



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2005

Mr. Scott A. Durfee
General Counsel
Harris County
1201 Franklin, Suite 600
Houston, Texas 77002

OR2005-05382

Dear Mr. Durfee:

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# 226404.

The Harris County District Attorney's Office (the "district attorney") received three requests from the same requestor for the district attorney's case files related to three specified cause numbers. 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, portions of which consist of representative sample information.¹

We initially note that the submitted information includes "search and arrest" warrants and the supporting affidavits for the warrants. The article 15.26 of the Code of Criminal Procedure provides that:

[t]he 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

¹We 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.

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 (emphasis added). Thus, as the submitted arrest warrant and the affidavit for the warrant were presented to a magistrate, they are made public by and must be released under article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant and affidavit that we have marked must be released to the requestor under article 15.26 of the Code of Criminal Procedure.²

Next, we note that the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant 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). In this instance, the responsive information consists of three completed investigations. Unless the completed investigations are expressly confidential under other law or excepted from disclosure pursuant to section 552.108 of the Government Code, they must be released to the requestor. *Id.* Section 552.103 of the Government Code is discretionary and, as such, does not constitute other law that makes information confidential. *See 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Accordingly, we conclude that the district attorney may not withhold any portion of the submitted information pursuant to section 552.103 of the Government Code. However, section 552.101 constitutes other law for the purposes of section 552.022; therefore we will consider your sections 552.101 and 552.108 arguments.

²We note that these documents also constitute a search warrant and affidavit for a search warrant. An affidavit for a search warrant is made public under article 18.01 of the Code of Criminal Procedure where the related search warrant was executed. *See* Crim. Proc. Code art. 18.01(b).

You seek to withhold the tape recordings submitted in Envelope 2 because, you assert, the information “discloses the existence and possible identity of a confidential informant.” Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common-law right of privacy. Ordinarily, information is protected by common-law privacy only if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, information also may be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain “special circumstances.” *See* Open Records Decision No. 169 (1977). This office considers “special circumstances” to refer to a very narrow set of situations in which the release of information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. Such “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* After careful review, we find you have not demonstrated with sufficient specificity any imminent threat of physical danger that would constitute such “special circumstances.” *See id.* Thus, the district attorney may not withhold the information in Envelope 2 based on section 552.101 of the Government Code.

You also claim that the recordings in Envelope 2 are excepted from public disclosure under section 552.108(a)(1) and (b)(1). 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 the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime[.]

(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 the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov’t Code § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) 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 have not stated that the information at issue pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not

met your burden under section 552.108(a)(1) or 552.108(b)(1) with regard to the recordings in Envelope 2, and the information may not be withheld from disclosure on this basis.

You also seek to withhold the information in Envelope 3 under section 552.108(a)(4) and (b)(3) of the Government Code.³ Section 552.108 of the Government Code provides in 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.

(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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. You state that the information

³Although you cite section 552.108(a)(3), we note that proper exception in this instance is section 552.108(a)(4).

submitted in Envelope 3 “includes the District Attorney’s work product, including prosecutorial handwritten notes and typewritten notes.” Based on your representations and our review of the information at issue, we conclude that you may withhold the information in Envelope 3 under section 552.108(a)(4) and (b)(3).

The records submitted in Envelope 1 contain information that is excepted from public disclosure under section 552.130 of the Government Code. This section excepts from public disclosure information relating to a driver’s license or motor vehicle title or registration issued by an agency of this state. Thus, we have marked the type of information that the district attorney must withhold pursuant to section 552.130.⁴

In summary, the arrest warrant and affidavit that we have marked must be released to the requestor under article 15.26 of the Code of Criminal Procedure. The district attorney may withhold the information in Envelope 3 under section 552.108(a)(4) of the Government Code. We have marked the information in Envelope 1 that the district attorney must withhold pursuant to section 552.130 of the Government Code. The remaining submitted 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, 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

⁴If the district attorney does not have the technology necessary to withhold the section 552.130 information on the corresponding audiotape, then the district attorney must withhold the entire audiotape from disclosure under section 552.130.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 226404

Enc. Submitted documents

c: Mr. Carl Farris
231 West Thonway
Houston, Texas 77015
(w/o enclosures)