



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2005

Sergeant Thomas P. Karlok
Custodian of Records
City of Galveston
P. O. Box 568
Galveston, Texas 77553

OR2005-07673

Dear Sergeant Karlok:

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# 230957.

The City of Galveston (the "city") received a request for the following information:

1. Photographs the city police department (the "department") took of a named individual after his arrest on May 8, 2005;
2. Any videotape the department shot in connection with the arrest;
3. Audiotape of department radio traffic relevant to the arrest; and
4. Service records of two named department peace officers.

You have submitted among other documentation supporting your arguments:

- Exhibit E. Photographs taken of the arrestee at issue by the department after his arrest on May 8, 2005;
- Exhibit F. The civil service records for one of the named officers;
- Exhibit G. The civil service records for the other named officer;
- Exhibit H. The offense report generated by the named officers regarding the arrest at issue;
- Exhibit I. A copy of the audiotape of department radio traffic relevant to the arrest at issue;
- Exhibit J. A copy of the videotape shot in connection with the arrest at issue; and
- Exhibit K. Internal affairs investigation records for the named officers.

You claim that the submitted 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.

Initially, we note the submitted information in Exhibit H includes an affidavit for a warrant of arrest, as well as a separate complaint. 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.” Crim. Proc. Code art. 15.26. Article 15.04 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). Therefore, to the extent the marked affidavit and marked complaint were presented to a magistrate in support of the issuance of an arrest warrant, they are public under article 15.26 of the Code of Criminal Procedure and must be released in their entirety. To the extent these documents were not so presented to a magistrate, we will address them together with the other submitted information.

You argue Exhibits E, F, G, H, I, and J are excepted 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 state, and provide documentation showing, that Exhibits E, H, I, and J relate to criminal litigation that was pending at the time the city received the request for information.¹ Based upon this representation, we conclude that, at the time the city received this request, the release of Exhibits E, H, I, and J 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). Therefore, section 552.108 is applicable to this information.

¹ Generally, after criminal litigation is no longer pending, a governmental body must be able to reasonably explain why release of requested information would continue to interfere with law enforcement in order for section 552.108 to still be applicable. *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, however, that 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). Basic information refers to the information held to be public in *Houston Chronicle*. See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of the basic offense and arrest information, you may withhold Exhibits E, H, I, and J under section 552.108(a)(1).

We note that Exhibit H contains the arrestee's social security number. 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.³ The city must withhold the social security number of the arrestee in Exhibit H under section 552.147.⁴

Although you generally assert section 552.108 excepts the submitted service records in Exhibits F and G, you have not explained how release of Exhibits F and G would interfere with the investigation or prosecution of crime. Therefore, the city has failed to establish that section 552.108 is applicable to Exhibits F and G. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706; Open Records Decision No. 434 at 2-3 (1986).

You also argue Exhibits F and G are excepted from required public disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

² Added 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).

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴ We 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that Exhibits F and G relate to the pending criminal litigation at issue. However, the city is not a party to the pending criminal litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest, the Galveston County District Attorney's Office (the "district attorney's office"), that the governmental body wants the information at issue withheld from disclosure under section 552.103. You have not provided this office with an affirmative representation from the district attorney's office that it wants the information at issue withheld from public disclosure. Accordingly, you may not withhold Exhibits F and G under section 552.103 of the Government Code on the basis of this pending criminal litigation.

You also assert that Exhibits F and G are excepted from disclosure under section 552.103 because you anticipate that the arrestee in this matter will file a civil suit against the city. To establish that litigation is reasonably anticipated at the time it receives a request, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

While you state the arrestee has retained an attorney in the pending criminal litigation, you have not demonstrated that the arrestee has taken any objective steps toward initiating civil litigation against the city. Upon review of your arguments and the submitted documentation, we find that you have failed to establish that civil litigation was reasonably anticipated when the city received the present request. Therefore, Exhibits F and G may not be withheld on the basis of section 552.103 of the Government Code.

However, Exhibits F and G include information that is subject to mandatory exceptions in the Act. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). We note that you have redacted the personal information of the peace officers in Exhibits F and G pursuant to the previous determination of this office in Open Records Decision No. 670 (2001). In that decision, we determined that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members, of any individual who meets the definition of "peace officer" set forth in article 2.12 of the Texas Code of Criminal Procedure, without the necessity of requesting an attorney general decision as to the applicability of section 552.117(a)(2) of the Government Code. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 670 (2001); *see also* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). We have marked additional information that must be withheld under this exception. We note, however, that section 552.117(a)(2) does not except from disclosure a peace officer's date of birth. *See* Gov't Code § 552.117(a)(2). Accordingly, the city must withhold the peace officers' home addresses, home telephone numbers, social security numbers, personal cellular phone numbers, personal pager numbers, and family member information as redacted and marked in Exhibits F and G pursuant to section 552.117(a)(2).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. *See* Gov't Code § 552.101. Exhibits F and G include Employment Eligibility Verification I-9 Forms. An I-9 Form is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Act would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the I-9 Forms are confidential for purposes of section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Exhibit F also includes an account number that is subject to section 552.136 of the Government Code. This section provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Accordingly, the city must withhold the account number we have marked pursuant to section 552.136.

Finally, we note that Exhibit K was not submitted in accordance with the city's procedural obligations under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate

which exceptions apply to which parts of the documents. You did not submit Exhibit K to this office within the fifteen-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.101 is a mandatory exception and constitutes a compelling reason that overcomes the presumption of openness caused by a failure to comply with section 552.301. *See Gov't Code §§ 552.007, .352*; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

As previously stated, section 552.101 excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You inform us the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. *See Local Gov't Code § 143.089(f)*; Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You explain Exhibit K consists of internal affairs investigation records of the named officers. You indicate the investigations at issue did not result in the type of disciplinary actions prescribed in Chapter 143 and are maintained by the department pursuant to section 143.089(g). Based on your representations and our review of Exhibit K, we conclude

that this information is confidential pursuant to section 143.089(g). Therefore, the city must withhold Exhibit K under section 552.101 of the Government Code.

In summary, to the extent the marked affidavit and marked complaint in Exhibit H were presented to a magistrate in support of the issuance of an arrest warrant, they must be released under article 15.26. To the extent these documents were not so presented to a magistrate, the city has established section 552.108 is applicable to the affidavit and complaint along with the remaining information in Exhibit H, as well as the information in Exhibits E, I, and J. Basic information from these exhibits must be released pursuant to section 552.108(c). We note the city has the discretion to release all or part of the remaining information in Exhibits E, H, I, and J that is not otherwise confidential by law. Gov't Code § 552.007. The social security number in Exhibit H must be withheld under section 552.147. The city must withhold the submitted I-9 Forms in Exhibits F and G under section 552.101 in conjunction with federal law. The city must withhold the marked account number in Exhibit F under section 552.136. The city must withhold the peace officers' personal information in Exhibits F and G, as redacted and marked, under section 552.117(a)(2). The remaining information in Exhibits F and G must be released. The city must withhold Exhibit K under section 143.089(g) of the Local Government Code in conjunction with section 552.101.

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 230957

Enc. Submitted documents

c: Mr. Marty Schladen
The Galveston County Daily News
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(w/o enclosures)