



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2005

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Bexar County
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030

OR2005-06897

Dear Ms. Dye:

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# 229257.

The Bexar County District Attorney's Office (the "district attorney") received a request for all information regarding the theft investigation of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that the submitted information includes an arrest warrant affidavit and probable cause affidavit. 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[.]" Crim. Proc. Code art. 15.26. The exceptions to disclosure found in the Act 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). If the arrest warrant affidavit and probable cause affidavit were presented to the magistrate in support of the issuance of the warrant, the district attorney must release them pursuant to article 15.26.

Next, we note that the remaining submitted information 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 submitted information constitutes a completed investigation made of, for, or by the district attorney that must be released pursuant to section 552.022(a)(1), unless it is excepted from disclosure under "other law" or section 552.108. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions that may be waived and, as such, do not constitute "other law" that makes information confidential for purposes of section 552.022(a)(1). See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive Gov't Code § 552.103), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, none of the remaining submitted information may be withheld under either section 552.103 or 552.111. We note that the district attorney's claim of the attorney work product privilege under section 552.111 is based on rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that the Texas Rules of Civil Procedure are "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the Texas Rules of Civil Procedure only apply to "actions of a civil nature." See TEX. R. CIV. P. 2. Accordingly, we find that the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any portion of the submitted information. However, since section 552.022(a)(1) provides that information made public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the district attorney's section 552.108 claim as it pertains to the remaining submitted information. Furthermore, because section 552.101 of the Government Code constitutes "other law" for purposes of section 552.022, we will also consider the district attorney's arguments under that section.

Section 552.108 provides in relevant part as follows:

- (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]

....

(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), (c). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). As you note, in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380.

In this instance, you state that the requestor seeks access to all of the district attorney's documents related to a specified investigation. We therefore agree that this request encompasses the district attorney's entire case file. You also assert that the submitted information was "prepared by an attorney representing the state in anticipation of litigation" and "reflect[s] the mental impressions or legal reasoning of [that] attorney." Based on your representations and our review, we find that section 552.108(a)(4) is applicable to the remaining submitted information.

However, 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 Company v. City of Houston*, 531 S.W.2d 177 at 185 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 at 3-5 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, except for basic information, the remaining submitted information may be withheld under section 552.108(a)(4).¹ We note, however, that you have the discretion

¹As our ruling is dispositive, we need not address your arguments under section 552.101.

to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

We note that section 552.147 of the Government Code² provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the district attorney must withhold the social security number of the arrestee contained in the submitted information under section 552.147.³

In summary, if the arrest warrant affidavit and probable cause affidavit were presented to a magistrate in support of the issuance of the warrant, they must be released pursuant to article 15.26 of the Code of Criminal Procedure. Except for basic information, the district attorney may withhold the remaining submitted information under section 552.108(a)(4) of the Government Code. The arrestee’s social security number must be withheld under section 552.147 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

²Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 229257

Enc. Submitted documents

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