



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 29, 2015

Ms. Jordan M. Powell
Assistant District Attorney
Caldwell County Criminal District Attorney's Office
1703 South Colorado Street, Box 5
Lockhart, Texas 78644

OR2015-08304

Dear Ms. Powell:

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# 561783 (Caldwell Reference #2015-002).

The Caldwell County Criminal District Attorney's Office (the "district attorney's office") received a request for information pertaining to money the requestor owes to the county and information pertaining to two specified case numbers.¹ You state the district attorney's office does not have information responsive to a portion of the request.² You claim the requested 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

¹We note the district attorney's office asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the information pertaining to case number 38,771 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[.]

Id. § 552.022(a)(1). Case number 38,771 pertains to a completed investigation subject to section 552.022(a)(1). The district attorney's office must release the information pertaining to case number 38,771 pursuant to section 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.* Although you raise section 552.111 of the Government Code for the information at issue, we note section 552.111 is a discretionary exception and does 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), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). As such, the district attorney's office may not withhold any portion of the information at issue under section 552.111. The attorney work product privilege, which is encompassed by section 552.111, is also found in rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5. The Texas Supreme Court has held "[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*, 53 S.W.3d 328, 336 (Tex. 2001). We note, however, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because case number 38,771 relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply, and the information at issue may not be withheld on that basis. However, because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your arguments under section 552.108 for the information pertaining to case number 38,771. We will also consider your claim under section 552.111 of the Government Code for the information that is not subject to section 552.022(a)(1).

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.

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 U.S. v. Nobles*, 422 U.S. 225, 236 (1975). In the *Curry* decision, the Texas Supreme Court held a request for a district attorney’s “entire litigation file” was “too broad” and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), 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.” 873 S.W.2d at 380. Accordingly, if a requestor seeks an attorney’s entire litigation file, and a governmental body demonstrates that 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 at 5 (1996); *see Nat’l Union*, 863

S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).

You argue the remaining information encompasses the district attorney's office's entire litigation file concerning case number 10-189. We find the request at issue constitutes a request for an "entire" litigation file for purposes of the *Curry* decision. Thus, we agree the district attorney's office may withhold the information pertaining to case number 10-189 under section 552.111 of the Government Code.³

Section 552.108 of the Government Code states in pertinent part the following:

(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) reflects the mental impressions or legal reasoning of an attorney representing the state.

(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:

...

(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.

³As our ruling is dispositive for this information, we do not address your remaining arguments to withhold this information.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). As previously discussed, in *Curry*, the Texas Supreme Court held 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. However, a party is not prevented from requesting specific documents or categories of documents relevant to issues in a pending case, even though some or all of the documents may be contained in an attorney's files. *Nat'l Union*, 863 S.W.2d at 461.

You claim the instant request for information seeks the district attorney's office's entire prosecution file for case number 38,771. Further, you assert the information pertaining to case number 38,771 reflects the mental impressions or legal reasoning of an attorney representing the state. Thus, upon review, we conclude sections 552.108(a)(4) and 552.108(b)(3) of the Government Code are applicable to the information at issue. Therefore, the district attorney's office may generally withhold the information pertaining to case number 38,771 under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code and the court's ruling in *Curry*.

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*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). Therefore, with the exception of basic information, the district attorney's office may withhold the information pertaining to case number 38,771 under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code and the court's ruling in *Curry*.

In summary, the district attorney's office may withhold the information pertaining to case number 10-189 under section 552.111 of the Government Code. With the exception of basic information, which must be released, the district attorney's office may withhold the information pertaining to case number 38,771 under sections 552.108(a)(4) and 552.108(b)(3) 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,

A handwritten signature in cursive script that reads "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 561783

Enc. Submitted documents

c: Requestor
(w/o enclosures)