



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2005

Mr. J. Cameron Cowan
Assistant Criminal District Attorney
Kaufman County
100 W. Mulberry
Kaufman, Texas 75142

OR2005-06405

Dear Mr. Cowan:

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# 228407.

The Kaufman County Criminal District Attorney's Office (the "district attorney") received a request for information pertaining to an unspecified investigation of a named individual, including arrest reports, fingerprints, and the medical records of another named individual.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note that the submitted information includes arrest warrants and complaints. 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." 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

¹We note that the request for information does not specify the case at issue or identify the individual at issue other than by name. You inform us that, "[i]n an abundance of caution," you have submitted information pertaining to a case that the district believes may be responsive. We assume that the district attorney has made a good-faith effort to relate the request for information to the submitted documents. See Open Records Decision Nos. 87 at 5 (1975) (governmental body must make a good faith effort to relate a request to information held by it). We also note that, pursuant to section 552.222 of the Government Code, a governmental body may ask a requestor to clarify a request for information if the request is vague or unclear.

commission of an offense.” 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) (complaint in support of arrest warrant need not contain same particularity required of indictment). The exceptions to disclosure 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). The complaints at issue were presented to and signed by a magistrate in support of the issuance of a warrant. Therefore, the arrest warrants and complaints we have marked must be released pursuant to article 15.26 of the Code of Criminal Procedure.

Next, we note that the submitted information contains documents filed with the court. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See* Gov’t Code § 552.022(a)(17). 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) (governmental body may waive law enforcement exception); *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 department may not withhold the court-filed documents pursuant to those sections. Section 552.101 does constitute other law for purposes of section 552.022; therefore, we will address whether that section requires you to withhold any of the information in these documents. We also note that some information in these documents is subject to section 552.130 of the Government Code.

Section 552.130 of the Government Code provides that a motor vehicle operator’s, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code § 552.130(a)(1), (2). However, section 552.130 protects privacy interests, and the person or person’s representative to whom such information relates has a right of access to such information under section 552.023 of the Government Code. Therefore, the district attorney must withhold the Texas motor vehicle record information we have marked under section 552.130 within the documents subject to section 552.022; however, it must release this information if the requestor is the authorized representative of the person to whom this information pertains.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses section 1703.306 of the Occupations Code. Section 1703.306(a) makes confidential information obtained from a polygraph examination; however, section 1703.306(a)(1) provides that “the examinee or any other person specifically designated in writing by the examinee” has a right of access to that information. Accordingly, the polygraph examination information we have marked is confidential under section 1703.306 of the Occupations Code, and the district attorney must withhold it under

section 552.101 of the Government Code; however, the district attorney must release this information to the requestor if she has a right of access to it pursuant to section 1703.306(a)(1).

The district attorney asserts that the remaining information is excepted under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from 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.” 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), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information “is an ongoing investigation that has not yet been presented to any grand jury.” Based on 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.*, 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, with the exception of the basic front-page offense and arrest information, you may withhold the remaining information under section 552.108(a)(1).²

Basic information includes the identification and description of the complainant. Open Records Decision No. 127 (1976). Information tending to identify a sexual assault victim is private information that must be withheld. Gov’t Code § 552.101 (excepts information made confidential by judicial decision and encompasses common law privacy); *see Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976); Open Records Decision Nos. 393 (1983), 339 (1982). Here, the complainant is not a victim of sexual assault and her information is not protected by common law privacy; thus, none of the basic information may be withheld under section 552.101 on that ground.

You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code; accordingly, we will consider whether you have established the applicability of this section to the basic information. 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*

²As we are able to resolve this under section 552.108, we do not address your other arguments for exception of this information.

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.

A governmental body seeking to withhold information under this exception 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. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) 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 b) 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; ORD 677 at 7.

If a requestor seeks an attorney's entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996); *Nat'l Union Fire Ins. Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

Having considered your arguments, we find that you have not established that the information at issue was created or developed for trial or in anticipation of litigation. We therefore conclude that the district attorney may not withhold any basic information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Finally, we note that the submitted information contains a social security number. Section 552.147 of the Government Code³ provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. However, section 552.147 protects privacy interests, and the person or person’s representative to whom such information relates has a special right of access to such information under section 552.023 of the Government Code. Therefore, the district attorney must withhold the social security number under section 552.147; however, it must release this information if the requestor is the authorized representative of the person to whom this information pertains.

To conclude, the district attorney must release the marked arrest warrants and complaints under article 15.26 of the Code of Criminal Procedure. Pursuant to section 552.022, it must release the marked documents that have been filed with the court; however, it must withhold under section 552.130 the marked Texas motor vehicle record information in these documents, unless the requestor has a right of access to this information under section 552.023. Pursuant to section 552.101 of the Government Code, the district attorney must withhold the marked polygraph examination information that is confidential under section 1703.306 of the Occupations Code, unless the requestor has a right of access to this information under section 1703.306(a)(1). With the exception of the basic front-page offense and arrest information, you may withhold the remaining information under section 552.108; however, the department must withhold the social security number under section 552.147, unless the requestor has a special right of access to this information under section 552.023.

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

³Added 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).

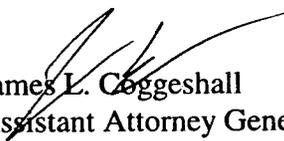
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/krl

Ref: ID# 228407

Enc. Submitted documents

c: Ms. Aneli Lopez
c/o J. Cameron Cowan
Assistant Criminal District Attorney
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(w/o enclosures)