



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 14, 2015

Ms. M. Ann Montgomery-Moran
Assistant County & District Attorney
County of Ellis
109 South Jackson Street
Waxahachie, Texas 75165

OR2015-09442

Dear Ms. Montgomery-Moran:

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# 563656.

The Ellis County and District Attorney's Office (the "district attorney's office") received a request for (1) all information released in response to a specified previous request for information, and (2) all documentation relating to peace officers the district attorney's office will not sponsor as witnesses at trial. You state the district attorney's office has released information responsive to the first portion of the request to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and article 39.14 of the Code of Criminal Procedure.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we understand the requestor contends the district attorney's office did not comply with section 552.301(b) of the Government Code. Pursuant to section 552.301(b), a

¹Although you also raise section 552.101 of the Government Code in conjunction with article 39.14 of the Texas Code of Criminal Procedure and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002).

governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request for information. *See id.* § 552.301(b). The requestor asserts the district attorney's office received the request for information on or about February 19, 2015, or February 20, 2015. You state the district attorney's office received the request for information on February 24, 2015. The determination of the date the district attorney's office received the request for information is a question of fact. This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos.* 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue is not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD* 552 at 4. Thus, we must accept the representation of the district attorney's office that it received the request for information on February 24, 2015. You inform us the district attorney's office was closed on March 5, 2015, due to inclement weather. This office does not count the date the request was received or days a governmental body's offices were closed for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the district attorney's office's ten-business-day deadline was March 11, 2015. The envelope in which the district attorney's office sent its request for a ruling bears a postmark of March 9, 2015. *See Gov't Code* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we conclude the district attorney's office complied with the requirements of section 552.301(b) of the Government Code.

Next, you seek to withhold the submitted information pursuant to article 39.14 of the Code of Criminal Procedure. We note, however, article 39.14 governs the discovery of information and the testimony of witnesses in criminal proceedings. *See* *Crim. Proc. Code* art. 39.14. Article 39.14 does not expressly make information confidential for purposes of the Act. *See Open Records Decision Nos.* 658 at 4 (1998) (statutory confidentiality under section 552.101 must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public); *see also* *Open Records Decision No.* 575 at 2 (1990) (explicitly stating discovery privileges are not covered by statutory predecessor to section 552.101). Therefore, we conclude the district attorney's office may not withhold any of the submitted information under article 39.14 of the Code of Criminal Procedure.

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, the following:

- (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:

...

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

Gov't Code § 552.022(a)(17). The submitted information includes court-filed documents subject to section 552.022(a)(17) of the Government Code. The district attorney's office must release this information, which we have marked, pursuant to section 552.022(a)(17) unless the information is made confidential under the Act or other law. *See id.* Although you raise sections 552.108 and 552.111 of the Government Code for the information subject to section 552.022(a)(17), these are discretionary exceptions to disclosure that protect the governmental body's interests and do not make information confidential under the Act. *See Open Records Decision Nos. 677 at 8-10 (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) (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 section 552.022(a)(17) under section 552.108 or section 552.111 of the Government Code. We note the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, those rules are applicable only to "actions of a civil nature." *See TEX. R. CIV. P. 2.* Thus, because the information subject to section 552.022(a)(17) pertains to a criminal case, rule 192.5 is not applicable to this information. Therefore, the district attorney's office may not withhold this information on the basis of the attorney work-product privilege in Texas Rule of Civil Procedure 192.5. However, because section 552.1175 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the information at issue.² We will also address your arguments against disclosure of the information not subject to section 552.022.

Section 552.108 of the Government provides, in 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:

²The 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).*

(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 required public disclosure] 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.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* §§ 552.108(a)(4), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue reflects the mental impressions and legal strategies of attorneys representing the state. You state this information is used in determining whether to call individuals as witnesses in criminal prosecutions and in complying with a prosecutor's "obligations under *Brady [v. Maryland]*, *Giglio [v. United States]*, and the Morton Act." Upon review, we agree some of the information at issue reflects the mental impressions or legal reasoning of attorneys representing the state. However, we find you have failed to demonstrate how any portion of the remaining information was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney representing the state. Accordingly, we find you have failed to demonstrate how any of the remaining information is protected by sections 552.108(a)(4) and 552.108(b)(3), and the district attorney's office may not withhold the remaining information under section 552.108 of the Government Code.

We understand the requestor to argue release of the information at issue is in the public interest, and that this interest outweighs the application of section 552.108. The legislature considered the public's right to know when it enacted the Act. Information is presumed to be public and the public is entitled to such public information unless a governmental body

shows that the information is within one of the Act's exceptions. Gov't Code §§ 552.001, .301. Here, the district attorney's office has shown that sections 552.108(a)(4) and 552.108(b)(3) are applicable to the portions of the submitted information. By its language, section 552.108 does not require consideration of the public interest in the information. Such a consideration was contemplated by the legislature when it enacted section 552.108 to allow a governmental body to withhold information prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or which reflects the mental impressions or legal reasoning of an attorney representing the state. Thus, because the district attorney's office has met its burden under sections 552.108(a)(4) and 552.108(b)(3) with regards to the information at issue, we find, with the exception of the information subject to section 552.022(a)(17) of the Government Code and the additional information we have marked, the district attorney's office may withhold the submitted information under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.³

You assert the remaining information is excepted from disclosure under section 552.111 of the Government Code, which 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, 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 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:

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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.

Upon review, we find you have failed to establish the remaining information consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the district attorney’s office. Therefore, the district attorney’s office may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

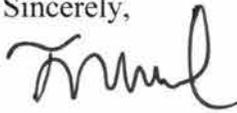
Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov’t Code § 552.1175. Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). The remaining information contains the personal information of individuals who were licensed peace officers of other law enforcement agencies at the time the information was created. However, we are unable to determine from the information provided whether the individuals at issue are currently-licensed peace officers. Thus, we must rule conditionally. Accordingly, to the extent the individuals whose information is at issue are currently-licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b), the district attorney’s office must withhold the information we have marked under section 552.1175 of the Government Code. If the individuals whose information we have marked are no longer licensed peace officers or no election is made, the district attorney’s office may not withhold the information we have marked under section 552.1175.

In summary, with the exception of the information subject to section 552.022(a)(17) of the Government Code and the additional information we have marked, the district attorney’s office may withhold the submitted information under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. To the extent the individuals whose information is at issue are currently-licensed peace officers and elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code, the district attorney’s office must withhold the information we have marked under section 552.1175. The district attorney’s office 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.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 black ink, appearing to read 'Tim Neal', written in a cursive style.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 563656

Enc. Submitted documents

c: Requestor
(w/o enclosures)