



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 22, 2015

Mr. Sterling Harmon
Assistant District Attorney
County of McLennan
219 North 6th Street, Suite 200
Waco, Texas 76701

OR2015-19843

Dear Mr. Harmon:

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# 581558.

The McLennan County District Attorney's Office (the "district attorney's office") received a request for all e-mails and text messages related to official business sent to or from a named individual during a specified time frame.¹ You state the district attorney's office does not possess any information responsive to a portion of the request.² You further state the district attorney's office is releasing some responsive information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note the district attorney's office sought and received clarification of this request from the requestor. See Gov't Code § 552.222(b) (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

...

(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.

Gov't Code § 552.108(a)(1), (a)(4), (b)(3). 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); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state Exhibits G, H, I, and J relate to pending criminal investigations and/or prosecutions. However, we note the information at issue includes information that was sent to or received from an attorney for the defendant in one of the cases at issue. Because this information, which we have marked, has been seen by the defendant's attorney, we find its release will not interfere with the detection, investigation, or prosecution of crime. *See Gov't Code* § 552.108(a)(1). Therefore, the district attorney's office may not withhold this information under

section 552.108(a)(1). Nevertheless, based on your representations, we conclude the release of the remaining information at issue 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, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) is applicable to this information. Accordingly, with the exception of the information we have marked for release, the district attorney's office may withhold Exhibits G, H, I, and J under section 552.108(a)(1) of the Government Code.

You further state the remaining information consists of material prepared by attorneys representing the state in anticipation or in the course of preparing for criminal litigation or reflects the mental impressions or legal reasoning of attorneys representing the state. Upon review, we find the district attorney's office may withhold Exhibit F under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.³ However, as previously noted, the remaining information was sent to or received from an attorney for the defendant in one of the cases at issue. Thus, we find you have failed to demonstrate how this information is protected by sections 552.108(a)(4) and 552.108(b)(3), and the district attorney's office may not withhold it on this basis.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.⁴ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137(a)-(c). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the district attorney's office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, with the exception of the information we have marked for release, the district attorney's office may withhold Exhibits G, H, I, and J under section 552.108(a)(1) of the Government Code and may withhold Exhibit F under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. However, in releasing the information we have marked, the district attorney's office must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

³As our ruling is dispositive, we do not address your other argument to withhold this information.

⁴The 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).

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 'B. Berger', written over a horizontal line.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 581558

Enc. Submitted documents

c: Requestor
(w/o enclosures)