

NOs. 416-81913-2015
416-82148-2015
416-82149-2015

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	416 th JUDICIAL DISTRICT
	§	
WARREN KENNETH PAXTON, JR.	§	COLLIN COUNTY, TEXAS

**PAXTON'S RESPONSE TO MOTIONS TO QUASH PRODUCTION OF RECORDS OF
PUBLIC PROCEEDINGS AND OPEN COURTS**

TO THE HONORABLE JUDGE GALLAGHER:

WARREN KENNETH PAXTON, JR. ("Paxton"), Defendant, files his *Response to Motion to Quash* as follows:

I. INTRODUCTION

Paxton issued subpoenas duces tecum for the production of public records (transcripts and audio recordings) of proceedings conducted in open court relating to the formation of Collin County grand juries, one of which indicted him. Disclosure of the requested information is available as a public record to every member of the public with no justification. Selection of a grand jury is a public proceeding. The Court's records and proceedings are open to public scrutiny. Tx. Op. Att'y Gen. No. GA-0422 (2006). Attempting to quash the release of transcripts and audio recordings of court proceedings open to the public conflicts with the express language of Article I, Section 13 of the Texas Constitution and with Section 1.24 of the Texas Code of Criminal Procedure.

Paxton seeks these public records to challenge the formation of the grand jury under Chapter 19 of the Texas Code of Criminal Procedure and his rights to due process and equal protection afforded by the Texas and U.S. Constitutions. Upon information and belief, the grand

jury array may have been empaneled in a manner inconsistent with law. It is necessary and proper for Paxton to investigate the formation process.

The attorneys pro tem attempt to prevent Paxton from obtaining grand jury information is troublesome, since this information is available as a public record according to Texas statutes, case law, an Attorney General opinion, and Collin County District Clerk policy. Attorneys pro tem cite no authority for quashing public access to public records of public proceedings, and no authority exists for this position. Nonetheless, rather than thoroughly reviewing the materials sought to identify exculpatory evidence about the process, or contacting Defense counsel to discuss the subpoenas and attempt to resolve disputes, the attorneys pro tem immediately told newspaper reporters they would move to quash, which they have done.¹

II. RESPONSE TO MOTION TO QUASH

A. Attorneys Pro Tem Lack Standing to Quash the Subpoenas.

Texas courts have not had the need to squarely address the issue of whether a party has standing to quash subpoenas duces tecum lawfully issued to non-party sources, likely because litigants have realized that the target of the subpoena is the responsible party that moves to quash. Federal authority, whether civil or criminal, is instructively and weighs heavily against affording attorneys pro tem standing. In *Wells Fargo Bank, N.A. v. Iny*, 2014 U.S. Dist. LEXIS 62381 (D. Nev. May 6, 2014), Wells Fargo accused the defendants of fraudulent transfers and subpoenaed their “bank and financial institution records.” The court noted “[a]s a general rule, a party has no standing to seek to quash a subpoena issued to a non-party to the action. ... Nonetheless, some courts have found that a party has standing to move to quash subpoenas where the party has “some personal right or privilege” in the documents sought.” In *United*

¹ See “Paxton attorneys question grand jury selection process,” Houston Chronicle, October 2, 2015, published at <http://www.chron.com/news/politics/ken-paxton/article/ken-paxton-subpoenas-grand-jury-indictment-texas-6545948.php>. (last viewed on October 6, 2015).

States v. Tomison, 969 F. Supp. 587 (E.D. Cal. 1997), the court ruled that the government lacked “the sine qua non of standing, an injury in fact relative to those grounds.” *Id.* at 596; *see also United States v. Nachamie*, 91 F. Supp.2d 552, 558 (S.D.N.Y. 2000) (government lacked standing because it had no claim of privilege or proprietary interest in subpoenaed materials). Attorneys pro tem do not represent the third-party witnesses, nor do they have authority to act for them. They cannot, and have not, asserted a privilege or proprietary case. Three (3) of the witnesses have their own counsel – apparently retained by Collin County - who may seek to restrict some disclosure, but not all, and the remaining two (2) witnesses have indicated they are prepared to comply with the subpoenas.

The two cases attorneys pro tem cite to justify quashing subpoenas to non-parties are distinguishable from this case and do not support their standing.² The two cases focus on statutorily confidential materials (not public records as in the instant case) in which a third-party custodian of the information moved to quash, but neither of which circumstance exists in this case.³

Unlike grand jury deliberations or the records in the two cases cited by the attorneys pro tem, there is *no* statute that requires the process of forming a grand jury to be secret. *See* § II.B, *infra*. Only the personal contact and identifying information of the grand jurors is confidential by statute, and a Court may choose to order that to also be public record. *Id.*; TEX. CODE CRIM. PRO. ART. 19.42. Paxton has no interest in personal contact and identifying information but only

²The attorneys pro tem citation to Art. 39.04 is misplaced as by its context in Chapter 39 and actual text, the article relates specifically to the formalities of depositions and examining trials, which Paxton has not sought, rather than subpoenas under Chapter 24 of the Code of Criminal Procedure.

