



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2009

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County Attorneys Office
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2009-18180

Dear Ms. Lytle:

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# 365607.

The El Paso District Attorney's Office (the "district attorney") received a request for: 1) e-mails, facsimiles, letters, memoranda, complaints, or written documents prepared by, received by, sent by, or filed with the district attorney, between two specified dates, identifying or referencing two specified individuals; and 2) e-mails, facsimiles, letters, memoranda, complaints, or written documents prepared by, received by, sent by, or filed with the district attorney, between two specified dates, identifying or referencing a specified individual and the Federal Bureau of Investigation. You state the district attorney has no information responsive to the request for documents identifying or referencing two specified individuals.¹ You claim the submitted information is not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

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).

Initially, you assert the submitted information constitutes grand jury information that is not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. 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. Open Records Decision No. 411 (1984). In Open Records Decision No. 513 (1988), this office concluded that information obtained by a governmental body pursuant to a grand jury subpoena issued in connection with a grand jury investigation is within the grand jury's constructive possession and is not subject to the Act. However, if an investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the governmental body's actions in the investigation, then the information is not deemed to be in the grand jury's constructive possession. *Id.* at 4. The mere fact that information collected or prepared by a governmental body 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 governmental body. *Id.*

You inform us the submitted information was "collected for presentation to the grand jury as part of [an] ongoing investigation." Based on your representation and our review, we determine that the district attorney did not prepare or collect the requested information as an agent of the grand jury. *See id.* at 4-5. Therefore, the submitted information is subject to the Act and may be withheld only if an exception under the Act applies.

Section 552.101 exempts from disclosure information made confidential by law including information made confidential by statute. *Id.* § 552.101. You raise 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(a), 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). You have submitted no arguments explaining how the information at issue reveals grand jury testimony or the deliberations of the grand jury. Accordingly, you have failed to demonstrate the applicability of article 20.02(a) to the submitted records.

Section 552.108(a)(1) of the Government Code exempts 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 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), 301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the district attorney collected the submitted information as part of a grand jury investigation of criminal violations of a nepotism statute. Based upon your representations and our review, we

conclude the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *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). Therefore, the district attorney may withhold the submitted information under section 552.108(a)(1) of the Government Code.

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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 365607

Enc. Submitted documents

c: Requestor
(w/o enclosures)