



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2004

Ms. Patricia J. Acosta
Assistant District Attorney
34th Judicial District
500 East San Antonio Street, 2nd Floor
El Paso, Texas 79901-2420

OR2004-6889

Dear Ms. Acosta:

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# 206520.

The Office of the District Attorney, 34th Judicial District (the "district attorney") received a request for information relating to three specified cause numbers, including all files, records, and other documents pertaining to the arrest, investigation and trial. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that this office previously ruled on the public availability of information related to two of the specified cause numbers in Open Records Letter No. 2004-4488 (2004), issued June 6, 2004. Pursuant to that ruling, the district attorney was allowed to withhold some of the responsive information and required to release the remaining information. Therefore, assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the district attorney may rely on our decision in Open Records Letter No. 2004-4488 (2004) with respect to the information requested in this instance that was previously ruled upon in that decision.¹

¹ The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). To the extent that the information requested in this instance is not identical to the information at issue in the prior ruling, we will address your arguments for the information you have submitted.

Next, we note that the requestor asserts that the former attorney for the criminal defendant in this case has been allowed to inspect many of the requested documents and papers. Whether information has previously been voluntarily released is a fact question that cannot be addressed in the ruling process. *See* Attorney General Opinion JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). We therefore must rely on a governmental body's representations with regard to such issues. The district attorney informs us that the defendant's attorney was only allowed to review the state's case files in compliance with constitutional requirements. *See Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution is required to provide defense with all potentially exculpatory evidence). Based on the district attorney's representation, we conclude that the district attorney has not previously released any of the requested information that it now seeks to withhold to a member of the public and will therefore address the district attorney's claim that the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. *See* generally Gov't Code § 552.007 (if governmental body voluntarily releases information to member of public, such information may not later be withheld unless confidential under law); Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007); 454 at 2 (1986) (where governmental body disclosed information because it reasonably concluded it had constitutional obligation to do so, it could still invoke law enforcement exception).

Third, we note that some of the submitted information relates to grand jury proceedings. 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 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.” 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). As we are unable to determine whether the submitted complaints were presented to a magistrate in support of the issuance of an arrest warrant, we must rule in the alternative. To the extent that the complaints that we have marked were, in fact, “presented to the magistrate in support of the issuance of an arrest warrant,” they are made public by article 15.26 of the Code of Criminal Procedure and must be released. To the extent that the marked complaints were not so presented, they are not made public by article 15.26 and must be disposed of along with the rest of the requested information.

The submitted information also includes a search warrant affidavit. Article 18.01(b) of the Code of Criminal Procedure provides in relevant part the following:

A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested. The affidavit is public information if executed, and the magistrate’s clerk shall make a copy of the affidavit available for public inspection in the clerk’s office during normal business hours.

Crim. Proc. Code art. 18.01(b). Based on this provision, the submitted search warrant affidavit is deemed public. The exceptions found in the Act generally do not apply to information that is made public by other statutes. *See Open Records Division No. 525 (1989)* (statutory predecessor). Therefore, you must release the submitted search warrant affidavit to the requestor.

The remainder of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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). The submitted information is part of completed investigation made of, for, or by the district attorney. A completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although the district attorney contends that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure under the Act and, as such, does not constitute "other law" that makes information confidential.² Accordingly, we conclude that the district attorney may not withhold any portion of the remaining information under section 552.103. However, because information subject to section 552.022(a)(1) may be withheld as provided by sections 552.101 and 552.108, we will address these exceptions for this information.

Section 552.108 provides 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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

² 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)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also 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 section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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 litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "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. In this instance, the requestor seeks access to "[a]ll files, records and any other documents in the possession of the [district attorney's] office pertaining to the arrest, investigation and trial" of a specified case. We agree that the request encompasses the district attorney's entire case file for the referenced case. You assert that this information reflects the mental impressions, and legal reasoning of the attorneys representing the state. You also contend that the information was gathered by an attorney in preparation for trial, and therefore constitutes attorney work product. Based on your representations and our review of the remaining information, we agree that section 552.108(a)(4) is applicable in this instance.

We note that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing 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). The district attorney must release basic front-page information, including a detailed description of the offense involved, even if this information does not literally appear on the front page of an offense or arrest report. See *Houston Chronicle*, 531 S.W.2d at 186-187; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*).

In summary: (1) 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; (2) the complaints that we have marked must be released if they were presented to a magistrate in support of the issuance of an arrest warrant; (3) the search warrant affidavit must be released; and (4) with the exception of the basic offense and arrest information, the district attorney may withhold the remaining submitted information that is subject to the Act, under section 552.108(a)(4) of the Government 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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 206520

Enc. Submitted documents

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