³In neither case did the state alone move to quash and thus the issue was not addressed. *May* involved school records, which are confidential under federal law, and the school also moved to quash. *May v. State*, 139 S.W.3d 93, 101 (Tex.App.—Texarkana 2004, pet. ref’d.). Similarly, in *Ealoms*, the defendant sought personnel records from the Waco Police Department, which are confidential by § 153.089(g) of the Local Government Code, and the City of Waco moved to quash. *Ealoms v. State*, 983 S.W.2d 853, 858 (Tex.App.—Waco 1998, pet. ref’d). Even then, the *Ealoms* court held that “in determining Ealoms’ right to the privileged material, the court was obligated to conduct an in camera review of the evidence.” *Id.* at 859.

seeks other specifically identified materials. *See Applications for Subpoena*. Furthermore, the persons Paxton subpoenaed are the custodians of the public information Paxton seeks and they may redact any part of the production that is confidential by law.

Assuming the attorneys pro tem have standing to quash the subpoenas, their Motion should be denied, as the information sought is material and of a type they may be ethically bound to turn over anyway (*Brady*) and, most importantly, is a matter of public record under Texas laws including the guaranty of “Open Courts.” TEX. CODE CRIMINAL PROCEDURE § 1.24.

B. The Information Subpoenaed is a Public Record.

On April 13, 2006, then Attorney General of Texas Greg Abbott addressed this exact issue in a written opinion. *See* Exhibit “A.” In his analysis, Governor Abbott wrote,

Although the *proceedings* of a grand jury - once it is organized - are closed to the public, *see id.* art. 20.011 (enumerating those who may be present during grand jury proceedings); *id.* art. 20.02(a) (“The proceedings of the grand jury shall be secret.”), **there are no similar provisions that release a court during the grand jury organization process from the general rule articulated in article 1.24 of the Code of Criminal Procedure that the “proceedings and trials in the courts shall be open to the general public,” *id.* art. 1.24. Indeed, article 19.27 expressly includes the public in the grand jury organization process by permitting “any person [to] challenge the array of jurors or any person presented as a grand juror.” *See id.* art. 19.27; *see also id.* arts. 19.21-.26 (requiring court to test juror qualifications and present qualified jurors for impanelment). Therefore, the grand jury organization process is conducted in open court.** As a practical matter, then, grand jurors’ identities will become public during the grand jury organization process. Consequently, grand jury lists do not contain “personal information” and must fall outside article 19.42’s bounds. *See* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 18.06 (2d. ed. 2001) (stating that the identity of a grand juror is public information despite article 19.42’s language because the qualifications of potential grand jurors are tested in open court, among other things).

Returning to your specific questions, we can find nothing in the law that overcomes the presumption’ that these lists are public information; therefore, a

clerk or a judge has no duty to keep a grand jury list confidential after the clerk has opened the envelope containing the names of prospective grand jurors.⁴

- Tx. Op. Att’y Gen. No. GA-0422 (2006) at pp. 3-4.
(Emphasis Added)

Revealingly, this opinion is *cited* several times in Part A of Chapter 2 of “the Collin County District Clerk Manual,” 2013, a true and correct copy of which is attached hereto as Exhibit “B” and made a part hereof for all purposes. Despite this clear authority and local policy, on July 8, 2015, the day after Paxton was first indicted, Judge Chris Oldner cited Art. 19.42 to seal the names of the grand jurors – not any of the other information sought by Paxton.⁵

The information sought by Paxton is not only a public record to which he is entitled – as is any other Texan – it is material to his exercise of his statutory and due process right to challenge the formation of the grand jury.⁶

C. Public Information Sought is Material to a Potential Claim that the Grand Jury was Improperly Impaneled.

Paxton is investigating matters that the strict requirements of Articles 19.21-19.24 and of due process provisions were not followed in the impaneling of the grand jury that indicted him. Moreover, the grand jury’s formation may have been inconsistent with the manner in which the qualifications of other recent grand jury arrays were tested in Collin County, Texas.

The evidence sought from each duces tecum is material to formation/array issues. Each record sought is material to confirming or denying what Paxton has information and belief of, and may be used to challenge the legality of the formation of the grand jury in that it will provide

⁴ n.2 from the A.G. Opinion, “For both civil and criminal cases, we presume that the courts’ records and proceedings are open to public scrutiny. See *Ashpole*, 778 S.W.2d at 170; TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 2005).”

⁵On July 29, 2015, Judge Chris Oldner of the 416th District Court, whose grand jury indicted Paxton and whose Court the cases were assigned to, voluntarily recused himself for an undisclosed reason. See “Order” in Clerk’s file.

