



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 30, 2015

Ms. Ann-Marie Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2015-24880

Dear Ms. Sheely:

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# 588655.

The Travis County Attorney's Office (the "county attorney's office") received a request for (1) all records pertaining to a named individual's arrest and conviction and (2) all records pertaining to civil litigation relating to the named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you indicate the county attorney's office has previously released some of the requested information in response to prior requests for information. We note the Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld unless public disclosure of the information is expressly prohibited by law or the information

¹We 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 that those records contain substantially different types of information than that submitted to this office.

is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the county attorney's office may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. You claim the information at issue is protected by section 552.103, the attorney-client privilege encompassed by section 552.107(1), section 552.108, and the work product privilege encompassed by section 552.111 of the Government Code. However, we note these exceptions are discretionary in nature and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475–76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 8 (2002) (attorney work-product privilege under section 552.111 and Texas Rule of Civil Procedure 192.5 may be waived), 676 at 10–11 (2002) (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions in general), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, these exceptions neither prohibit public disclosure of information nor make information confidential under law. Therefore, to the extent the county attorney's office has previously released the requested information, the county attorney's office may not withhold any portion of the previously released information under section 552.103, the attorney-client privilege encompassed by section 552.107(1), section 552.108, or the work product privilege encompassed by section 552.111. However, to the extent the county attorney's office has not previously released the requested information, we will consider your arguments against disclosure of the information at issue under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code.

Next, we note the requested information is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). You raise sections 552.103, 552.107, and 552.111 of the Government Code for this information. However, as previously noted, sections 552.103, 552.107, and 552.111 do not make information confidential under the Act. *See Dallas Morning News*, 4 S.W.3d at 475–76; *see also* ORDs 677 at 8, 676 at 10–11, 665 at 2 n.5. Accordingly, the county attorney's office may not withhold the requested information under section 552.103, section 552.107, or section 552.111 of the Government Code. Nevertheless, section 552.107 encompasses the attorney-client privilege, which is found at rule 503 of the Texas Rules of Evidence, and section 552.111 encompasses the attorney work-product privilege, which is found at rule 192.5 of the Texas Rules of Civil Procedure. Both of these rules are “other law” that make information confidential within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Accordingly, we will consider the applicability of rule 503 to the requested information. We note, however, that the Texas Rules of Civil

Procedure are only applicable to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Therefore the county attorney’s office may not withhold the requested information pertaining to the named individual’s arrest and conviction on the basis of rule 192.5. However, we will address the applicability of rule 192.5 to the requested information pertaining to civil litigation. You also raise sections 552.101 and 552.108 of the Government Code for the requested information. Section 552.101 makes information confidential for purposes of the Act, so we will consider your assertion of that exception. Furthermore, as section 552.022(a)(1) allows for information subject to this provision to be withheld under section 552.108, we will also consider your assertion of that exception.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank 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. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

Furthermore, if a requestor seeks a governmental body’s entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. Thus, if the governmental body demonstrates the file was created in anticipation of litigation,

this office will presume the entire file is within the scope of the privilege. *See* Open Records Decision No. 647 at 5 (1996) (organization of attorney's litigation file necessarily reflects attorney's thought processes (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993))); *see also* *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) ("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").

The county attorney's office argues the present request for information encompasses the entirety of litigation files compiled by attorneys in the county attorney's office in the course of preparing for the civil litigation referenced in the instant request. The county attorney's office further states the information at issue reflects the mental impressions or legal reasoning of the attorneys. Upon review, we find the county attorney's office has demonstrated the information at issue constitutes core attorney work product. Therefore, we conclude the county attorney's office may withhold the information at issue, which we have marked, under Texas Rule of Civil Procedure 192.5.²

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:

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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). Sections 552.108(a)(4) and 552.108(b)(3) protect information prepared by an attorney representing the state or information that reflects the mental impressions or legal reasoning of an attorney representing the state. A governmental body that claims an exception to disclosure under sections 552.108(a)(4) and 552.108(b)(3) must reasonably explain how and why these exceptions are applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), 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.

You contend the remaining portion of the instant request encompasses the county attorney's office's entire prosecution file for the arrest and conviction of the named individual. In addition, you state release of the remaining requested information would reveal the mental impressions or legal reasoning of the prosecutors in the county attorney's office. Based on your representations and our review, we agree sections 552.108(a)(4) and 552.108(b)(3) are applicable to the remaining requested 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 Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the county attorney's office may withhold the remaining requested information under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code and the holding in *Curry*.³

In summary, the county attorney's office may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. With the exception of basic information, the

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

county attorney's office may withhold the remaining requested information under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code and the holding 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/som

Ref: ID# 588655

Enc. Submitted documents

c: Requestor
(w/o enclosures)