



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2013

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2013-01250

Dear Mr. Smith:

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# 476730.

The Texas Health and Human Services Commission (the "commission") received two requests from different requestors for the commission's Predicate Manual. You state you have released some responsive information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state the submitted information is excepted under section 552.108(b) of the Government Code, which provides the following:

(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 the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

...

(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(b)(1), (3). A governmental body raising section 552.108 must reasonably explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You explain the commission's Office of Inspector General (the "OIG") is responsible for "the development and implementation of procedures for the processing of cases involving suspected fraud, waste, and abuse in, among other things, Medicaid, [the Supplemental Nutrition Assistance Program], Temporary Assistance for Needy Families, and the Children's Health Insurance Program." You state section 531.102 of the Government Code, located in subchapter C of chapter 531 of the Government Code, titled "Medicaid and Other

Health and Human Services Fraud, Abuse, or Overcharges,” specifies the OIG “is responsible for the investigation of fraud and abuse in the provision of health and human services and the enforcement of state law relating to the provision of those services.” Gov’t Code § 531.102(a). Thus, subchapter C addresses the responsibilities of the OIG in conducting investigations of welfare fraud and abuse, and in enforcing state law regarding the provision of the services. You further state the submitted Predicate Manual is a tool developed by OIG attorneys to provide detailed outlines and legal theories to prosecutors to assist local district attorneys in the prosecution of suspected welfare abuse and fraud cases. You argue release of the Predicate Manual would interfere with the prosecution of welfare fraud and abuse by allowing defendants to undermine prosecutors’ tactics and techniques. Based on your representations and our review, we agree the release of the information we have marked would interfere with law enforcement. Accordingly, the commission may withhold the marked information under section 552.108(b)(1) of the Government Code.¹ However, we find the commission has not established the release of the remaining information would interfere with law enforcement; therefore, the commission may not withhold any of the remaining information under section 552.108(b)(1).

Further, although you argue the remaining information was prepared by OIG attorneys in preparation for criminal prosecution, you do not inform us the information at issue pertains to a specific ongoing criminal investigation or prosecution. Accordingly, we do not find the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state for purposes of section 552.108(b)(3). *See id.* § 552.108(b)(3). Thus, we find you have failed to demonstrate the applicability of section 552.108 to this information. *See id.* § 552.301(e)(1)(A), .301(e)(2) (governmental body must label information to indicate which exceptions apply to which parts of information). Therefore, the commission may not withhold any of the remaining information under section 552.108 of the Government Code.

Next, you claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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[.]” *Id.* § 552.111. Section 552.111 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

(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

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

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 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

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.

You state the remaining information was specifically prepared to assist prosecuting attorneys in welfare fraud cases within their jurisdictions. Upon review, we find you have failed to demonstrate how any of the remaining information was prepared in anticipation of litigation for the purposes of section 552.111. Accordingly, the commission may not withhold any of the remaining information under the attorney work product privilege of section 552.111 of the Government Code.

In summary, the commission may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The commission must release the remaining 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 476730

Enc. Submitted documents

c: Requestors
(w/o enclosures)