



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 25, 2017

Mr. Mark C. Kratovil
Assistant Criminal District Attorney
Tarrant County
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2017-24396

Dear Mr. Kratovil:

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# 681272.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for specified information for any case in which the district attorney's office investigated an officer of a law enforcement agency under its jurisdiction. You state you released some of the information. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information relates to completed investigations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(1). Although you raise section 552.111 of the Government Code for this information, we note section 552.111 is a discretionary exception and does not make information confidential under the Act. *See* 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). As such, the district attorney's office may not withhold any of the information at issue under section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We note the Texas Rules of Civil Procedure are only applicable to "actions of a civil nature." *See* Tex. R. Civ. P. 2. Thus, because the information at issue pertains to criminal cases, the attorney work product privilege found in Texas Rule of Civil Procedure 192.5 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, we will address your argument under section 552.108 of the Government Code for the information at issue. We will also consider your arguments for the information not subject to section 552.022(a)(1) of the Government Code.

Section 552.108 of the Government 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.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

(3) the internal record or notation:

(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), (b)(3). A governmental body claiming section 552.108(a)(4) or (b)(3) must explain how and why this exception is applicable to the information the

governmental body seeks to withhold. *See id.* §§ 552.108(a)(4), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted information reflects the mental impressions and legal strategies of attorneys representing the state in anticipation of criminal litigation. Upon review, we find some of the information at issue, which we marked, reflects the mental impressions or legal reasoning of attorneys representing the state. Accordingly, we find the district attorney's office may withhold the information we marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.¹ Upon review, however, we find you have failed to demonstrate the remaining information at issue was prepared by the district attorney's office in anticipation of or in the course of preparing for criminal litigation or represents the mental impressions or legal reasoning of an attorney representing the state. Accordingly, the district attorney's office may not withhold any of the remaining information at issue under section 552.108(a)(4) or section 552.108(b)(3) of the Government Code.

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state a portion of the remaining information contains offense reports that pertain to concluded investigations that did not result in convictions or deferred adjudications. Based on your representations and our review, we find section 552.108(a)(2) is applicable to some of the information you indicated. We note, however, Exhibit C, which you provided as supporting documentation, reveals case numbers 1497950R and 1497957R resulted in deferred adjudication. Thus, we find the information pertaining to case numbers 1449730D and 1497957R may not be withheld under section 552.108(a)(2). Accordingly, with the exception of the information pertaining to case numbers 1497950R and 1497957R, the district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code.²

Section 552.111 of the Government Code 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." *See* Gov't Code § 552.111. 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

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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(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. CIV. P. 192.5. 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. *Id.*; 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.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see U.S. v. Nobles*, 422 U.S. 225, 236 (1975). Upon review, we find you have failed to establish the remaining information not subject to 552.022(a)(1) of the Government Code consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the district attorney's office or representatives of the district attorney's office. Therefore, the district attorney's office may not withhold any of the remaining information not subject to 552.022(a)(1) as attorney work product under section 552.111 of the Government Code.

As state above, section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process.

See Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We note the remaining information not subject to 552.022(a)(1) of the Government Code consists of factual information. Accordingly, the district attorney's office may not withhold any portion of the remaining information not subject to 552.022(a)(1) under the deliberate process privilege of section 552.111 of the Government Code.

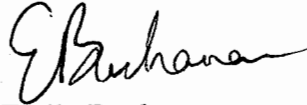
In summary, the district attorney's office may withhold the information we marked under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. With the exception of the information pertaining to case numbers 1497950R and 1497957R, the district attorney's office may withhold the information you indicated under section 552.108(a)(2) of the Government Code. The remaining information must be released.

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,

A handwritten signature in black ink, appearing to read "Emily Buchanan". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Emily Buchanan
Attorney
Open Records Division

EB/eb

Ref: ID# 681272

Enc. Submitted documents

c: Requestor
(w/o enclosures)