⁶The June 25, 2015, order sealing the names of the grand jurors impaneled misinterpreted Art. 19.42, is unlawful, and should be set aside.

evidence to support a “well-founded” challenge under Art. 19.30 or in violation of due process. The attorneys’ pro tem attempt to narrow the definition of materiality is improper.

In *Kyles v. Whitely*, 514 U.S. 419, 446 (1995), the Supreme Court emphasized that defendants are not only entitled to attack specific pieces of evidence and testimony, but also that “a common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.” *Id.* (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986); citing *Lindsey v. King*, 769 F.2d 1034, 1042 (5th 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence “carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case”)). Under this authority, Defendants have a due process right guaranteed by the Fourteenth Amendment to discover irregularities in the selection of grand jury that raise an inference that the indictment was the procured through misconduct.

Furthermore, because the court exercises some “supervisory power over the grand jury, whether by impaneling, reassembling, qualifying, quashing subpoenas, or aiding investigations,” the grand jury is “often characterized as an arm of the court by which it is appointed rather than an autonomous entity.” *Dallas County Dist. Attorney v. Doe*, 969 S.W.2d 537, 542 (Tex.App.-Dallas 1998, no pet.). Federal authority, although not binding, instructs that a trial court’s supervisory power can be used to dismiss an indictment because of misconduct before the grand jury where that misconduct amounts to a violation of rules which were drafted and approved to ensure the integrity of the grand jury’s functions. *See Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66 (1986) (O’CONNOR, J.,

concurring in judgment). The materials sought by Paxton are material to that end as these rules are embodied in Texas law as cited in § II.B above.

D. Paxton Has the Right to Challenge the Formation of the Grand Jury.

Although the legality of a grand jury in Texas must normally be challenged before the grand jury is impaneled, TEX. CODE CRIM. PROC. ART. 19.27, “a judicially created exception to this rule applies respecting when the accused has no prior notice as to the selection of the grand jury.” *United States v. Chambers*, 922 F.2d 228, 231 n.3 (5th Cir. 1991) (citing *Sumner v. State*, 132 Tex. Crim. 281, 104 S.W.2d 45 (App.1937)). A challenge to the array of a grand jury may also be made by a motion to quash the indictment before trial commences, even after it is impaneled. *Muniz v. State*, 672 S.W.2d 804, 807 (Tex.Crim.App. 1984). Indeed, this right was recognized in 2006 by then Attorney General Greg Abbot in a written opinion. Tx. Op. Att’y Gen. No. GA-0422 (2006) at pp. 3-4 (attached as Exhibit “A”). With the appropriate evidence, Paxton may challenge the array and the grand jury impaneled.

An “array” is the “whole body of persons summoned to serve as such before they have been impaneled.” TEX. CODE CRIM. PROC. ART. 19.28.

“Impaneled” means “after his qualifications have been tried and he has been sworn.” *Id.* at Art. 19.29.

The *sine qua non* of any challenge is information about the formation of the grand jury impaneled from the array so as to provide evidence to the Court to support the challenge. This is critical as the Court may summarily decide if a challenge is “well-founded or not.” *Id.* at Art. 19.32. The information sought by Paxton is narrowly tailored to this end of providing proof to the Court for a future challenge and nothing more. *See Applications for Subpoena Duces Tecum.*

Under the strictures of Article 19.32, absent access to these materials, neither Paxton – nor any other Defendant or member of the public – could *ever* challenge the formation of a grand jury, a right and remedy expressly recognized by statute and available at law. *See e.g.*, TEX. CODE CRIM. PRO. ART. 19.30. The attorneys’ pro tem position – that Paxton must prove the materiality of the records to gain access to them, which proof must come from the records they deny to him – is a veritable “Catch-22,” contrary to settled law, as recognized by a written opinion of past Attorney General Greg Abbott, who observed, “[i]ndeed, **article 19.27 expressly includes the public in the grand jury organization process by permitting ‘any person [to] challenge the array of jurors or any person presented as a grand juror.’**” Tx. Op. Att’y Gen. No. GA-0422 (2006) at p. 3 (internal citations omitted) (emphasis added).

Regardless, the attorneys pro tem do not have standing to quash Paxton’s subpoenas to this public information.

III. CONCLUSION

WHEREFORE, PAXTON RESPECTFULLY REQUESTS that the Motion to Quash be denied and the materials requested be produced instanter and that the Court grant any other relief to which the Defendant may be entitled.

WHEREFORE, Paxton is opposed to Respondents’ Motions, which should be denied.

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Respectfully submitted,
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ATTORNEYS FOR DEFENDANT,
WARREN KENNETH PAXTON, JR.

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of October 2015, a true and correct copy of the above and foregoing **Response** was served on all counsel of record via ECF, certified mail, return receipt requested, email, electronically, or hand delivery.



