



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 19, 2020

Mr. Paul E. Fulbright
Assistant District Attorney
Navarro County
300 West Third Avenue, Suite 301
Corsicana, Texas 75110

OR2020-05240

Dear Mr. Fulbright:

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# 812632.

The Navarro County Criminal District Attorney's Office (the "district attorney's office") received a request for information related to all criminal cases submitted to the district attorney's office during a specified time period that the district attorney's office rejected or declined to prosecute. The district attorney's office states it does not maintain some of the responsive information.¹ The district attorney's office claims the submitted information is excepted from disclosure under sections 552.107, 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.²

Initially, the district attorney's office states some of the submitted information, which it marked, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

² 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.

Next, we note the responsive 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) 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). The submitted information relates to completed investigations and is subject to section 552.022(a)(1). The district attorney's office must release the 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.* The district attorney's office seeks to withhold the responsive information under 552.108 and under the deliberative process privilege of section 552.111 of the Government Code and seeks to withhold portions of the submitted information under section 552.107 of the Government Code and under the attorney work product privilege of section 552.111 of the Government Code. We note sections 552.107 and 552.111 are discretionary in nature and do 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), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 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). Therefore, the district attorney's office may not withhold the information at issue under section 552.107 or section 552.111 of the Government Code. The Texas Supreme Court has held the Texas Rules of Evidence and 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 attorney work-product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. The Texas Rules of Civil Procedure are applicable only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because the submitted information pertains to criminal cases, rule 192.5 is not applicable to the information at issue and the district attorney's office may not withhold any portion of the submitted 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 assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Further, as information subject to section 552.022 may be withheld under section 552.108 of the Government Code, we will consider the district attorney's office's argument under section 552.108 for the information at issue.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* 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. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should

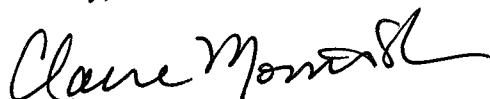
apply to information requested). The district attorney's office states the submitted information relates to closed criminal investigations that did not result in conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the information at issue.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing 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). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the district attorney's office may withhold the responsive portions of Exhibits B, C, D, E, and F under section 552.108(a)(2) of the Government Code.³ The district attorney's office must release the remaining responsive information, which we marked.

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/mo

Ref: ID# 812632

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³ As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.