



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 13, 2022

Mr. Joe R. Zapata
Administration Manager
City of Houston
1200 Travis, 10th Floor
Houston, Texas 77002-6000

OR2022-27898

Dear Mr. Zapata:

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# 972045 (ORR# P031844-062322).

The Houston Police Department (the "department") received a request for information pertaining to the requestor at a specified location. You claim some information was not properly requested pursuant to chapter 1701 of the Occupations Code. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information consists of a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary, and therefore, not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). 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 also is 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. Thus, to the extent the department holds this information solely

as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the department is not required to release that information in response to the instant request. To the extent the department holds the information at issue in its own capacity and not solely as an agent of the grand jury, we will address the department's arguments against its disclosure.

Section 552.108(a)(1) 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 . . . 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 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). The department states Exhibits 3-7 pertain to an active criminal investigation or prosecution. Based on this representation, we conclude the release of the information at issue 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) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to Exhibits 3-7.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The department states Exhibit 2 pertains to a closed case that did not result in conviction or deferred adjudication. Based on this representation, we agree section 552.108(a)(2) is applicable to Exhibit 2.

However, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the department may withhold Exhibits 3-7 under section 552.108(a)(1) of the Government Code and may withhold Exhibit 2 under section 552.108(a)(2) of the Government Code.¹

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 section encompasses article 20A.202(a) of the Code of Criminal

¹ As we are able to make this determination, we do not address the applicability of section 1701.661(a) of the Occupations Code to the submitted video recording. *See generally* Occ. Code § 1701.661(a), (e). Further, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Procedure, which provides “[g]rand jury proceedings are secret.”² 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 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 department seeks to withhold some of the remaining information at issue under article 20A.202. However, we conclude the department 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 department 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 department may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with article 20A.202 of the Criminal Code of Procedure.

In summary, to the extent the department holds the grand jury subpoena solely as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act, and the department is not required to release that information in response to the instant request. With the exception of the basic information, which must be released, the department may withhold Exhibits 3-7 under section 552.108(a)(1) of the Government Code and may withhold Exhibit 2 under section 552.108(a)(2) 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.

² We understand the department to raise article 20A.202, rather than the former article 20.02 of the Code of Criminal Procedure.

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,

Colin Henry
Attorney
Open Records Division

CEH/jxd

Ref: ID# 972045

Enc. Submitted documents

c: Requestor
(w/o enclosures)