Philip H. Hilder

EXHIBIT “A”



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2006

Mr. Carl Reynolds
Administrative Director
Office of Court Administration
Post Office Box 12066
Austin, Texas 78711-2066

Opinion No. GA-0422

Re: Confidentiality of grand and petit jury lists
(RQ-0380-GA)

Dear Mr. Reynolds:

You ask about the confidentiality of grand and petit jury lists.¹ Specifically, you ask us to address whether judges and clerks are required by law to keep jury lists confidential when dealing with parties to a case, counsel to parties to a case, and third parties at different points in time, such as during voir dire, during trial, and after trial. See Request Letter, *supra* note 1, at 2.

Jury lists are distinct from other information collected in jury selection processes and consist only of jurors' names. See *id.* at 1; see also *Saur v. State*, 918 S.W.2d 64, 66–67 (Tex. App.—San Antonio 1996, no writ) (explaining “jury lists” in the context of petit jury organization); cf. TEX. GOV'T CODE ANN. § 62.0132 (Vernon 2005) (requiring prospective jurors to provide biographic and demographic information in the form of a questionnaire). We note that the term “jury list” in some cases refers to the panel of individuals from which a jury is selected, see TEX. GOV'T CODE ANN. § 62.004 (Vernon Supp. 2005) (drawing names of prospective petit jurors), and in other cases refers to the list of names of people who actually serve on a jury, see TEX. CODE CRIM. PROC. ANN. art. 35.26 (Vernon Supp. 2005) (list of prospective jurors chosen to serve). The laws that govern petit and grand jury organization, including the laws governing jury lists, are found in diverse statutes and do not apply uniformly to all jury lists. For example, the Code of Criminal Procedure contains provisions relevant only to juries in criminal cases. See generally TEX. CODE CRIM. PROC. ANN. arts. 35.01–29 (Vernon 1989 & Supp. 2005) (governing the organization of a petit jury in criminal matters). Thus, the answer to your questions varies depending on the type of jury—whether summoned for civil or criminal duty and whether petit or grand—and we therefore will address your questions separately for each jury type.

¹See Letter from Carl Reynolds, Administrative Director, Office of Court Administration, to Honorable Greg Abbott, Attorney General of Texas (Aug. 17, 2005) (on file with the Opinion Committee, also available at <http://www.oag.state.tx.us>) [hereinafter Request Letter].

I. General Matters

For both civil and criminal cases, we presume that the courts' records and proceedings are open to public scrutiny. See *Ashpole v. Millard*, 778 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1989, no writ) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978), for the proposition that American courts recognize the public's general right under the common law to inspect and copy judicial records); TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 2005) ("The proceedings and trials in all courts shall be open to the general public."). Furthermore, to the extent that we will need to construe statutes relevant to your questions, we must give effect to the legislature's intent. See TEX. GOV'T CODE ANN. §§ 311.021, .023 (Vernon 2005); *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). To do so, we must first attempt to construe statutes according to their plain language, see *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *Peek v. State*, 106 S.W.3d 72, 75 (Tex. Crim. App. 2003), reading the language according to the rules of grammar and common usage, unless it has acquired a technical meaning, see TEX. GOV'T CODE ANN. § 311.011(a)–(b) (Vernon 2005); TEX. CODE CRIM. PROC. ANN. art. 3.01 (Vernon 2005). We may also consider, among other things, a statute's objectives, the legislative history, and the consequences of a particular construction. See TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005); *Boykin*, 818 S.W.2d at 785–86.

A. Grand Jury List Confidentiality

Chapter 19 of the Code of Criminal Procedure governs grand jury organization. See TEX. CODE CRIM. PROC. ANN. arts. 19.01–.42 (Vernon 2005 & Supp. 2005). District judges may choose to organize a grand jury by means of a jury commission, see *id.* art. 19.01(a) (Vernon 2005), or by directing that "20 to 125 prospective grand jurors be selected and summoned . . . in the same manner as the selection and summons of panels for the trial of civil cases in the district courts," *id.* art. 19.01(b); see also generally TEX. GOV'T CODE ANN. §§ 62.001–.114 (Vernon 2005 & Supp. 2005) (petit jury organization process in the district courts). In all cases of grand jury organization, courts collect jury lists consisting of the names of individuals to be summoned as prospective grand jurors. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 19.09 (Vernon 2005) (describing grand jury list selected by jury commission); TEX. GOV'T CODE ANN. § 62.004 (Vernon Supp. 2005) (describing petit jury wheel process that also may be used to select grand jury list); TEX. GOV'T CODE ANN. § 62.011 (Vernon 2005) (selection of names for petit jury with aid of electronic or mechanical equipment that may also be used to select grand jury list). These lists are then delivered by the judge to the clerk, who is required to swear under oath to keep the lists in a sealed envelope until a time prescribed by law. See TEX. CODE CRIM. PROC. ANN. art. 19.11 (Vernon 2005) (requiring clerk's oath for grand jury list created by commission); TEX. GOV'T CODE ANN. § 62.007(c) (Vernon 2005) (requiring clerk's oath for grand jury list created by petit jury organization process). And that time is the point at which the envelope is unsealed and delivered to the sheriff or constable to issue summonses. See TEX. CODE CRIM. PROC. ANN. art. 19.13 (Vernon 2005) ("Clerk shall open lists"); TEX. GOV'T CODE ANN. § 62.013 (Vernon 2005) ("Summons for Jury Service by Sheriff or Constable"). Beyond these provisions requiring a clerk to keep sealed the envelope containing prospective grand jurors' names, we can find no other provision that speaks to a judge's or clerk's duty to keep grand jury lists confidential.

