



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2004

Mr. John Feldt
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2004-10973

Dear Mr. Feldt:

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# 216012.

The Denton County Criminal District Attorney's Office (the "district attorney") received a request for "any and all information in the possession of the Denton County District Attorney's Office concerning [a specified] criminal file." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111 and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that some of the submitted information appears to have been obtained pursuant to grand jury subpoenas. This office has concluded that grand juries are not

¹Although you raise sections 552.107 and 552.111 of the Government Code, you have failed to submit any comments stating the reasons why these exceptions are applicable to the submitted information. Therefore, we find that the district attorney has waived sections 552.107 and 552.111. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 630 (1994) (section 552.107 is discretionary exception), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception).

²We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 at issue is in the custody of the district attorney as agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the district attorney as agent of the grand jury, it is subject to disclosure under chapter 552. In that event, we address your claims for this information, as well as for the remaining submitted information.

The submitted information also includes an arrest warrant. 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 Act do not apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Accordingly, we have marked the arrest warrant that must be released under the amended statute.

The submitted information also includes a complaint. 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." (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). We are unable to determine whether this complaint was presented to the magistrate to support the issuance of an arrest warrant. Because we are unable to determine whether the complaint was presented to the magistrate in support of a warrant, we must rule in the alternative. If this complaint was in fact "presented to the magistrate in support of the issuance of the warrant," it is made public by article 15.26 and must be released. If the complaint was not so presented, it is not made public by this statute and must be disposed of in accordance with the remaining information at issue in this ruling.

Additionally, the submitted information includes a search warrant affidavit. An affidavit to support a search warrant is made public by statute if the search warrant has been executed. *See* Code Crim. Proc art. 18.01(b); *see also* Open Records Decision No. 525 (1989). Here, the search warrant has been executed; therefore, the district attorney must release the search warrant affidavit.

The submitted information also includes documents that have been filed with the court. 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 under this chapter 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 information filed with a court expressly public. Therefore, the district attorney may withhold this information only to the extent it is made confidential under other law. Although the district attorney claims sections 552.103 and 552.108, these exceptions are discretionary and thus, do not constitute other law 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. 663 (1999), 473 (1987); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney may not withhold court-filed documents under sections 552.103 or 552.108 of the Government Code. Therefore, with the exception of the fingerprint information, the medical records, the driver's license number and possibly the social security number as discussed below, you must release the court documents pursuant to section 552.022(a)(17).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Two of the court documents contain fingerprint information which is confidential under section 560.003 of the Government Code. Sections 560.001, 560.002, and 560.003 of the Government Code provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001, 560.002, 560.003. It does not appear to this office that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold the fingerprint information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

The submitted court documents also include medical records, access to which is governed by the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Further, information that is subject to the MPA also includes information obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005.

Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). The medical records in the submitted court documents may only be released in accordance with the MPA.

One of the court documents also contains motor vehicle information subject to section 552.130 of the Government Code, providing, in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a). Therefore, the district attorney must also withhold the Texas driver's license information we have marked on one of the submitted court documents under section 552.130.

One of the court documents also contains a social security number which may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that this social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

We next address your claim under section 552.108 for the remaining information. Section 552.108 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]

(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 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 records request encompasses the district attorney's entire case file. *Curry* thus provides that the release of the information would reveal the district attorney's mental impressions or legal reasoning. Thus, we find that subsections 552.108(a)(4)(B) and (b)(3)(B) of the Government Code apply to the remaining responsive information.

We note, however, that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* 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.³ The remaining responsive information may be withheld under section 552.108. As we are able to make this determination, we need not address your remaining arguments.

In summary, 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. The arrest warrant we have marked must be released under article 15.26 of the Code of Criminal Procedure. To the extent that the complaint we have marked was presented to a magistrate in support of the issuance of a warrant, it is made public by article 15.26 and must be released. The search warrant affidavit we have marked must be released under article 18.01(b) of the Code of Criminal Procedure. The district attorney must release the marked court-filed documents pursuant to section 552.022(a)(17), with the exception of 1) the submitted fingerprint information, which must be withheld under section 552.101 in conjunction with section 560.003 of the Government Code; 2) the medical records, which may only be released in accordance with the MPA; and 3) the Texas driver's license number which must be withheld under section 552.130. The social security number on one of the submitted court documents may be excepted under section 552.101 in conjunction with federal law. With the exception of basic offense and arrest information, the district attorney may withhold the remaining responsive information based on section 552.108 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

³Generally, basic information held to be public in *Houston Chronicle* is not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

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,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 216012

Enc: Submitted documents

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