ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
City of Dallas
1400 South Lamar Street
Dallas, Texas 75215

OR2009-16187

Dear Ms. Middlebrooks:

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# 361586 (DPD# 09-6958).

The City of Dallas (the "city") received a request for all records related to the allegations against a former city employee. You state that you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, you note that some of the submitted information was obtained pursuant to grand jury subpoenas. The Act generally requires the disclosure of information maintained by a "governmental body," but 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 Decision Nos. 513

[1]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.

(1988), 411 (1984), 398 (1983). *But see* ORD 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. 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 exception. *See* ORD 513. Thus, to the extent this information is in the custody of the city as an agent for the grand jury, this information is in the grand jury's constructive possession and is not subject to the Act. This decision does not address the public availability of such information. However, to the extent this information is not in the custody of the city as an agent for the grand jury, we will address your arguments to withhold the information.

You argue that the information obtained pursuant to grand jury subpoenas is confidential under article 20.02 of the Code of Criminal Procedure. Section 552.101 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 statutes, including article 20.02(a) of the Code of Criminal Procedure, which 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). Upon review, we find you have not demonstrated, and we are unable to determine, how any of the information you seek to withhold under article 20.02 reveals grand jury testimony or deliberations of the grand jury. Accordingly, the city may not withhold any portion of the information at issue under article 20.02 of the Texas Code of Criminal Procedure.

Next, we note that the submitted information contains account information relating to the receipt of funds by a governmental body and a document that has been filed with a court. Section 552.022 of the Government Code provides in relevant part:

> [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> . . .
>
> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
>
> . . .

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). Although you seek to withhold the account and court-filed information, which we have marked, under section 552.108 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). As such, section 552.108 is not other law that makes information expressly confidential for the purposes of sections 552.022(a)(3) and 552.022(a)(17). Therefore, the city may not withhold the account and court-filed information we have marked under section 552.108 of the Government Code.

We note a portion of the information subject to section 552.022(a)(3) is excepted from disclosure under section 552.136 of the Government Code, which is considered other law for the purposes of 552.022. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136; *see id.* § 552.136(a) (defining "access device"). Accordingly, you must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information relates to a pending criminal investigation by the city's police department. Based on this representation, and our review of the information at issue, we conclude that section 552.108(a)(1) is applicable to the remaining information you have marked and it may be withheld on that basis. *See 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) (court delineates law enforcement interests that are present in active cases).

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 that other statutes make confidential. Criminal history record information ("CHRI") obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National

Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov't Code ch. 411 subch. F. Although sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See id.* § 411.089(b). The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code. However, we find that none of the remaining information you have marked constitutes CHRI for the purposes of chapter 411. Therefore, the city may not withhold any portion of the remaining submitted information on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision No. 545 (1990). The lien information we have marked constitutes personal financial information. Further, in this instance, we find that there is not a legitimate public interest in the release of this information. Therefore, the city must withhold the lien information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, section 552.117(a)(1) only protects a current or former employee's information in the context of his or her role as an employee of the governmental body and not as a suspect, defendant, complainant, victim, or witness in a criminal investigation. *See generally id.* §§ 552.024 (allowing employees and officials of governmental body to elect to withhold enumerated categories of information held by governmental body in its capacity as employer), .117(a)(1) (exception is subject to proper election under 552.024). Because the city holds the former employee's information in the context of her role as a suspect, section 552.117 is inapplicable in this instance.

Section 552.130 excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit or Texas motor vehicle title or registration.

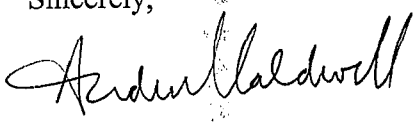
Gov't Code § 552.130(a)(1), (2). The city must withhold the Texas motor vehicle record information we have marked under section 552.130.

In summary: (1) to the extent the city holds the information as an agent of the grand jury, that information is in the grand jury's constructive possession and is not subject to the Act; (2) with the exception of the documents we have marked under section 552.022 the city may withhold the information you have marked under section 552.108(a)(1); (3) the city must withhold the information we have marked under section 552.136; (4) the city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (5) the city must withhold the lien information we have marked under section 552.101 in conjunction with common-law privacy; and (6) the city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 361586

Enc. Submitted documents

c: Requestor
(w/o enclosures)