You refer us to Code of Criminal Procedure article 19.42 and suggest that this provision may be relevant to grand jury list confidentiality. *See* Request Letter, *supra* note 1, at 2. Article 19.42 makes confidential certain information collected in the grand jury selection process:

(a) Except as provided by Subsection (b), 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, including the person's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, court personnel, or prosecuting attorney.

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

TEX. CODE CRIM. PROC. ANN. art. 19.42 (Vernon 2005). You ask about a judge's or clerk's duty to keep confidential all jury lists, including those lists that contain the names of only prospective jurors. *See* Request Letter, *supra* note 1, at 2. Thus, we note first that by the provision's plain language, article 19.42 applies only to information collected about a person "who serves as a grand juror" and so, regardless of its relevance to grand jury list confidentiality, this provision does not apply to grand jury lists that contain the names of individuals who were summoned but did not serve. The provision's plain language does, however, make confidential certain information collected about a person who actually served or is serving as a grand juror, "including [a juror's] home address, home telephone number, social security number, driver's license number, and *other personal information*." TEX. CODE CRIM. PROC. ANN. art. 19.42 (Vernon 2005) (emphasis added). Given this language, it is incumbent upon us to determine if jury lists that contain the names of actual grand jurors are the type of "personal information" considered confidential under this provision's terms.

Although the *proceedings* of a grand jury—once it is organized—are closed to the public, *see id.* art. 20.011 (enumerating those who may be present during grand jury proceedings); *id.* art. 20.02(a) ("The proceedings of the grand jury shall be secret."), there are no similar provisions that release a court during the grand jury organization process from the general rule articulated in article 1.24 of the Code of Criminal Procedure that the "proceedings and trials in the courts shall be open to the general public," *id.* art. 1.24. Indeed, article 19.27 expressly includes the public in the grand jury organization process by permitting "any person [to] challenge the array of jurors or any person presented as a grand juror." *See id.* art. 19.27; *see also id.* arts. 19.21–26 (requiring court to test juror qualifications and present qualified jurors for impanelment). Therefore, the grand jury organization process is conducted in open court. As a practical matter, then, grand jurors' identities will become public during the grand jury organization process. Consequently, grand jury lists do not contain "personal information" and must fall outside article 19.42's bounds. *See* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 18.06 (2d ed. 2001) (stating that the identity of a grand juror is public information despite article 19.42's language because the qualifications of potential grand jurors are tested in open court, among other things).

Returning to your specific questions, we can find nothing in the law that overcomes the presumption² that these lists are public information; therefore, a clerk or a judge has no duty to keep a grand jury list confidential after the clerk has opened the envelope containing the names of prospective grand jurors. Until that time, a clerk is specifically obligated to maintain sealed the list of prospective grand jurors. You do not ask about and we do not consider a judge's discretionary authority to seal court records, including grand jury lists, or a clerk's responsibility in such case.

B. Petit Jury List Confidentiality - Generally

Some provisions affect the confidentiality of jury lists for all petit juries. You ask about the lists that courts formally collect, which for petit juries sometimes consist of the names of citizens summoned as prospective jurors, *see* TEX. GOV'T CODE ANN. § 62.004 (Vernon Supp. 2005) ("Drawing Names for Jury Lists"), and which, in other instances, consist of the names of the prospective jurors who have not been stricken by peremptory challenge during the jury selection process, *see* TEX. CODE CRIM. PROC. ANN. art. 35.26 (Vernon Supp. 2005) (jury list returned to clerk in a criminal matter); TEX. R. CIV. P. 234 (jury list returned to clerk in a civil matter). Similar to grand jury lists, petit jury lists of prospective jurors—the venire panel—are confidential by law for a prescribed period, *see* TEX. GOV'T CODE ANN. § 62.007 (Vernon 2005) (requiring clerk and clerk's deputy to take oath swearing to maintain the list of the venire panel sealed until time authorized by law), which ends when they are unsealed for the purpose of summoning the jurors. *See* TEX. GOV'T CODE ANN. § 62.013 (Vernon 2005) ("Summons for Jury Service by Sheriff or Constable"). In addition, the petit jurors' names are expressly required to be revealed to the parties at the time they announce ready for trial. *See, e.g.,* TEX. R. CIV. P. 224 (requiring provision of jury list to parties in a civil suit when they announce ready for a civil trial); TEX. CODE CRIM. PROC. ANN. art. 35.01 (Vernon 1989) (requiring the names of the venire panel to be called at the time the parties announce ready in a criminal matter); *see also* Tex. Att'y Gen. Op. No. JC-0405 (2001) at 5, 8.

