



October 1, 2001

Ms. Kristi LaRoe  
Assistant District Attorney  
Tarrant County  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2001-4382

Dear Ms. LaRoe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152565.

The Tarrant County District Attorney's Office (the "district attorney") received a request for copies of all documents pertaining to the arrest and investigation of a specified person, including documents related to a particular arrest and prosecution of this person. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that one of the submitted documents which we have marked is subject to section 552.022(a) of the Government Code. Section 552.022(a) provides that certain categories of information are public, unless they are expressly confidential under other law. *See* Gov't Code § 552.022(a). The document which we have marked is encompassed by section 552.022(a) of the Government Code. You claim that this document is excepted from disclosure pursuant to sections 552.103, 552.108, and 552.111 of the Government Code. However, sections 552.103, 552.108, and 552.111 are discretionary exceptions under the Public Information Act (the "Act") and are not "other law" for purposes of section 552.022.<sup>1</sup>

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 586 (1991) (governmental body may waive section 552.108), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Accordingly, we will not address your claims regarding sections 552.103, 552.108, and 552.111 with regard to the document that we have marked.

However, the marked document may be excepted from disclosure pursuant to the attorney work product privilege which is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001). For purposes of section 552.022 of the Government Code, an attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *See id.* Based on our review of your arguments and the marked document that is subject to section 552.022(a), we conclude that it constitutes attorney work product. Consequently, the district attorney must withhold the marked document from disclosure pursuant to Rule 192.5 of the Texas Rules of Civil Procedure. *See Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (finding that release of any portion of attorney’s litigation file would necessarily reveal governmental body’s thought process concerning case).

We next address the request for copies of all documents pertaining to the arrest and investigation of the individual, other than the particular arrest and prosecution mentioned in the request. 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 the common law right to privacy. Where an individual’s criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual’s right to privacy. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, the request for information requires the district attorney to compile all arrests and investigations pertaining to the named individual. Based on the reasoning set out in *Reporters Committee*, we conclude that such a compilation implicates the named individual’s right to privacy to the extent that it includes arrests and investigations where the individual is a suspect in a case. Accordingly, other than information pertaining to the particular arrest and prosecution, you must withhold from disclosure any other arrests and investigations pertaining to the specified person where the person is a suspect pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

You claim that the remaining submitted information is excepted from disclosure pursuant to the attorney work product aspect of section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code

§ 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), 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 (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." 873 S.W.2d at 380. Here, the requestor seeks all documents relating to the arrest and prosecution of a specified person for burglary of a habitat, aggravated sexual assault, sexual assault, and rape for a specified date. The request for information, thus, encompasses the district attorney's litigation file for this matter. Under *Curry*, we find that release of the litigation file would necessarily reveal the district attorney's thought process concerning its case. Therefore, we conclude that the district attorney may withhold the submitted litigation file from disclosure pursuant to the attorney work product aspect of section 552.111 of the Government Code.

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, within 10 calendar days of this ruling, the

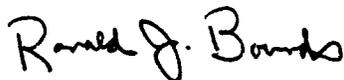
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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); *Texas Department of Public 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 General Services 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. 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 152565

Enc. Marked documents

cc: Mr. O. Paul Dunagan  
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(w/o enclosures)