



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2014

Mr. Bill Delmore
Assistant District Attorney
Montgomery County District Attorney's Office
207 West Phillips, 2nd Floor
Conroe, Texas 77301

OR2014-03352

Dear Mr. Delmore:

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# 514811.

The Montgomery County District Attorney's Office (the "district attorney's office") received a request for the district attorney's office's files regarding two specified cases and any documents related to any plea agreement with a named person, regardless of whether the documents were filed with the plea agreement. 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.

Initially, we understand the district attorney's office asserts some of the submitted information is not responsive to the request for information. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). However, the district attorney's office has submitted the information at issue for our review, and it concerns the cases specified in the request. Thus, we find the district attorney's office has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will address the public availability of this information under the Act.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) 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; [and]

...

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

Gov't Code § 552.022(a)(1), (17). We first note Appendix C consists of a completed investigation subject to subsection 552.022(a)(1). The district attorney's office must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). We also note Appendix B contains court-filed documents and documents signed by a judge, which are subject to subsection 552.022(a)(17). This information is expressly public under subsection 552.022(a)(17), and the district attorney's office must release it unless it is confidential under the Act or other law. Although you raise section 552.108 of the Government Code for Appendix B, and the attorney work product privilege encompassed by section 552.111 of the Government Code for Appendices B and C, these are discretionary exceptions to disclosure that protect the governmental body's interests and do not make information confidential under the Act. *See id.* § 552.007; Open Record Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the district attorney's office may not withhold the information subject to subsection 552.022(a)(17) in Appendix B under section 552.108 or section 552.111 of the Government Code, and may not withhold the information subject to subsection 552.022(a)(1) in Appendix C under section 552.111. We note the attorney work product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure, which has been held to be other law within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, those rules are applicable only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because the information at issue pertains to a criminal case, rule 192.5 is not applicable. Therefore, the district attorney's office may not withhold any of the information subject to section 552.022 on the basis of the work product privilege in Texas Rule of Civil Procedure 192.5. However, because section 552.101 can make information confidential under the Act, we will address the applicability of this exception to the information subject to subsection 552.022(a)(17).¹ Further, because information subject to subsection

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your assertion of that exception for the information in Appendix C. We will also address your arguments under sections 552.108 and 552.111 for the information not subject to section 552.022.

Next, we address the information subject to subsection 552.022(a)(17) of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“‘Biometric identifier’ means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.”). However, section 560.002 of the Government Code provides that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). We have marked fingerprints in the information subject to subsection 552.022(a)(17). You do not inform us, and the submitted information does not indicate, section 560.002 permits disclosure of the submitted fingerprint information. Therefore, the district attorney’s office must withhold the fingerprints we have marked under section 552.101 of the Government Code in accordance with section 560.003 of the Government Code.² The remainder of the information subject to subsection 552.022(a)(17) of the Government Code must be released.

Next, we address your arguments for the information not subject to subsection 552.022(a)(17) 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. This exception 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,

²We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general opinion.

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 *United States 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, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993) (orig. proceeding), 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."³ *Curry*, 873 S.W.2d at 380 (internal quotations omitted) (quoting *National Union Fire Ins. Co.*, 863 S.W.2d at 460). Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 (1996) at 5 ; see *Nat'l Union Fire Ins. Co.*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

You contend Appendix B comprises the district attorney's office's entire file for one of the specified cases. You further state the information at issue was prepared by the district attorney's office in anticipation of and in the course of preparing for criminal litigation. Based on your representations and our review, we agree Appendix B encompasses the

³We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996).

entirety of an attorney's litigation file, and this file was created in anticipation of litigation. Accordingly, we conclude the district attorney's office may withhold the remaining information in Appendix B as attorney work product under section 552.111 of the Government Code.⁴

Section 552.108 of the Government Code provides in relevant 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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). As discussed above, in *Curry*, the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co.*, 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 (internal quotations omitted) (quoting *National Union Fire Ins. Co.*, 863 S.W.2d at 460). You state the instant request for information asks for the district attorney's office's entire files regarding the specified cases. You further state Appendix C was prepared by the district attorney's office in anticipation of and in the course of preparing for criminal litigation. Therefore, upon review, we conclude section 552.108(a)(4) of the Government Code is applicable to the information in Appendix C.

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*, 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* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Therefore, with the

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

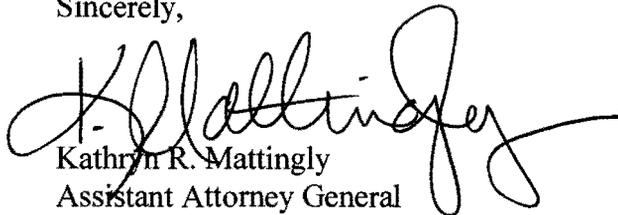
exception of basic information, the district attorney's office may withhold Appendix C under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.

In summary, the district attorney's office must withhold the fingerprints we have marked under section 552.101 of the Government Code in accordance with section 560.003 of the Government Code. The remainder of the information subject to subsection 552.022(a)(17) of the Government Code must be released. The district attorney's office may withhold the remaining information in Appendix B as attorney work product under section 552.111 of the Government Code. With the exception of basic information, the district attorney's office may withhold Appendix C under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 514811

Enc. Submitted documents

c: Requestor
(w/o enclosures)