You suggest that section 62.0132 of the Government Code is relevant to the confidentiality of all petit jury lists because it makes confidential information contained in a jury questionnaire, which includes a person's name. *See* Request Letter, *supra* note 1, at 1; *see also* TEX. GOV'T CODE ANN. § 62.0132 (Vernon 2005) ("The questionnaire must require a person to provide . . . the person's . . . name . . ."). Section 62.0132 reads in relevant part:

(f) Except as provided by Subsection (g), information contained in a completed questionnaire is confidential and is not subject to the [Public Information Act].

(g) The information contained in a completed questionnaire may be disclosed to:

(1) a judge assigned to hear a cause of action in which the respondent to the questionnaire is a potential juror;

²For both civil and criminal cases, we presume that the courts' records and proceedings are open to public scrutiny. *See Ashpole*, 778 S.W.2d at 170; TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 2005).

(2) court personnel; and

(3) a litigant and a litigant's attorney in a cause of action in which the respondent to the questionnaire is a potential juror.

TEX. GOV'T CODE ANN. § 62.0132(f)–(g) (Vernon 2005). We assume that by bringing our attention to this statute you understand section 62.0132 to make petit jurors' names confidential, even when those names appear on a court record other than the questionnaire. The regulatory scheme for the petit jury organization process, however, does not support this construction.

The names of the petit jurors who will actually serve are divulged in open court as a matter of law. *See* TEX. CODE CRIM. PROC. ANN. art. 35.26 (Vernon Supp. 2005) (“[T]he clerk *shall* . . . *call off the* . . . *names* on the lists that have not been stricken. . . . Those whose names are called shall be the jury.”) (emphasis added); TEX. R. CIV. P. 234 (“The clerk *shall* . . . *call off the* . . . *names* on the lists that have not been erased; . . . those whose names are called shall be the jury.”) (emphasis added). Therefore, adopting the construction that names appearing on a court record other than a questionnaire are confidential under 62.0132 would lead to the inconsistent result of a clerk having to simultaneously divulge and keep confidential jury lists. Because it would be impossible under this construction for a court clerk to comply with section 62.0132, and because we presume the legislature in writing a law intends a result feasible of execution, *see* TEX. GOV'T CODE ANN. § 311.021(4) (Vernon 2005), we must conclude that the legislature did not intend for jurors' names to be information that is confidential under section 62.0132, when the names appear on a jury list. Section 62.0132 of the Government Code does not impose a duty on a clerk or judge in maintaining jury lists to keep the lists confidential.

1. *Confidentiality of Petit Jury Lists in a Civil Matter*

Specific to petit jury lists in a civil matter, we can find nothing in the law that overcomes the presumption that these lists are public information and therefore a clerk or a judge has no duty to keep a petit jury list in a civil matter confidential from any party, counsel to a party, or third party after the clerk has opened the envelope containing the names of prospective petit jurors. Thus, in answer to your specific question, there is no duty during voir dire, during trial, and after trial. You do not ask about and we do not consider a judge's discretionary authority to seal court records, including jury lists, or a clerk's responsibility in such case.

2. *Confidentiality of Petit Jury Lists in a Criminal Matter*

With respect to the confidentiality of petit jury lists in a criminal matter, you suggest that article 35.29 of the Code of Criminal Procedure may be relevant. *See* Request Letter, *supra* note 1, at 1–2. Article 35.29 addresses personal information about jurors and provides:

Information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social

security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought.

TEX. CODE CRIM. PROC. ANN. art. 35.29 (Vernon Supp. 2005). The language of this provision is essentially identical to article 19.42's language, which makes personal information collected about grand jurors confidential. *Compare id.* art. 35.29, *with id.* art. 19.42 (Vernon 2005). Again, you ask about a judge's or clerk's duty to keep confidential all jury lists, including those lists that contain the names of only prospective jurors. *See* Request Letter, *supra* note 1, at 2. Thus, we note first that by the provision's plain language, article 35.29 applies only to information collected about a person "who serves as a juror" and so, regardless of its relevance to petit jury list confidentiality, this provision does not apply to petit jury lists that contain the names of individuals who were summoned but did not serve. Tex. Att'y Gen. Op. No. JC-0405 (2001) at 5-7. Article 35.29's plain language, however, does make confidential certain information collected about a person who actually served or is serving as a petit juror, "including [a juror's] home address, home telephone number, social security number, driver's license number, and *other personal information*." TEX. CODE CRIM. PROC. ANN. art. 35.29 (Vernon Supp. 2005) (emphasis added). Thus, it is again incumbent upon us to determine if petit jury lists that contain the names of actual petit jurors are the type of "personal information" considered confidential under this provision's terms.

