ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2004

Ms. Marisa Elmore
Assistant District Attorney
Dallas County
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207

OR2004-8170

Dear Ms. Elmore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209829.

The Dallas County District Attorney's Office (the "DA") received a request for a specified prosecution file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that the submitted information contains an arrest warrant and its corresponding affidavit. The Seventy-eighth Legislature amended article 15.26 of the Code of Criminal Procedure, which became effective September 1, 2003. Article 15.26 states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. We note that the exceptions found in the Public Information Act (the "Act") do not apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory

[1] We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

predecessor). Therefore, we have marked the arrest warrant and affidavit that must be released under article 15.26 of the Code of Criminal Procedure.

Next, we note that a portion of the submitted information found in Exhibit C (1)(d) may constitute grand jury records that are not subject to the Act. 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 this information is in the custody of the DA 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 DA as agent of the grand jury, we will address your claims for this and the remaining submitted information.

Third, we note that the remaining submitted information consists of a completed investigation made of, for, or by the DA. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. Although you claim that this information is excepted from disclosure under section 552.111 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Act that does not constitute "other law" for purposes of section 552.022.[2] Accordingly, we conclude that the DA may not withhold any portion of this information under section 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 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, 337 (Tex. 2001). The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." TEX. R. CIV. P. 2. Accordingly, Rule 192.5 does not apply to the criminal matter at issue here. However, because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we will address your section 552.108 assertion for this information.

Section 552.108 of the Government Code states in pertinent part:

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[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 which implicates the interests of third parties. *See, e.g.*, Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

> (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:
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> . . .
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> (4) it is information that:
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> (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
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> (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
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> (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:
>
> . . .
>
> (3) the internal record or notation:
>
> (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.
>
> (c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(4), (b)(3), (c). When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to section 552.108 and the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). In this instance, we agree that the request encompasses the DA's entire case file. *Curry* thus provides that the release of the information would reveal the DA's mental impressions or legal reasoning. Therefore, we find that subsections 552.108(a)(4)(B) and (b)(3)(B) of the Government Code apply to the remaining submitted information.

We note, however, 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). We believe such basic information refers to the 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). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*. *See* Open Records Decision No. 127 at 4 (1976). This information must be released, whether or not the information is found on the front page of an offense report. The remaining submitted information may be withheld under section 552.108.[3]

In summary, we conclude that the arrest warrant and affidavit we have marked must be released under article 15.26 of the Code of Criminal Procedure. To the extent the submitted grand jury records are in the custody of the department as agent of the grand jury, such information is not subject to disclosure under the Act. To the extent that this information is not in the custody of the department as agent of the grand jury, it and the remaining submitted information may be withheld under section 552.108 of the Government Code. However, basic front page offense and arrest information must be released to the requestor.

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

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[3] As we are able to make this determination, we do not address your remaining arguments against the disclosure of this information.

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,

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 209829

Enc. Submitted documents

c: Mr. Elijah McGrew
2829 Fordham
Dallas, Texas 75227
(w/o enclosures)