



March 9, 2001

Ms. Lillian Guillen Graham  
Assistant City Attorney  
City of Mesquite  
Box 850137  
Mesquite, Texas 75185-0137

OR2001-0945

Dear Ms. Graham:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144867.

The Mesquite Police Department (the "department") received two separate requests for law enforcement records stemming from the arrest of the requestor's son. The first request seeks:

- (1) Search warrant executed - 12/11/00 - for premises located at 8406 Flower Meadow Drive.
- (2) Affidavits affixed to search warrant of 12/11/00.
- (3) Arrest warrant issued for Ricardo S. Gonzalez (DOB -2-13-74).
- (4) Affidavits affixed to arrest warrant issued for Ricardo S. Gonzalez (above).
- (5) Inventory of all personal property seized pursuant to search warrant executed 12/11/00. This to include all correspondence, credit cards, licenses and other notes or memorand[a].
- (6) Copy of arrest report.

You inform us that there appears to be no information in the department's custody or control responsive to the second request. With regard to information responsive to the first request, you state that you have released the "public copy" of the relevant arrest report, as well as the

search warrant and the “public” portion of the affidavit attached to the executed search warrant. You claim that a portion of the remaining information responsive to the first request is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer’s privilege, as well as under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, with regard to the information requested which you assert is not within the department’s custody or control, Chapter 552 of the Government Code does not require a governmental body to obtain information that is not in its possession. Open Records Decision No. 518 (1989). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds, or to which it has access. Open Records Decision No. 561 (1990) at 8. If the department holds or has access to information from which the requested information can be obtained, it must provide that information to the requestor unless it is otherwise excepted from disclosure.

We next address your raised exceptions to disclosure. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming 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).

You state that the requested information relates to a pending criminal investigation. Based upon this representation, we conclude that the release of the submitted arrest and incident reports, as well as the documents labeled “return and inventory,” which we have marked, 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), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). This information may be withheld from disclosure under section 552.108(a)(1), except for basic information. 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.*; Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the arrest and incident reports.

In addition, with regard to the arrest warrant and related supporting affidavit, we note that if the warrant and affidavit themselves have been filed with a court, then they are considered

public information. See Gov't Code § 552.022(a)(17) (providing for required public disclosure of information that also is a matter of public court record); see also *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). You argue that the arrest warrant and affidavit is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. Sections 552.103 and 552.108 are discretionary exceptions and not "other law" that makes information "expressly confidential" for purposes of section 552.022.<sup>1</sup> Therefore, you may not withhold the submitted information under these sections.

In addition, however, you raise the informer's privilege aspect of section 552.101 for a portion of the information contained in the submitted arrest warrant affidavit. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege, incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); see also *Roviaro v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviaro* exists to protect governmental bodies' interests. Therefore, it may be waived by the governmental body. Open Records Decision No. 549 at 6 (1990). Consequently, the informer's privilege under *Roviaro* is not "other law" that makes the information confidential under section 552.022. But in the recent case of *In re The City of Georgetown*, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001) (No. 00-0453), the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." Rule 508 of the Texas Rules of Evidence provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

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<sup>1</sup>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), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(c) Exceptions.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity . . . .

Upon review of the submitted arrest warrant affidavit which you seek to withhold, we conclude that the department has waived the privilege of keeping confidential the identities of any informants identified therein. Therefore, the department must release the submitted arrest warrant and accompanying affidavit under section 552.022(a)(17) if they have been filed with a court.

With regard to the search warrant affidavit you seek to withhold, an executed search warrant affidavit is made public by statute. *See* Code Crim. Proc. art. 18.01(b). As you inform us the search warrant has been executed, the search warrant affidavit must be released in its entirety. We note that attachment A to the search warrant affidavit contains highlighted information you seek to withhold under the informer's privilege aspect of section 552.101, as well as under sections 552.103 and 552.108. As a general rule, exceptions to required public disclosure provided in the Public Information Act are inapplicable to information that is expressly made public by other statutes. Open Records Decision No. 623 (1994). Therefore, no portion of the search warrant affidavit may be withheld.

To summarize, the department may withhold the submitted arrest and incident reports, as well as the documents labeled "return and inventory" which we have marked, under section 552.108(a)(1), with the exception of basic information. The arrest warrant and related supporting affidavit must be released if they have been filed with a court. Exhibit A to the executed search warrant affidavit must be released in its entirety pursuant to article 18.01(b) of the Code of Criminal Procedure.

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).

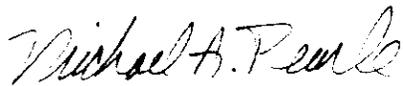
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Hadassah Schloss at 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 A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 144867

Encl. Submitted documents

cc: Mr. Tim Gonzalez  
8406 Flower Meadow Drive  
Dallas, Texas 75204  
(w/o enclosures)