



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 29, 2005

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County  
401 West Belknap  
Fort Worth, Texas 76102

OR2005-10664

Dear Ms. Fourt:

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# 237064.

The Tarrant County District Attorney's Office (the "district attorney") received a request for "any and all records, documents, reports, [and] photographs" pertaining to a specified case involving a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes an executed arrest warrant and an unsigned complaint affidavit. Article 15.26 of the Code of Criminal Procedure states 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 a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours.

Code of Crim. Proc. 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, the arrest warrant and any supporting affidavits, including complaint affidavits, are made public under article 15.26. Exceptions to disclosure under the Act generally do not apply to information that is made public by other statutes, such as article 15.26 of the Code of Criminal Procedure. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). The arrest warrant must therefore be released to the requestor. Moreover, if the complaint affidavit was presented to a magistrate in support of the issuance of an arrest warrant, it must also be released; otherwise, it is subject to the remainder of this ruling as discussed below.

The submitted information also includes an executed search warrant, a search warrant supporting affidavit signed by a magistrate, and several other documents that have been filed with the court. A search warrant affidavit is made public by statute if the search warrant has been executed. *See* Crim. Proc. Code art. 18.01(b). As stated above, 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 (1985). Therefore, the district attorney must release the search warrant affidavit.

With respect to the search warrant itself and the other court-filed documents, we note that information filed with a court is generally a matter of public record under section 552.022(a)(17) of the Government Code and may only be withheld if expressly confidential under other law. *See* Gov't Code § 552.022(a)(17) (information contained in public court record is not excepted from required disclosure under Act unless expressly confidential under other law). Sections 552.108 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 586 (1991) (section 552.108 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, sections 552.108 and 552.111 do not constitute other law for purposes of section 552.022, and the district attorney may not withhold the search warrant and other court-filed documents pursuant to those sections. However, because section 552.101 can constitute other law for purposes of section 552.022, we will address this section's applicability to this information, as well as its applicability to the remaining information at issue.

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 the doctrine of common-law privacy, which protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and the public has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). You contend that the information at issue is protected under common-law privacy on the basis of the holding in *United States Department of*

*Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). This case held that where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See id.* However, information that refers to an individual solely as a victim, witness, or involved person is not private under *Reporters Committee* and may not be withheld under section 552.101 on that basis.

In this instance, the requestor seeks information pertaining to a specified case that involves a named individual. This request does not ask the department to compile records on the named individual because it only seeks information pertaining to the specified case. Therefore, the privacy concerns expressed in *Reporters Committee* are not implicated by the request, and none of the information at issue may be withheld under section 552.101 on the basis of this case's holding.

We next address your arguments regarding the attorney work product privilege as encompassed by section 552.111 of the Government Code with respect to the submitted information other than the documents that are subject to articles 15.26 and 18.01 of the Code of Criminal Procedure and section 552.022(a)(17) of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. OF CIV. P. 192.5. A governmental body seeking to withhold information on this basis bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of

preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; Open Records Decision No. 677 at 7 (2002). 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, 460 (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 “[i]ncluded in the information sought are documents that, considered individually, reflect the prosecutor’s thought processes and/or were created or prepared in anticipation of presentation to the Tarrant County Grand Jury, trial or appeal by the prosecuting attorney, his investigator, or agent in the criminal case.” However, you have not explained, marked, labeled, or in any way identified the documents that are “[i]ncluded in the information sought” for which you are claiming this exception. As such, we find that the district attorney has failed to meet its burden explaining the applicability of section 552.111, and none of the information at issue may be withheld on this basis. *See* Gov’t Code § 552.301(e)(1)(D) (documents submitted by governmental body under the Act must be labeled to indicate which exceptions apply to which parts of documents).

You also contend that this information is excepted from disclosure 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 that the information at issue relates to a pending criminal prosecution. Based upon this representation, we conclude that the release of this 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).

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). Basic information refers to the information held to be public in *Houston Chronicle*. Thus, other than the basic front page offense and arrest information, the district attorney may withhold from disclosure this remaining information at issue pursuant to section 552.108(a)(1).<sup>1</sup> We note that the district

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<sup>1</sup>As we reach this conclusion, we need not address your remaining arguments for this information.

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

Lastly, we note that section 552.147 of the Government Code<sup>2</sup> provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the arrestee’s social security number must be withheld pursuant to section 552.147.<sup>3</sup>

In summary, the arrest warrant must be released in accordance with article 15.26 of the Code of Criminal Procedure. The complaint affidavit must also be released on this basis if it was presented to a magistrate in support of the issuance of an arrest warrant. The search warrant affidavit must be released pursuant to article 18.01(b) of the Code of Criminal Procedure. The search warrant and other court-filed documents that we have marked must be released under section 552.022(a)(17) of the Government Code. Other than basic information, the district attorney may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code. The arrestee’s social security number must be withheld pursuant to section 552.147 of the Government Code. The remaining basic information must be released.

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 ten 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

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<sup>2</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov't Code § 552.147).

<sup>3</sup>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.

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); *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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/krl

Ref: ID# 237064

Enc. Submitted documents

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(w/o enclosures)