In this respect, we return to our analysis of article 19.42 and apply its rationale to article 35.29. There is no provision that releases the petit jury organization process from the general rule articulated in article 1.24 of the Code of Criminal Procedure that the "proceedings and trials in the courts shall be open to the general public." *Id.* art. 1.24 (Vernon 2005). As a practical matter, then, petit jurors' identities will become public at the time the parties to the case announce ready for trial and the petit jury organization process begins in open court. *See id.* art. 35.01 (Vernon 1989) ("When a case is called for trial and the parties have announced ready for trial, *the names* of those summoned as jurors in the case *shall be called*." (emphasis added); *id.* art. 35.26(a) (Vernon Supp. 2005) (after parties have made their peremptory challenges, "the clerk shall . . . *call off the first twelve names on the lists*") (emphasis added). Therefore, petit jury lists in a criminal matter cannot be the type of personal information made confidential by article 35.29; and we must conclude that article 35.29 does not impose a duty on a clerk or judge to keep jury lists confidential.

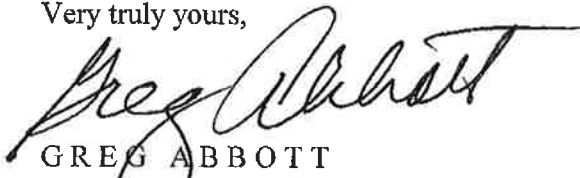
In sum, we find nothing in the law that overcomes the presumption that petit jury lists in a criminal matter are public information; therefore, clerks and judges have no duty to keep such lists confidential from any party, counsel to a party, or third party to a criminal case at any point in time after the clerk has opened the envelope containing the names of prospective petit jurors. Thus, in answer to your specific question, there is no duty during voir dire, during trial, and after trial. You do not ask about and we do not consider a judge's discretionary authority to seal court records, including jury lists, or a clerk's responsibility in such case.

S U M M A R Y

Neither a clerk nor a judge has a duty to keep a grand jury list confidential after the clerk, in order to summon the prospective grand jurors, has opened an envelope containing their names. Until that time, a clerk is specifically obligated to maintain sealed the list of prospective grand jurors.

Neither a clerk nor a judge has a duty to keep petit jury lists confidential from any party, counsel to a party, or third party at any point in time after the clerk, in order to summon the prospective petit jurors, has opened the envelope containing the names of prospective petit jurors.

Very truly yours,



GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

ELLEN L. WITT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Daniel C. Bradford
Assistant Attorney General, Opinion Committee

EXHIBIT “B”

CHAPTER 2

JURY SELECTION AND ASSIGNMENT

A. THE GRAND JURY

Article 20.09 of the Texas Code of Criminal Procedure sets out the following duties for the grand jury: CCP
Art. 20.09

The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.

The bill of indictment returned by the grand jury initiates most of the criminal cases heard in district court.

There are two alternative methods of selecting potential grand jurors. The first method involves the use of grand jury commissioners. The second method allows for direct selection by the district judge. CCP
Art. 19.01

1. Selection of Potential Grand Jurors by Grand Jury Commissioners

- The district judge appoints between three and five persons to serve as grand jury commissioners and notifies the Clerk of the persons selected. CCP
Art. 19.01(a)
- Each grand jury commissioner is notified by the sheriff of this appointment, and when and where to appear. CCP
Art. 19.01(a)
CCP
Art. 19.02
- At the appointed time, the commissioners meet and make a list of between 15 and 40 persons to be summoned as grand jurors for the relevant term of court. These persons should represent a broad cross-section of the county's population, considering the factors of race, sex and age. The qualifications of grand jurors are set out in Article 19.08. The commissioners place the list in an envelope and deliver the list to the district judge in open court. CCP
Art. 19.06
CCP
Art. 19.08
CCP
Art. 19.09
- The judge will deliver the envelope to the District Clerk for safekeeping after the Clerk and each of his or her deputies has taken the following oath in open court: CCP
Art. 19.10
CCP
Art. 19.11

"You do swear that you will not open the jury lists now delivered you, nor permit them to be opened until the time prescribed by law; that you will not, directly or indirectly, converse with any one selected as a juror concerning any case or proceeding which may come before such juror for trial in this court at its next term."

CCP
Art. 19.11
- Each grand jury commissioner is to receive \$10.00 for each day or part thereof served. CCP
Art. 19.01

The judge notifies the District Clerk as to the date the grand jury is to be impaneled and, within 30 days of that date, and not before, the Clerk will open the sealed envelope containing the list of grand jurors, make a certified copy of the list, and give the copy to the sheriff. At this point, the list of grand jurors becomes public information. CCP
Art. 19.13
A.G. Op.
GA-0422 (2006)

- Each grand juror is notified by the sheriff to appear on the appointed date. The grand jurors must be served at least three days prior to the date they are impaneled. Neither the existence of nor the contents of a grand jury summons itself is confidential.

