



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2004

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2004-6843

Dear Ms. Bryce Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206147.

The Bexar County District Attorney's Office (the "district attorney"), the Bexar County Criminal Investigation Laboratory (the "laboratory"), and the Bexar County Sheriff's Office (the "sheriff") each received a request for multiple categories of information relating to an inmate who died while in custody of the sheriff. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111 and 552.134 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted information includes an arrest warrant affidavit. Article 15.26 of the Code of Criminal Procedure provides:

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.

Crim. Proc. Code art. 15.26 (emphasis added). As a general rule, the exceptions to disclosure found in the Public Information Act (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). Thus, if the submitted arrest warrant affidavit was presented to the magistrate in support of the issuance of an arrest warrant, then the affidavit is public and must be released under article 15.26 of the Code of Criminal Procedure.

We also note that the submitted information includes complaints. 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). We are unable to determine whether the complaints we have marked were 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 marked complaints were in fact "presented to the magistrate in support of the issuance of an arrest warrant," then they are made public by article 15.26 and must be released. If the marked complaints were not so presented, then they are not made public by article 15.26, and we must consider whether any of the exceptions you claim protect them from disclosure.

We also note that the submitted information includes a breath test result of the inmate's blood alcohol content. Normally, full information concerning the analysis of the specimen must be made available upon the request of the person who has given a specimen at the request of a peace officer. Transp. Code § 724.018. In this instance, the requestor is an authorized representative of an individual with a right of access to this information. Therefore, the breath test results must be released to the requestor.

Section 552.022 of the Government Code also governs portions of the submitted information. Section 552.022 provides:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless they are expressly confidential under other law:

(17) information that is also contained in the public court record[.]

Gov't Code § 552.022(a)(17). Section 552.022(a)(17) makes the submitted information that has been filed with a court expressly public. Therefore, the you may withhold this information only to the extent it is made confidential under other law. You claim that the information subject to section 552.022 is excepted from disclosure under sections 552.103,

552.108, 552.111 and 552.134. Sections 552.103, 552.108, and 552.111 are discretionary exceptions that protect a governmental body's interests and may be waived. As such, sections 552.103, 552.108, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 473 (1987) (governmental body may waive section 552.111), 177 (1977) (law enforcement exception may be waived by governmental body); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the court-filed documents we have marked may not be withheld pursuant to section 552.103, 552.108 or 552.111.

We note that the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Accordingly, we find that the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to the information subject to section 552.022.

However, section 552.134 of the Government Code qualifies as "other law" that makes information confidential; therefore, we will consider your argument under this exception for the information subject to section 552.022 as well as for the remaining information. Section 552.134 provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.134 applies only to information obtained or maintained by the Texas Department of Criminal Justice ("TDCJ"). The inmate about whom information is being requested was held in the Bexar County Jail, which is not a TDCJ facility. Additionally, none of the information at issue was obtained or is maintained by TDCJ. Therefore, we conclude that none of the information is excepted from disclosure under section 552.134. Accordingly, the court-filed documents must be released.

We now turn to your claims regarding the submitted information that is not subject to section 552.022. We first address the custodial death report. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with

a directive issued by the Office of the Attorney General, section one of a custodial death report filed with this office is public information and must be released, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Article 49.18(b) of the Code of Criminal Procedure does not, however, make confidential all information held by a local law enforcement agency simply because the information is also included in or attached to a custodial death report submitted to the attorney general. If a governmental body receives a request for information otherwise generated or maintained by the law enforcement agency as part of its ordinary responsibilities, those documents may be withheld only if one of the Act's exceptions or another specific law protects them. ORD 521 at 7 (1989). To the extent certain documents were compiled for and attached to the custodial death report, they must be withheld pursuant to section 552.101 in conjunction with article 49.18 of the Code of Criminal Procedure. *Id.* at 7.

We next address your claim that the information relating to the inmate's arrest for drug possession is excepted from release under section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. No prosecution is pending or anticipated in this case because the suspect is now deceased. Therefore, we agree that section 552.108(a)(2) is applicable to the information relating to the inmate's arrest for drug possession.

Next, we address your claim that the district attorney's criminal prosecution file relating to an arrest for driving while intoxicated ("DWT") is excepted from disclosure as attorney work product pursuant to section 552.108(a)(4) of the Government Code. Section 552.108 of the Government Code states in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

....

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

....

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's entire file is necessarily a request for work product because "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380 (quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding)). In this instance, you assert that the requestor seeks an entire criminal case file. We agree and conclude that the release of this information would reveal the district attorney's mental impressions or legal reasoning. Therefore, section 552.108(a)(4) applies to the district attorney's criminal case file.

We note, however, that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, 531 S.W.2d 177. See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information and information that is subject to section 552.022, you may withhold the information relating to the arrest for drug possession under section 552.108(a)(2) and the district attorney's criminal case file for the DWI arrest under section 552.108(a)(4). We note that you have the discretion to release all or part of the information protected by section 552.108 that is not otherwise confidential by law. Gov't Code § 552.007.

We next address your claim that the sheriff's jail duty rosters are excepted under section 552.108(b)(1) of the Government Code, which excepts from public disclosure an internal record of a law enforcement agency that is maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." See *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information which, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize office safety, and generally undermine police efforts to effectuate state laws). Generally, a governmental body claiming section 552.108(b)(1) 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(b)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). This office has on numerous occasions concluded that section 552.108 excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records Decision Nos. 531 (1989) (holding that section 552.108 excepts detailed guidelines regarding a police department's use of force policy), 508 (1988) (holding that release of dates of prison transfer could impair security), 413 (1984) (holding that section 552.108 excepts sketch showing security measures for

execution). In this instance, you contend that the release of the jail duty rosters would interfere with law enforcement by permitting the public to know the schedules and locations of law enforcement officers. Having reviewed your arguments and the submitted information, we agree that the release of the duty rosters would interfere with law enforcement. Accordingly, you may withhold the sheriff's jail duty rosters from disclosure under section 552.108(b)(1) of the Government Code.

Finally, we address the information relating to the inmate's death while in custody under section 552.103. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In this instance, you argue that the sheriff reasonably anticipates litigation regarding the death of the inmate in custody. Based on your representations and our review of the submitted information, we agree that the sheriff reasonably anticipated such litigation on the date it received the request for information. Furthermore, we agree that the remaining information at issue is related to the anticipated litigation. Accordingly, you may withhold this information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In conclusion, if the submitted arrest warrant affidavit and complaints were presented to a magistrate in support of the issuance of an arrest warrant, then they must also be released pursuant to article 15.26 of the Code of Criminal Procedure. The results of the inmate's breath test results must be released to this requestor pursuant to section 724.018 of the Transportation Code. You must also release the court-filed documents pursuant to section 552.022(a)(17). You must withhold the portions of the custodial death report made confidential under article 49.18 of the Code of Criminal Procedure. To the extent certain documents were compiled for and attached to the custodial death report, they must be withheld pursuant to section 552.101 in conjunction with article 49.18. With the exception of basic information and court-filed documents, you may withhold information relating to the arrest for drug possession under section 552.108(a)(2) and the district attorney's criminal case file for the DWI arrest under section 552.108(a)(4). The sheriff's jail duty rosters are excepted from disclosure under section 552.108(b)(1). The remaining submitted information may be withheld under section 552.103 of the Government 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. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 206147

Enc. Submitted documents

c: Mr. Bruce Phillips
Wayne Wright Lawyers
5707 Interstate 10 West
San Antonio, Texas 78201
(w/o enclosures)