ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2004

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2004-4868

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203378.

The Waco Police Department (the "department") received a request for information relating to 20 cases. You inform us that the department has released some of the requested information. You claim that most of the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that the submitted information includes complaints that were submitted in support of the issuance of arrest warrants. Article 15.26 of the Code of Criminal Procedure was amended by the 78th Legislature to add language providing:

> The 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. 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.) 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." (Emphasis added.) 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 Christi1990, 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).

In this instance, the information that relates to case number 94-033412 includes complaints. These complaints, which we have marked, were "presented to the magistrate in support of the issuance of the [arrest] warrant." Crim. Proc. Code art. 15.26. As a general rule, the exceptions to disclosure found in the Public Information Act (the "Act"), chapter 552 of the Government Code, 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).[1] Therefore, the marked complaints are made public by article 15.26 of the Code of Criminal Procedure and must be released to the requestor.

Next, we address the department's obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) a copy of the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, the department failed to submit a copy of the entire request for information within the fifteen-business-day period prescribed by section 552.301(e). The requested information is therefore presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open

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[1]We note that we contacted the department regarding the possible sealing by court order of these records, but to date we have received no indication that any of the records at issue have been sealed. *See generally* Tex. R. Civ. Proc. 76a (procedural mechanism for sealing court records).

Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The department's claims under sections 552.101 and 552.130 of the Government Code can provide compelling reasons for non-disclosure under section 552.302. Therefore, we will address your claims under these sections.

The department also raises section 552.108. This section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). The law enforcement interests under section 552.108 of a governmental body that fails to comply with section 552.301 are not a compelling reason for non-disclosure under section 552.302. However, the need of another law enforcement agency to withhold information under section 552.108 can provide a compelling reason for non-disclosure. *See* Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991). You indicate that federal law enforcement authorities have a prosecutorial interest in the information that you seek to withhold under section 552.108. Therefore, we will address the applicability of section 552.108 to that information.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You contend that some of the submitted information is confidential under section 261.201 of the Family Code. Chapter 261 of the Family Code is applicable to information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 provides in part:

> (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also id.* § 261.001(1), (4) (definitions of abuse and neglect); Open Records Decision No. 440 at 2 (1986) (construing statutory predecessor to Fam. Code § 261.201). We find that the rest of the submitted information that relates to case number 94-033412 consists of files, reports, records, communications, and working papers used or developed in an investigation made under chapter 261 of the Family Code. You do not inform this office of any rule adopted by the department that would allow the release of this information in this instance. We therefore assume that no such rule exists. Given that

assumption, we conclude that the department must withhold the rest of the submitted information that relates to case number 94-033412 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

You also raise section 552.101 in conjunction with section 58.007 of the Family Code. This section provides in part:

> (c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:
>
> > (1) if maintained on paper or microfilm, kept separate from adult files and records;
> >
> > (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
> >
> > (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Fam. Code § 58.007(c); *see also id.* § 51.03(a)-(b) (defining "delinquent conduct" and "conduct indicating need for supervision" for purposes of Fam. Code tit. 3). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996). The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining "child" for purposes of title 3 of Family Code). Section 58.007 is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party, rather than as a juvenile suspect or offender. We find that the submitted information that relates to case number 97-059660 is confidential under section 58.007 of the Family Code. Therefore, the department must also withhold that information under section 552.101.

A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number that you have marked is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that the marked social security number was obtained or is maintained under such

a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the marked social security number, the department should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Next, we address section 552.108. This section excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). 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* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform us that the submitted information that relates to case number 03-010919 pertains to federal search warrants. You also inform us that this information relates to an open and pending federal criminal case. You indicate that the responsible federal law enforcement authorities have asked the department not to release the information that relates to case number 03-010919 at this time. Based on your representations, we find that you have demonstrated the existence of a compelling reason to withhold most of the information that relates to case number 03-010919 under section 552.108(a)(1). *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); Open Records Decision Nos. 586 at 3 (1991) (ongoing investigative interests of Texas Department of Public Safety constituted compelling demonstration sufficient to overcome presumption that information held by prosecutor must be released), 372 at 4 (1983) (statutory predecessor to Gov't Code § 552.108 may be invoked by any proper custodian of information relating to incident allegedly involving criminal conduct that remains under active investigation or prosecution).

We note 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). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle.* The department must release basic information, including a detailed description of the offense, even if this information does not literally appear on the front page of an offense or arrest report. *See Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). As the relevant law enforcement interests in this instance are those of the federal authorities, the department should consult with the federal authorities with regard to release of basic information. The department may withhold the rest of the submitted information that relates to case number 03-010919 under section 552.108(a)(1). We note that the department has discretion under section 552.108 to release additional information regarding this case that is not otherwise confidential by law. *See* Gov't Code § 552.108; Open Records Decision No. 177

(1977) (statutory predecessor to Gov't Code § 552.108 did not prohibit release of information).

Lastly, we address section 552.130. This section excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). Assuming that the information that you have marked is a Texas driver's license number, we agree that it must be withheld from disclosure under section 552.130.

In summary: (1) the department must release the complaints under article 15.26 of the Code of Criminal Procedure; (2) the department must withhold the rest of the information that relates to case number 94-033412 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (3) the department must withhold the information that relates to case number 97-059660 under section 552.101 in conjunction with section 58.007 of the Family Code; (4) the department may be required to withhold the social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (5) except for the basic information that must be released under section 552.108(c), the department may withhold the information that relates to case number 03-010919 under section 552.108(a)(1); and (6) the department must withhold a Texas driver's license number under section 552.130. The rest of the submitted 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 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

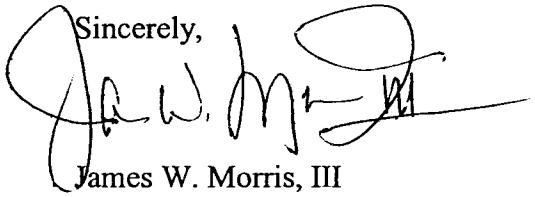
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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,



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JWM/sdk

Ref: ID# 203378

Enc: Submitted documents

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