



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 8, 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

OR2015-13849

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# 570776.

The Texas Commission of Law Enforcement (the "commission") received a request for information related to the licensure of a named individual and information pertaining to testing for commission training during a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have only submitted information related to the licensure of the named individual. To the extent any additional information responsive to this request existed and was maintained by the commission on the date the commission received the request, we assume the commission has released it. If the commission has not released any such information, it must do so at this time. Gov't Code §§ 552.301(a), .302; *see also* Open

¹Although you also raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 submitted information pertains to an ongoing criminal investigation. Based on this representation and our review, we conclude the release of the submitted 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 submitted 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*. *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 submitted information under section 552.108(a)(1) of the Government Code.²

²As 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)*.

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.

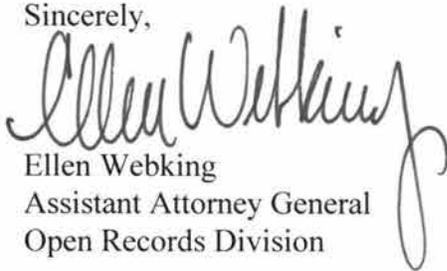
Upon review, we find the commission has failed to establish the basic information consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the commission or representatives of the commission. *See Nat’l Tank*, 851 S.W.2d 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.

In summary, with the exception of basic information, which must be released, the commission may withhold the submitted information under section 552.108(a)(1) of the Government Code.

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, appearing to read "Ellen Webking". The signature is written in black ink and is positioned above the typed name and title.

Ellen Webking
Assistant Attorney General
Open Records Division

EW/akg

Ref: ID# 570776

Enc. Submitted documents

c: Requestor
(w/o enclosures)