



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
Thirty-Fourth Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-0587

Dear Ms. Acosta:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195423.

The Office of the District Attorney of the 34th Judicial District (the "district attorney") received a request for any records pertaining to cause numbers 990D04206, 58934, and 59744. You explain that "the cases in 58934 and 59744 were both disposed of in January 1991," and that case files "from 1986-1992 were approved to be destroyed on March 1, 1994." Therefore, you state that "the District Attorney has nothing in its possession on files 58934 and 59744." We note that the Public Information Act (the "Act") does not require the district attorney to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Additionally, you state that the district attorney is in possession of the file related to cause number 990D04206, and that some of the requested information has been released to the requestor.¹ However, you claim that the remainder of the file related to cause

¹You represent that the submitted arrest warrant and complaint affidavit were among those documents released to the requestor. Article 15.26 of the Code of Criminal Procedure, as amended by House Bill 13 during the 78th Legislative Session, provides that "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Act of May 28, 2003, 78th Leg., R.S., H.B. 13, § 1 (to be codified as an amendment to Crim. Proc. Code art. 15.26). 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." 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).

number 990D04206 is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information may constitute grand jury records that are not subject to the Act. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or 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 chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information we have marked is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that this information is not in the custody of the district attorney as agent of the grand jury, we will address your claims for this and the remaining submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 261.201 of the Family Code reads in part as follows:

(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.

We conclude that the information at issue consists of reports, records, or working papers used or developed in an investigation made under chapter 261 of the Family Code. You have not indicated that the district attorney has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the submitted information is confidential pursuant to section 261.201 of the Family Code, and it must be withheld under section 552.101 of the Government Code. *See* Open Records

Decision No. 440 at 2 (1986) (construing predecessor statute). As we are able to make this determination, we need not address your remaining arguments.

In summary, we conclude that to the extent the information we have marked is in the custody of the district attorney as agent of the grand jury, such information is in the constructive possession of the grand jury and is therefore not subject to disclosure under the Act. However, to the extent that this information is not in the custody of the district attorney as agent of the grand jury, and in regard to the remaining submitted information, we conclude that the district attorney must withhold this information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 195423

Enc: Submitted documents

c: Mr. Charles Louis Roberts
101 S. Kansas, Suite 200
El Paso, Texas 79901
(w/o enclosures)