



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 2, 2017

Ms. Laura Anne Coats
Assistant District Attorney
Dallas County
133 North Riverfront Boulevard, LB-19
Dallas, Texas 75207-4399

OR2017-17353

Dear Ms. Coats:

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# 668887.

The Dallas County District Attorney's Office (the "district attorney's office") received a request for all records and documents related to the district attorney's prosecution of a specified case. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.130, 552.1325, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the information in Exhibit O consists of grand jury testimony. In addition, some of the information in Exhibit T appears to have been obtained pursuant to a grand jury subpoena. The judiciary is expressly excluded from the requirements of the Act. Gov't Code § 552.003(1)(B). This office has determined for purposes of the Act, a grand jury is a part of the judiciary, and therefore, not subject to the Act. *See* Open Records Decision

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). Thus, to the extent the district attorney's office holds the information at issue as an agent of the grand jury, such information consists of records of the judiciary that are not subject to disclosure under the Act and the district attorney's office is not required to release that information in response to the instant request. To the extent the district attorney's office does not hold the information at issue as an agent of the grand jury, we will address the district attorney's office's arguments against its disclosure.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). We note the submitted information consists of a completed investigation subject to subsection 552.022(a)(1). The district attorney's office must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The district attorney's office seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code and the attorney work product privilege of section 552.111 of the Government Code. However, these exceptions are discretionary exceptions to disclosure that protect a governmental body's interests and do not make information confidential under the Act. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district attorney's office may not withhold the information subject to section 552.022 under section 552.103 or section 552.111 of the Government Code. You also raise the attorney work product privilege, which is found in rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5. The Texas Supreme Court has held “[t]he Texas Rules of Civil Procedure are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the requested documents relate to a criminal case, the attorney work product privilege found in rule 192.5

of the Texas Rules of Civil Procedure does not apply, and the district attorney's office may not withhold the information at issue on that basis. However, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under section 552.108 for the information at issue. Additionally, because sections 552.101, 552.130, and 552.1325 of the Government Code can make information confidential under the Act, we will consider the applicability of these exceptions to the information at issue.

We note the submitted information contains fingerprints whose public availability is governed by sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 of the Government Code provides, "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, "[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Although you seek to withhold the fingerprints under section 552.108 of the Government Code, we note the requestor may have a right of access to the fingerprints as an authorized representative of the individual whose fingerprints are at issue. *See id.* § 560.002(1). Thus, if the requestor is an authorized representative of the individual whose fingerprints are at issue, then he has a right of access to the marked fingerprints pursuant to section 560.002(1)(A) of the Government Code, and the fingerprints must be released to the requestor. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). If the requestor is not an authorized representative of the individual whose fingerprints are at issue, then the district attorney's office must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.108 of the Government Code provides, in part:

(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.

Gov't Code § 552.108(a)(4). A governmental body must explain how and why section 552.108 is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) (orig. proceeding), held "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. The present request is for all documents related to the prosecution of a specified case. You contend the request encompasses the district attorney's office's entire prosecution file for the case at issue. In addition, you assert release of the remaining information would reveal the prosecutor's legal reasoning and thought process. Based on your representations and our review, we agree section 552.108(a)(4) is applicable to the remaining 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). Basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. 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 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, the district attorney's office may withhold the remaining information under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.²

In summary, to the extent the information in Exhibits O and T is held by the district attorney's office as agent of the grand jury, it constitutes records of the judiciary and is not subject to the Act. If the requestor is an authorized representative of the individual whose fingerprints are at issue, the marked fingerprints must be released to the requestor pursuant to section 560.002(1)(A) of the Government Code. If the requestor is not an authorized representative of the individual whose fingerprints are at issue, then the district attorney's office must withhold the submitted fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. With the exception of basic information, which must be released, the district attorney's office may withhold the remaining information under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/bw

Ref: ID# 666887

Enc. Submitted documents

c: Requestor
(w/o enclosures)