



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 1, 2022

Mr. Thomas Wilson
Assistant Criminal District Attorney
Smith County
100 North Broadway 4th Floor
Tyler, Texas 75702

OR2022-15692

Dear Mr. Wilson:

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# 950196.

The Smith County Criminal District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified grand-jury proceeding. The district attorney's office claims the submitted information is either not subject to the Act or excepted from disclosure under section 552.101 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

The submitted information consists of a grand jury roster that the district attorney's office asserts is not subject to the provisions of the Act because it is in the constructive possession of the grand jury. The Act generally requires the public disclosure of information maintained by a "governmental body." While the Act's definition of a "governmental body" is broad, it specifically excludes the judiciary. *See* Gov't Code § 552.003(1)(B). In determining whether a governmental entity falls within the judiciary exception of the Act, this office looks to whether the entity is acting in a judicial capacity or solely in an administrative capacity. *See* Open Records Decision No. 646 at 2-3 (1996) (citing *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ)).

Chapter 62 of the Government Code, which deals with the judicial branch, provides for the compilation of a list of prospective jurors. *See* Gov't Code §§ 62.001-.011 (detailing jury list selection methods such as a jury wheel and electronic or mechanical selection). Section 62.012 of the Government Code provides as follows:

(a) When a justice of the peace or a county or district judge requires a jury for a particular week, the judge, within a reasonable time before the prospective jurors are summoned, shall notify the county clerk, for a county court jury, or the district clerk, for a justice or district court jury, to open the next consecutively numbered envelope containing a jury list that is in the clerk's possession and has not been opened. The judge shall also notify the clerk of the date that the prospective jurors are to be summoned to appear for jury service.

(b) On receiving the notice from the judge, the clerk shall immediately write on the jury list the date that the prospective jurors are to be summoned to appear and shall deliver the jury list to:

(1) the sheriff, for a county or district court jury; or

(2) the sheriff or constable, for a justice court jury.

Id. § 62.012. Upon receipt of the jury list, the sheriff summons the prospective jurors to appear on the designated day. *Id.* § 62.013. Chapter 19 of the Code of Criminal Procedure outlines a similar procedure for the selection of prospective grand jurors. In Open Records Decision No. 433 (1986), this office determined a list of prospective grand jurors is a record of the judiciary because the list is “compiled, and at virtually all times is maintained, by the jury commissioners, the district judge, or the court clerk, all of whom are part of the judiciary or agents thereof.” ORD 433 at 2-3. We also found the sheriff was considered an agent of the judiciary when using the grand jury list to summon the jurors for service. *Id.* However, the district attorney holding a list of names of impaneled jurors was not found to be acting as an agent of the judiciary, since he had “no task to perform with that list.” *Id.* at 3. Thus, the list of impaneled jurors held by the district attorney was not within the constructive possession of the judiciary, and was subject to the Act. *Id.* Based on the reasoning in Open Records Decision No. 433, we find the submitted information does not constitute records of the judiciary and is, therefore, subject to the Act. *See* Gov't Code § 552.021 (Act generally requires disclosure of information maintained by “governmental body”). Accordingly, we will address the arguments of the district attorney's office to withhold the information at issue.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses article 20A.202(a) of the Code of Criminal Procedure, which provides “[g]rand jury proceedings are secret.”¹ Crim. Proc. Code art. 20A.202(a). However, article 20A.202 does not define “proceedings” for purposes of subsection (a). The Fourth Court of Appeals in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of the statutory predecessor of article 20A.202 and stated the term “proceedings” could “reasonably be understood as encompassing matters

¹ We understand the district attorney's office to raise article 20A.202, rather than the former article 20.02 of the Code of Criminal Procedure.

that take place before the grand jury, such as witness testimony and deliberations.” *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added the statutory predecessor to subsection (b) of article 20A.202. *See* Crim. Proc. Code art. 20A.202; FEDED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20A.202(b) states “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20A.202(b). However, this provision does not define or explain what factors to consider in making such a determination, and even if we considered article 20A.202 to be a confidentiality provision, information withheld under this statute would be secret only “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

The district attorney’s office seeks to withhold the information at issue under article 20A.202. However, we conclude the district attorney’s office has not explained how the matters upon which the information at issue were based are still “before the grand jury” to warrant keeping the information secret. Thus, upon review of article 20A.202 and related case law, it is not apparent, and the district attorney’s office has failed to otherwise explain, how this provision makes the information at issue confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Therefore, the district attorney’s office may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with article 20A.202 of the Criminal Code of Procedure.

Section 552.101 of the Government Code also encompasses article 19A.104 of the Code of Criminal Procedure.² Article 19A.104 reads as follows:

(a) Except as provided by Subsection (c), information collected by the court, court personnel, or prosecuting attorney during the grand jury selection process about a person who serves as a grand juror is confidential and may not be disclosed by the court, court personnel, or prosecuting attorney.

(b) Information that is confidential under Subsection (a) includes a person’s:

- (1) home address;
- (2) home telephone number;
- (3) social security number;
- (4) driver’s license number; and

² We understand the district attorney’s office to raise article 19A.104, rather than the former article 19.42 of the Code of Criminal Procedure.

(5) other personal information.

(c) On a showing of good cause, the court shall permit disclosure of the information sought to a party to the proceeding.

Crim. Proc. Code art. 19A.104. Upon review, we find some of the submitted information, which we have marked, is confidential under article 19A.104. Therefore, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with article 19A.104 of the Code of Criminal Procedure. However, the remaining information is not confidential under article 19A.104, and the district attorney's office may not withhold any of it under section 552.101 on that ground. Accordingly, the district attorney's office must release the remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/mo

Ref: ID# 950196

Enc. Submitted documents

c: Requestor
(w/o enclosures)