



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2005

Ms. Catherine L. Clifton
Senior Assistant City Attorney
City of Odessa
P.O. Box 4398
Odessa, Texas 79760-4398

OR2005-01143

Dear Ms. Clifton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220873.

The Odessa Police Department (the "department") received a request for information concerning case number 04-12643. 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.

First, we note that the submitted documents include a search warrant and supporting affidavit. Search warrant affidavits are made public by statute if the search warrants have been executed. *See* Crim. Proc. Code art. 18.01(b). Therefore, the department must release the submitted search warrant affidavit. Further, information that is contained in a public court record is public and must be released. *See* Gov't Code § 552.022(a)(17). Thus, information that has been filed with a court, including the submitted search warrant, must be released.

We also note that the submitted information includes an arrest warrant and an arrest warrant affidavit. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." 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. 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). The department must release the submitted arrest warrant and arrest warrant affidavit. Further, to the extent the submitted complaint affidavit was presented to the magistrate in support of the issuance of an arrest warrant, it is public under article 15.26 of the Code of Criminal Procedure and must be released.

With respect to the remaining submitted information, we must address the department's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Public Information Act (the "Act") is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You indicate that the department received the present request on January 5, 2005. Accordingly, you were required to submit the information required under section 552.301(e) to this office no later than January 27, 2005. Your submission containing a copy of the requested information bears a post office cancellation mark indicating it was mailed on January 28, 2005. Consequently, we find that you failed to comply with the fifteen business day deadline. *See Gov't Code* § 552.308(a) (fifteen day requirement met if request bears post office cancellation mark indicating time within fifteen day period).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982).

Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630* (1994). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, section 552.103 does not demonstrate a compelling reason to withhold information from the

public. 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). However, because your other claimed exceptions can provide a compelling reason to overcome the presumption of openness in this instance, we will address the applicability of these exceptions to the submitted information. See Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under statutory predecessor section 552.108 can provide compelling reason to overcome presumption of openness).

Section 552.108(a) of the Government Code 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).

We note that where an incident involving allegedly criminal conduct is under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. See Open Records Decision Nos. 474 (1987), 372 (1983); see also Open Records Decision No. 586 (1991). In this case, you indicate that the submitted information relates to a pending prosecution by the Ector County District Attorney’s Office (the “district attorney”), and you have submitted correspondence from the district attorney requesting that the information be withheld. Based upon the representations of the department and the district attorney and our review, we determine that release of the remaining submitted information would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases). We therefore find that section 552.108(a)(1) is applicable to the remaining information.

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, the department may withhold the remainder of the submitted information from disclosure pursuant to section 552.108(a)(1). We note that the department has the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov’t Code § 552.007.¹

¹ Because our ruling is dispositive, we need not reach your claim under section 552.101.

In summary, the search warrant affidavit, arrest warrant, and arrest warrant affidavit included in the submitted documents must be released pursuant to articles 18.01 and 15.26 of the Code of Criminal Procedure. To the extent the submitted complaint affidavit was presented to the magistrate in support of the issuance of an arrest warrant, it must be released pursuant to article 15.26. The submitted search warrant and other court-filed documents must be released pursuant to section 552.022(a)(17) of the Government Code. With the exception of basic information, which must be released, the department may withhold the remainder of the submitted information pursuant to section 552.108(a)(1) 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 220873

Enc: Submitted documents

c: Mr. Darrell Pope
2623 Santa Monica
Odessa, Texas 79763
(w/o enclosures)