



November 20, 2000

Mr. Rob Atherton
City Attorney
City of Nacogdoches
P.O. Drawer 631248
Nacogdoches, Texas 75963-1248

OR2000-4455

Dear Mr. Atherton:

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# 141450.

The City of Nacogdoches Police Department (the "department") received a request for copies of the probable cause affidavits "attached to any" arrest warrants for a named individual. Among other arguments, you claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments, the exceptions you claim, and we have reviewed the submitted information.

We first address your argument that the department has no information that is responsive to the request because the probable cause affidavit at issue was not attached to any arrest warrant for the named individual. This office has stated that a governmental body has a good faith duty to relate a request to that information which it holds. Open Records Decision No.561 (1990). Moreover, a hypertechnical reading of a request for information does not effectuate the overall legislative intent of the Act. We believe the submitted probable cause affidavit is responsive to the present request, whether or not it was attached to any arrest warrant.¹

¹You have submitted for our review copies of arrest warrants, an offense report, and a probable cause affidavit. Because the arrest warrants have evidently been made available to the requestor, this decision addresses only the offense report and probable cause affidavit.

Section 552.022(a)(17) of the Act provides that information that is also contained in a public court record is not excepted from disclosure under the Act, unless the information is expressly confidential under other law. *See* Gov't Code § 552.022(a)(17). Moreover, documents filed with a court are generally considered public. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992); *see also Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471 (Tex. 1995) (identity of sexual assault victim not private where contained in a public court record). Thus, if the submitted probable cause affidavit has been filed with a court, we believe that the document is not excepted from disclosure by section 552.108 of the Act.² In the event the probable cause affidavit has been filed with a court, we therefore next address your assertion that information contained in the affidavit is excepted from disclosure under section 552.101 of the Act.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You argue that certain information in the affidavit, which you have marked, may be withheld under section 552.101 in conjunction with the informer's privilege.

The informer's privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In the context of the Act, this office recognizes the privilege under section 552.101. The informer's privilege under section 552.101 protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). Where the privilege is demonstrated to apply, we note that the informer's privilege excepts not only an informer's identity, but also an informer's statement to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990).

²Section 552.108 is a discretionary exception under the Act and does not constitute other law that makes information confidential. Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

We agree that the probable cause affidavit contains information reflecting that an individual reported criminal violations to the department. You further explain that the subjects of the information do not already know the identity of the informer. Thus, where the information is contained in documents that are not expressly made public (such as the submitted offense report), we believe that the informer's privilege has been demonstrated to apply and that the information revealing the identity of the informer may therefore be withheld by the department.

However, unlike other section 552.101 assertions, the informer's privilege facet of section 552.101 serves to protect the flow of information to a governmental body and does not itself serve to protect the privacy interests of a third party. Open Records Decision No. 549 at 5 (1990). Thus, unlike other section 552.101 claims, a governmental body may waive an informer's privilege assertion by, for example, failing to timely assert the exception. *Id.* at 6. Therefore, if the information at issue is otherwise expressly made public, or is contained in a document that is otherwise public, a governmental body must demonstrate the existence of special circumstances in order to withhold the information. Therefore, if the probable cause affidavit is contained in a public court record, the information identifying the informer must be withheld only if the department demonstrates the existence of special circumstances that trigger the informer's privacy interests.

This office considers "special circumstances" under section 552.101 to refer to a very narrow set of situations in which release of the information would likely cause someone to face "an *imminent* threat of physical danger." Open Records Decision No. 169 at 6 (1997). This office has stated that special circumstances does not include "a generalized and speculative fear of harassment or retribution." Open Records No. 169 at 6 (1977). In support of the applicability of special circumstances in this case, you have explained that the informer fears for the informer's own safety and fears retribution from the suspects due to the informer having cooperated with the department. While we acknowledge the informer's concerns, we do not believe that the information you have provided in this instance sufficiently demonstrates that "an *imminent* threat of physical danger" exists. We therefore conclude that if the probable cause affidavit is also contained in a public court record, the document must be released to the requestor in its entirety.

As to the offense report (and the probable cause affidavit if it has not been filed with a court), we address the section 552.108 assertion. Section 552.108(a)(1) 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[.]" Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Because arrest

warrants have been issued, but we are advised that all of the suspects are not in custody, we understand that the submitted offense report and probable cause affidavit pertain to a pending criminal matter. We therefore find that section 552.108(a)(1) applies, and that the release of most of this information at this time would therefore interfere with the detection, investigation, or prosecution of crime.

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. pp.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, the department must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of the submitted report. Please note, however, that the identity of the informer in this instance is not among the types of information that constitutes basic information. *See id.*

In summary, if the probable cause affidavit has been filed with a court and therefore is also contained in a public court record, the department must release the document to the requestor in its entirety. If the affidavit has not been filed with a court, then pursuant to section 552.101 in conjunction with the informer's privilege, the department may withhold the information that would tend to identify the informer. Pursuant to section 552.108, except for the basic information that must be released, the department may withhold most of the information in the submitted offense report. Section 552.108 excepts most of the information in the probable cause affidavit only if that document has not been filed with a court.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 141450

Encl. Submitted documents

cc: Mr. R. Michael Thomas
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(w/o enclosures)