



**THE ATTORNEY GENERAL
OF TEXAS**

December 1, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Honorable John Vance
District Attorney
Specialized Crime
Division
400 Stemmons Tower South
2720 Stemmons Freeway
Dallas, Texas 75207

Open Records Decision: 513

Re: Whether records of an investigation into alleged criminal activity at the Dallas/Fort Worth International Airport are subject to required disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1169)

Dear Mr. Vance:

The Dallas County District Attorney's office received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for

any and all records, documents, correspondence, memos, reports, conclusions, findings and any other information collected, assembled or maintained by the Dallas County District Attorney's [O]ffice relating in any way to the following persons or corporations who were investigated or indicted in connection with a [Dallas/Fort Worth] Task Force Investigation into alleged contract mismanagement at Dallas/Fort Worth International Airport [followed by specific names].

Your request letter states:

In September of 1985, a criminal Task-Force was created by the Cities of Dallas and Ft. Worth to investigate allegations of criminal wrongdoing at the [DFW] Airport. . . .The investigation centered on several of the construction projects at DFW (buildings, terminals, runways, taxi-ways, bridges, etc.) between 1982 and 1985, and specifically centered on allegations of

contract mismanagement, misapplication of airport funds, bid rigging and possible kickbacks. After the Task-Force was formed, the Dallas County District Attorney's Office was asked to participate, and the Specialized Crime Division agreed to provide assistance when requested.

In the course of the investigation . . . at least forty-six (46) Dallas County Grand Jury Subpoenas Duces Tecum were obtained by this office, and literally tens of thousands of documents in over 1,600 files¹ were turned over to the Grand Jury (and then from the Grand Jury to the Task-Force and this office) pursuant to those subpoenas. . . .

The investigation eventually resulted in twenty[-]eight (28) indictments being returned by the Dallas County Grand Jury against an airport contractor, one (1) of its managers, and six (6) DFW employees. [Each was resolved by sentencing based on pleas of guilty or nolo contendere or by dismissal pursuant to plea-bargaining agreements or for insufficient evidence].

Your office takes the position that virtually all of the information requested is not covered by the Open Records Act because it is in the constructive possession of the Dallas County Grand Jury. You claim that sections 3(a)(1), 3(a)(3), 3(a)(8), and 3(a)(11) protect any information not deemed to be within the grand jury's constructive possession. You contend that the only information that must be released includes: 1) newspaper clippings, 2) indictments returned by the Dallas County Grand Jury, 3) copies of plea papers for defendants who have entered pleas, and 4) copies of motions to dismiss in one of the cases. We disagree.

The Open Records Act requires the release of all information held by "governmental bodies" unless one of the

1. We note that the requestor specifically sought information regarding the investigation of seven named individuals and three companies and their employees, not the information in "1,600 files."

act's specific exceptions protects the information from required disclosure. Section 2(1)(G) of the act expressly excludes the judiciary from the act's definition of "governmental body." The grand jury is an extension of the judiciary for purposes of the Open Records Act. Open Records Decision Nos. 433 (1986); 411 (1984); 403, 398 (1983). Information held by a grand jury, therefore, is not itself subject to the Open Records Act.

We recognize that the grand jury may not be deemed an "extension" of the judiciary for all purposes. The Texas Constitution treats it as part of the judiciary. See Tex. Const. art. V, §§ 13, 17; Code Crim. Proc. art. 19.01 et seq., art. 20.01 et seq. The grand jury is a distinct entity within the criminal justice system. The unique status of a grand jury and its historic link to the judiciary are sufficient to support the prior decisions of this office that grand juries are excluded from the Texas Open Records Act as part of the judiciary. See Ex parte Edone, 740 S.W.2d 446 (Tex. Crim. App. 1987).

The Open Records Act does not apply to information within the actual or constructive possession of the grand jury. When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession. For example, Open Records Decision No. 398 (1983) addressed the public availability of an audit prepared at the direction of the Nueces County Grand Jury by a private auditor selected by the grand jury. Although the audit was in the custody of the district attorney, the decision noted that it remained "in the possession of the grand jury even though it physically is held by officials who serve the grand jury as custodians of grand jury files and records." Open Records Decision No. 398 (1983) at 3. In Open Records Decision No. 411 (1984) the attorney general determined that a list of individuals subpoenaed to appear before a grand jury is "constructively in the possession of the grand jury . . . even though it may have physically been in the possession of the district attorney as well as the grand jury." Open Records Decision No. 411 (1984) at 2; see Open Records Decision No. 433 (1986) (list of prospective grand jurors in constructive possession of judiciary); see also Attorney General Opinion JM-446 (1986) (supreme court telephone records held by state agency in constructive possession of judiciary).

Not all of the information at issue here can be deemed to be within the constructive possession of the grand jury. Your investigation began before any information was

submitted to the grand jury. Moreover, the grand jury did not formally request or direct all of the district attorney's actions in this investigation. See generally Open Records Decision No. 398 (1983) (audit prepared at direction of grand jury). Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession. On the other hand, the fact that information collected or prepared by the district attorney 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 district attorney. Information not produced as a result of the grand jury's investigation may be protected from disclosure under one of the Open Records Act's exceptions, but it is not excluded from the reach of the Open Records Act by the judiciary exclusion.

For example, articles 20.01 and 20.02 of the Texas Code of Criminal Procedure require that grand juries deliberate in secret. Section 3(a)(1) of the Open Records Act protects "information deemed confidential by law." Information that reveals the deliberations of grand juries is protected from required disclosure by section 3(a)(1). Thus, with regard to the information the district attorney holds that is not within the constructive possession of the grand jury, the information should be withheld if releasing the information would reveal the grand jury's deliberations.

You claim that the requestor specifically seeks information submitted to the grand jury. The requestor does not, however, seek a list of specific information considered by the grand jury. The requestor seeks all information "collected, assembled or maintained by the Dallas County District Attorney's [O]ffice" relating to seven specific individuals and three companies "investigated or indicated in connection with a DFW Task Force Investigation into alleged contract mismanagement at Dallas/Fort Worth International Airport." You may not withhold your entire investigation simply because the grand jury considered some of the information the district attorney's office collected.

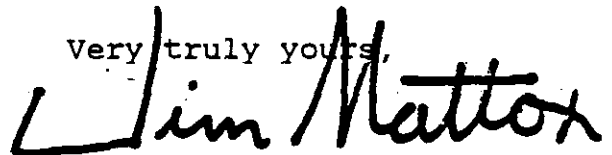
As indicated, you may withhold information obtained pursuant to grand jury subpoena and information collected at the express direction of the grand jury. You should not submit copies of this information for review; an affidavit to the effect that the information was prepared or collected

at the express direction of the grand jury will suffice. You have ten days from receipt of this decision to submit copies of the other information at issue for review. You must clearly identify which exceptions to disclosure apply to specific documents and indicate why the exceptions apply. Attorney General Opinion JM-672 (1987). Governmental bodies bear the burden of showing why specific information should be withheld. Attorney General Opinion H-436 (1974).

S U M M A R Y

The Texas Open Records Act, article 6252-17a, V.T.C.S., does not apply to grand juries because section 2(1)(G) of the act excludes the judiciary from the act's definition of "governmental body," nor does the Open Records Act apply to information within the constructive possession of the grand jury. When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. Information not held or maintained in this manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information.

Very truly yours,



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