CCP
Art. 19.14

In re Reed, 227
S.W.3d 273
(Tex.App.—San
Antonio 2007,
orig.
proceeding).

- Traditionally, the District Clerk makes an entry in the court's minutes that reflects the names of the grand jury commissioners and states that they have carried out their responsibility to select potential grand jurors. Also, the District Clerk traditionally enters the name of each potential grand juror in the Grand Jury Docket which is the official record of grand jurors for each term of court.

2. Selection of Potential Grand Jurors by the District Judge

Instead of directing grand jury commissioners to select prospective grand jurors, the district judge may direct that 20 to 125 prospective grand jurors be selected and summoned in the same manner as for the selection and summons of panels for the trial of civil cases in the district courts.

CCP
Art. 19.01(b)

3. Choosing and Impaneling the Grand Jurors

- On the day of impanelment, if there are at least 14 potential grand jurors in attendance, the judge is to examine the qualifications of each prospective grand juror. The first 12 potential grand jurors to qualify (and who are not excused) are impaneled as the grand jury. In addition, the judge shall qualify and impanel not more than two alternate grand jurors. The remaining potential grand jurors are dismissed. An alternate serves upon the disqualification or unavailability of a grand juror during the term of the grand jury.
- The judge then appoints a foreman, administers the oath of office, and the grand jury is ready to begin its deliberations.
- Traditionally, the District Clerk makes an entry in the minutes of the court stating that the grand jury has been impaneled, listing the members of the grand jury and identifying the foreman.
- 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, including the person's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, court personnel, or prosecuting attorney. However, on a showing of good cause, the court shall permit disclosure of the information sought to a party to the proceeding.

CCP
Arts. 19.21-19.26

CCP
Art. 19.34

CCP
Art. 19.42

NOTE: Grand jury lists contain only the names of grand jurors and prospective grand jurors. These lists are not confidential. Neither a Clerk nor a judge has any duty to keep a grand jury list confidential after the Clerk has opened the envelope containing the names of prospective grand jurors.

A.G. Op.
GA-0422 (2006)

4. Other Grand Jury Information

Upon voting to present an indictment and receiving an indictment prepared by the State's attorney, the grand jury, through its foreman, is to deliver the indictment to the judge or Clerk of the court. At least 9 members of the grand jury must be present. The fact of a presentment of indictment by a grand jury shall be entered upon the record of the court, if the defendant is in custody or under bond, noting briefly the style of the criminal action and the file number of the indictment and the defendant's name. If the defendant is not in custody or under bond at the time of the presentment of indictment, the entry in the record of the court relating to said indictment shall be delayed until such time as the *capias* is served and the defendant is placed in custody or under bond.

CCP
Arts. 20.19--
20.22

A *capias* shall be issued by the Clerk upon each indictment for felony presented. A *capias* or summons need not issue for a defendant in custody or under bond.

CCP
Art. 23.02

The grand jury may adjourn itself at any time it is in session. If the adjournment is to last longer than three days, however, the judge must issue an order authorizing such action. The judge may reconvene the grand jury at any time during the term of the court as its services are needed. At the end of the court's term, the judge issues an order discharging the grand jury. As part of the District Clerk's duty to record the acts and proceedings of the district court, the Clerk should record all orders adjourning, reconvening, or discharging the grand jury in the court's minutes.

CCP
Art. 20.08
CCP
Art. 19.41
Gov't. Code
Sec. 51.303

As noted above, some persons may be excused from grand jury service. The following qualified persons may be excused from grand jury service:

CCP
Art. 19.25

- A person older than 70 years;
- A person responsible for the care of a child younger than 18 years;
- A student of a public or private secondary school;
- A person enrolled and in actual attendance at an institution of higher education; and
- Any other person that the court determines has a reasonable excuse from service.
- A member of U.S. military forces serving on active duty outside their county of residence.

B. THE PETIT JURY

1. Compiling the List of Potential Jurors for the Jury Wheel

The jury wheel must be reconstituted by using, as the source:

- The names of all persons on the current voter registration lists from all the precincts in the county; and
- All names on a current list to be furnished by the Department of Public Safety, showing the citizens of the county who hold either a valid Texas driver's license or a valid personal identification card or certificate issued by the department, and who are not disqualified from jury service because of age, citizenship, or prior felony conviction.

Gov't. Code
Sec. 62.001(a)

NOs. 416-81913-2015

416-82148-2015

416-82149-2015

THE STATE OF TEXAS

V.

WARREN KENNETH PAXTON, JR.

§
§
§
§
§

IN THE DISTRICT COURT

416th JUDICIAL DISTRICT

COLLIN COUNTY, TEXAS

ORDER

Paxton's Response to Motions to Quash is hereby:

GRANTED / DENIED.

Should this order be denied, the materials subpoenaed are to be placed into the record under seal.

IT IS SO ORDERED this ____ day of _____ 2015.

GEORGE GALLAGHER, JUDGE PRESIDING