



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2004

Mr. Doug Arnold
Assistant District Attorney
Williamson County
405 M.L.K., No. 1
Georgetown, Texas 78626

OR2004-0014

Dear Mr. Arnold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193592.

The Williamson County District Attorney (the "district attorney") received a request for information relating to the investigation and prosecution of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹ We also have considered the comments that we received from the requestor.² Among other things, the requestor informs us that he submitted a second request to the district attorney, dated October 10, 2003, seeking access to "the billing records for the attorneys who worked on the case." In requesting this decision, you have neither acknowledged receipt of the second request nor submitted any

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney to withhold any information that is substantially different from the submitted information. *See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).*

²*See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).*

information that appears to be responsive to it.³ Therefore, provided that the district attorney received the second request, we assume that you have released any other information that is responsive to that request. If not, then you must release any such information at this time. See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require a governmental body to release information that did not exist when it received a request or to create responsive information.⁴

Next, we address your representation that the district attorney obtained some of the submitted information pursuant to a grand jury subpoena. This office has concluded that a grand jury is not a governmental body that is subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. See Gov't Code § 552.003(1)(B) (Act's definition of governmental body does not include judiciary); Open Records Decision No. 513 at 3 (1988) (information held by grand jury, which is extension of judiciary for purposes of Act, is not itself subject to Act). When an individual or an entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. See Open Records Decision No. 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld from the public only if a specific exception to disclosure is shown to be applicable. *Id.* Thus, to the extent that the district attorney has custody of the submitted information as agent of the grand jury, such information is in the grand jury's constructive possession and is not subject to disclosure under the Act. *Id.* at 4. The rest of this decision is not applicable to any such information. To the extent that the district attorney does not have custody of the submitted information as agent of the grand jury, we address your arguments against disclosure.

We also note that the submitted information includes a complaint. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is *public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

³We note that the second request is addressed to the Williamson County Treasurer. The requestor informs us that he was advised by the county that the second request was forwarded to the district attorney because the county considers the requested attorney fee bills to be part of the district attorney's records.

⁴See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Crim. Proc. Code art. 15.26 (emphasis added). Thus, an affidavit for an arrest warrant that has been presented to a magistrate is made public by, and must be released under, article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Article 15.04 of the Code of Criminal Procedure provides that “[t]he *affidavit* made before the magistrate or district or county attorney is called a ‘complaint’ if it charges the commission of an offense.” Crim. Proc. Code art. 15.04 (emphasis added). Case law indicates that a complaint can support the issuance of an arrest warrant. See *Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref’d); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref’d) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). Although the submitted complaint appears to have been made before a magistrate, we are unable to determine whether the complaint was presented to the magistrate in support of the issuance of an arrest warrant. As we are unable to make this determination, we must rule in the alternative. If the complaint that we have marked was in fact “presented to the magistrate in support of the issuance of an arrest warrant,” then it is made public by article 15.26 of the Code of Criminal Procedure and must be released to the requestor. If the complaint was not so presented, then it is not made public by article 15.26, and the complaint must be disposed of along with the rest of the submitted information.

We next note that the rest of the submitted information is subject to section 552.022 of the Act. This section provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). In this instance, the remaining information consists of a completed investigation made of, for, or by a governmental body. The district attorney must release this information under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Act or is expressly confidential under other law. Sections 552.103 and 552.111, which the district attorney raises, are discretionary exceptions to public disclosure that protect the governmental body’s interests and may be waived.⁵ As

⁵See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 470 at 7 (1987) (statutory predecessor to Gov’t Code § 552.111 may be waived), 542 at 4 (1990) (statutory predecessor to

such, these exceptions are not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district attorney may not withhold any of the remaining information under sections 552.103 or 552.111.

The district attorney also raises section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that another statute makes confidential. Chapter 261 of the Family Code governs information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also* Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor). The rest of the submitted information relates to an investigation and prosecution involving the fatal stabbing of a child. Section 261.001 of the Family Code defines “abuse” as including, among other things, “physical injury that results in substantial harm to the child.” Fam. Code § 261.001(1)(C). We find that the rest of the submitted information that is subject to the Act is confidential under section 261.201(a) of the Family Code. You do not inform us of any rule adopted by the district attorney that would allow the release of this information in this instance. We therefore assume that no such rule exists. Given that assumption, we conclude that the district attorney must withhold the rest of the submitted information under section 552.101 of the Act as information made confidential by law.

In summary: (1) any submitted information that is in the custody of the district attorney as agent of the grand jury is not subject to disclosure under the Act; (2) the district attorney must release the complaint under article 15.26 of the Code of Criminal Procedure if it was presented to the magistrate in support of the issuance of an arrest warrant; and (3) the district

attorney must withhold the rest of the submitted information that is subject to the Act under section 552.101 of the Act in conjunction with section 261.201 of the Family Code. As we are able to make these determinations, we need not address your other arguments against disclosure.

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).

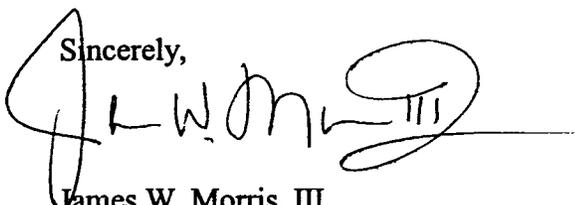
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 193592

Enc: Submitted documents

c: Mr. Brian P. Falbo
Graves, Dougherty, Hearon & Moody
P.O. Box 98
Austin, Texas 78767
(w/o enclosures)