



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 17, 2015

Mr. John P. Beauchamp
General Counsel for the Commission
Texas Commission on Law Enforcement
6330 East Highway 290, Suite 200
Austin, Texas 78723-1035

OR2015-07489

Dear Mr. Beauchamp:

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# 560656.

The Texas Commission on Law Enforcement (the "commission") received a request for all documents, excluding F-5 forms, pertaining to the requestor. You state the commission will provide some of the requested information to the requestor. You claim the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you also raise Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 508, we note the proper exceptions to raise when asserting the attorney work product privilege and the informer's privilege for information not subject to section 552.022 of the Government Code are section 552.111 of the Government Code and section 552.101 of the Government Code in conjunction with the common-law informer's privilege, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

²We 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.

Initially, we note the submitted information contains peace officers' commission identification numbers. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's commission identification number is a unique computer-generated number assigned to a peace officer for identification in the commissioner's electronic database and may be used as an access device number on the commission website. Accordingly, we find the commission numbers in the submitted information do not constitute public information under section 552.002 of the Government Code. Therefore, the commission numbers in the submitted information are not subject to the Act and need not be released to the requestor.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 is applicable only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See Open Records Decision Nos.* 493 at 2 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See Open Records Decision No.* 199 (1978). However, an agency that employs peace officers to investigate crime and enforce criminal laws may claim section 552.108 excepts portions of its records from required disclosure. *See Open Records Decision No.* 127 at 8 (1976) (arson investigation unit of fire department is law enforcement agency). You explain the Enforcement Division of the commission is comprised of commissioned investigators who investigate criminal violations of law as they relate to the commission's mission. *See Occ. Code* § 1701.160 (commission may commission certified peace officers as investigators employed by commission for purpose of assisting commission in administering chapter 1701); *see also id.* §§ 1701.551-.553. You state the commission employs peace officers with full investigative, detention, and arrest authority. Further, you state the remaining information pertains to an ongoing criminal investigation. Based on this representation and our review, we conclude the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.— Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the remaining information.

Section 552.108, however, 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*, and includes the identities of complainants. See 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Therefore, with the exception of basic information, the commission may withhold the remaining information under section 552.108(a)(1) of the Government Code.³

Section 552.111 of the Government Code 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); 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 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.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

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.

Upon review, we find the commission has failed to establish the basic information consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the commission or representatives of the commission. *See Nat'l Tank*, 851 S.W.2d at 206 (information created in ordinary course of business constitutes work product if agency demonstrates primary motivating purpose for preparation of information was in anticipation of litigation); *see also* ORD 677 at 7. Therefore, the commission may not withhold any of the basic information as attorney work product under section 552.111 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 the common-law informer's privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S. W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. *See Open Records Decision No. 208* at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” *Open Records Decision No. 279* at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582* at 2 (1990), 515 at 4 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. *Open Records Decision No. 549* at 5 (1990).

You seek to withhold the identifying information of a complainant who supplied “information to [the commission] regarding alleged violations of Texas law by a [commission] licensee.” You state the commission's enforcement division is conducting a criminal investigation regarding the alleged criminal violations of chapter 1701 of the Occupations Code. *See Occ. Code §§ 1701.551.553* (detailing criminal penalties for violations of chapter 1701). Based on your arguments and our review of the submitted information, we find the commission has demonstrated the applicability of the common-law informer's privilege to the identifying information you seek to withhold. Thus, the commission may withhold the complainant's identifying information in the basic information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. However, we find you have failed to demonstrate how any portion of the remaining basic information is excepted from disclosure under the common-law informer's privilege. Therefore, the commission may not withhold any portion of the

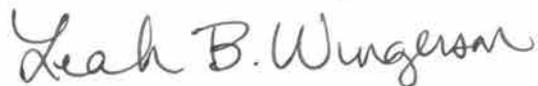
remaining basic information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

In summary, the commission numbers are not subject to the Act and need not be released to the requestor. With the exception of basic information, the commission may withhold the remaining information under section 552.108(a)(1) of the Government Code. However, in releasing the basic information, the commission may withhold the complainant's identifying information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 560656

Enc. Submitted documents

c: Requestor
(w/o enclosures)