



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 18, 2019

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

OR2019-29449

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# 793469.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for information related to a named peace officer and a specified incident. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions the district attorney's office claims and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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 We assume 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 those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record [.]

Gov't Code § 552.022(a)(1), (17). The submitted information related to cause numbers 1444611 and 1444612 consists of completed investigations that are subject to section 552.022(a)(1). The district attorney's office must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Further, the submitted information related to cause number 1444610 includes court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). The district attorney's office seeks to withhold the information subject to section 552.022(a)(1) under the attorney work-product privilege of section 552.111 of the Government Code. Further, the district attorney's office seeks to withhold the information subject to section 552.022(a)(17) under section 552.108 of the Government Code. However, sections 552.108 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver).* Therefore, the district attorney's office may not withhold the court-filed documents under section 552.108 of the Government Code and may not withhold the information subject to section 552.022(a)(1) under section 552.111 of the Government Code. We also note 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). The attorney work-product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. However, the Texas Rules of Civil Procedure are applicable only to "actions of a civil nature." *See TEX. R. CIV. P. 2.* Thus, because the information at issue pertains to criminal cases, rule 192.5 is not applicable to the information and the district attorney's office may not withhold the information on the basis of the attorney work-product privilege in Texas Rule of Civil Procedure 192.5. However, we will consider the district attorney's office's remaining arguments against disclosure of the submitted information.

The district attorney's office asserts the submitted information is excepted from disclosure under section 552.111 of the Government Code, which 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 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); ORD 677 at 4-8. 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. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating 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 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). In *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), 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." *Id.* at 380. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body 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); see *Nat'l Union*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

The district attorney's office asserts the information related to cause number 1444610 encompasses its entire litigation file concerning the case. The district attorney's office informs us the Court of Criminal Appeals has set a deadline for the filing of a Petition for Discretionary Review in this matter; thus, the case was pending when the district attorney's office received the request for information. Upon review, we agree the request at issue

constitutes a request for an “entire” litigation file for purposes of the *Curry* decision. Thus, we agree with the exception of the information subject to section 552.022(a)(17) of the Government Code, the district attorney’s office may withhold the information related to cause number 1444610 under the attorney work product doctrine of section 552.111 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). As noted above, in *Curry*, 873 S.W.2d 379, 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.*, 863 S.W.2d 458, 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 district attorney’s office states the instant request for information encompasses the district attorney’s office’s entire prosecution files related to cause numbers 1444611 and 1444612. Thus, the district attorney’s office argues release of the information at issue would reveal the mental impressions or legal reasoning of prosecutors. Based on these representations and our review of the submitted information, we agree section 552.108(a)(4) is applicable to the information related to cause numbers 1444611 and 1444612.

We note, 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 Co. v. City of Houston*. *See* 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); *see also* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the district attorney’s office may withhold the information

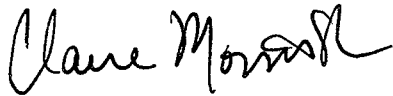
related to cause numbers 1444611 and 1444612 under section 552.108(a)(4) of the Government Code.

In summary, with the exception of the information subject to section 552.022(a)(17) of the Government Code, which must be released, the district attorney's office may withhold the information related to cause number 1444610 under the attorney work product doctrine of section 552.111 of the Government Code. With the exception of basic information, which must be released, the district attorney's office may withhold the information related to cause numbers 1444611 and 1444612 under section 552.108(a)(4) of the Government Code.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/gw

Ref: ID# 793469

Enc. Submitted documents

c: Requestor
(w/o enclosures)