID# 355509

Enc. Submitted documents

cc: Requestor
(w/o enclosures)