



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2004

Mr. J. David Dodd, III
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2004-9873

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213305.

The City of Allen (the "city"), which you represent, received a request for the following information:

Complaint (or Affidavit) which was the basis of a Search Warrant being signed by Magistrate Judge Quay Parker on August 10, 2004, regarding [the requestor and two other named individuals] and the premises of 1305 Matagorda Drive, Allen, Texas 75002; inventory which was returned as a result of said search; any police reports generated as a result of such search; any records made as a result of [a named individual] being taken into custody; arrest records, records of any charges brought and when as a result of said search warrant.

You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a preliminary matter, we note you have not submitted a complaint or affidavit supporting the search warrant specified in the request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266

(Tex.Civ.App.–San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). However, to the extent the requested complaint or affidavit exists, we assume that the city has released this information to the requestor. If not, the city must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances); *see also* Crim. Proc. Code art. 18.01(b) (affidavit supporting issuance of search warrant is expressly public).

Next, we note that the submitted information includes arrest warrants and supporting affidavits. 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. This provision makes the submitted arrest warrants and supporting affidavits expressly public. The exceptions found in the Public Information Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the city must release the arrest warrants and supporting affidavits, which we have marked, to the requestor.

Next, we note that a portion of the remaining submitted information is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes.¹ Juvenile law enforcement records are made confidential under section 58.007 of the Family Code, which provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c). An incident report, an arrest report, and a juvenile custody report in the submitted documents involve juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply. Thus, we find that this portion of the remaining information, which we have marked, is confidential pursuant to section 58.007(c) of the Family Code and must be withheld from disclosure under section 552.101.

We next address your claimed exceptions with respect to the remaining incident report in the submitted documents. You contend that this information is excepted from disclosure under section 552.103 of the Government Code. We note, however, that the incident report is subject to section 552.022 of the Government Code, which provides in part:

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 remaining information at issue is a completed incident report made by a governmental body. Therefore, as prescribed by section 552.022, the city must release this information unless it is excepted under section 552.108 or confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the remaining incident report may not be withheld under section 552.103.

You also contend that the remaining incident report at issue is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere

with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate that the information at issue relates to a pending prosecution in Allen Municipal Court. However, the requestor has submitted documentation showing that the arrested individual named in the request was convicted on the basis of his guilty plea in Allen Municipal Court on August 26, 2004. You indicate that the city received the present request on August 30, 2004. Based on the information you have provided, we cannot conclude that the information at issue relates to a prosecution that was pending on the date the city received the request. As you have not otherwise explained how the information at issue relates to a pending criminal case, we determine the remaining information is not excepted from disclosure under section 552.108 of the Government Code. Consequently, the city must release this incident report, which we have marked, to the requestor.

In summary, to the extent the city maintains a complaint or affidavit supporting the search warrant specified in the request, the city must release such information to the requestor. The arrest warrants and supporting affidavits in the submitted documents must be released to the requestor. We have marked the portions of the submitted information that are confidential under section 58.007 of the Family Code and must be withheld under section 552.101 of the Government Code. The remainder of the submitted information must be released.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 213305

Enc: Submitted documents

c: Ms. Carolyn Wilkinson
1305 Matagorda Drive
Allen, Texas 75002
(w/o enclosures)