



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 31, 2009

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

OR2009-18470

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# 366002 (Denton PIR no. 09-086).

The Denton County Criminal District Attorney's Office (the "district attorney") received a request for the district attorney files and Grand Jury transcripts regarding cause numbers F-2005-0561-E and F-2005-0562-E. You claim the submitted files are not subject to the Act. In the alternative, you claim the submitted files are excepted from disclosure under sections 552.101, 552.108, 552.130, and 552.147 of the Government Code. We have considered your arguments and reviewed the submitted information.

You state the requested information is maintained by the district attorney on behalf of the Denton County Grand Jury and is therefore 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 is, 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), 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 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 exclusion. *See* ORD 513.

You generally assert the submitted records are held by the district attorney on behalf of the Denton County Grand Jury. However, you provide no arguments explaining how this is the case. On the contrary, you represent these records are district attorney prosecution files. Accordingly, we conclude the submitted files were created and are maintained as part of the district attorney's investigation and subsequent presentation to the grand jury. Thus, we find all the submitted records are subject to the Act. *See* Gov't Code § 552.002 (providing that information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information").

The submitted information contains court-filed documents that are subject to section 552.022 of the Government Code. Information filed with a court is generally a matter of public record under subsection 552.022(a)(17) of the Government Code and may only be withheld if expressly made confidential under "other law." *See id.* § 552.022(a)(17). Although you assert 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 subsection 552.022(a)(17). Accordingly, the district attorney may not withhold the court-filed documents, which we have marked, under section 552.108 of the Government Code. However, you also claim the submitted records are confidential under section 552.101 of the Government Code. Section 552.101 is a mandatory exception to disclosure, and thus constitutes "other law" for purposes of section 552.022. We therefore consider whether section 552.101 of the Government Code excepts from disclosure any information subject to subsection 552.022(a)(17).¹

Section 552.101 excepts 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 "[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 anything that takes place before bailiffs

¹Although section 552.130 of the Government Code also constitutes "other law" for purposes of section 552.022, upon review, none of the information subject to section 552.022 contains Texas motor vehicle record information.

and grand jurors, including deliberations and testimony, is secret). You do not provide any arguments explaining how the submitted information reveals grand jury testimony or deliberations. Thus, we conclude you have not established the applicability of article 20.02(a) to the records at issue, and the district attorney may not withhold them on that basis.

Some of the records subject to subsection 552.022(a)(17) contain fingerprints. Section 552.101 of the Government Code also encompasses section 560.003 of the Government Code, which provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 provides, however, that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). Accordingly, we find a person, or the person’s authorized representative, has a right of access under subsection 560.002(1)(A) to that person’s biometric information. In this instance, the requestor may be an authorized representative of the individual whose fingerprints appear in the submitted information. Thus, if the district attorney determines the requestor is the authorized representative of the individual whose fingerprints are at issue, the requestor has a right of access to the fingerprints under subsection 560.002(1)(A), and they must be released. If, however, the district attorney determines the requestor is not the authorized representative of the individual whose fingerprints are at issue, the district attorney must withhold the marked fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.² The remaining information subject to subsection 552.022(a)(17) must be released.

With respect to the information not subject to subsection 552.022(a)(17), we will address your claim under section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(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:

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

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

Gov't Code § 552.108(a)(4). 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 id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

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 Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)). In this instance, the requestor seeks all of the district attorney's documents related to two specified prosecutions. We agree this request encompasses the district attorney's entire case file for cause numbers F-2005-0561-E and F-2005-0562-E. Thus, based on your representations and our review of the submitted information, we agree that subsection 552.108(a)(4) of the Government Code is applicable in this instance.

We note, however, 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). Basic information refers to the 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* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the district attorney may withhold the remaining information from disclosure based on subsection 552.108(a)(4) of the Government Code.

In summary, if the district attorney determines the requestor is the authorized representative of the individual whose fingerprints are at issue, the district attorney must release the marked fingerprints under section 560.002 of the Government Code; otherwise, these fingerprints must be withheld under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. With the exception of the remaining portions of the court-filed documents marked under subsection 552.022(a)(17) and basic information, the district attorney may withhold the remaining submitted information under subsection 552.108(a)(4) of the Government Code.³

³Because our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,

A handwritten signature in black ink, appearing to read 'Bob Davis', with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 366002

Enc. Submitted documents

cc: Requestor
(w/o enclosures)