



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 25, 2016

Mr. Isidro R. Alaniz  
District Attorney  
49<sup>th</sup> Judicial District  
P.O. Box 1343  
Laredo, Texas 78042-1343

OR2016-04483

Dear Mr. Alaniz:

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# 600042.

The 49th Judicial District Attorney's Office (the "district attorney's office") received a request for all e-mails on the computer of a named individual during a specified time period. You state the district attorney's office has released most of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, and 552.152 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information submitted as Exhibits A and

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<sup>1</sup>Although you do not raise section 552.101 or section 552.152 of the Government Code in your brief, we understand you to raise these exceptions based on the substance of your arguments.

B relates to pending criminal investigations. Based upon your representation, we conclude release of the information at issue will 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). Accordingly, we find the district attorney's office may withhold Exhibits A and B under section 552.108(a)(1) of the Government Code.

Section 552.108 of the Government Code also 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:

(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). You state the information submitted as Exhibit C contains mental impressions that were developed in anticipation of a murder trial that will take place in the future. Thus, you indicate the information was created by an attorney representing the state in anticipation of criminal litigation. Upon review, we find the district attorney's office has demonstrated the applicability of section 552.108(a)(4) to the information at issue. Thus, the district attorney's office may withhold Exhibit C under section 552.108(a)(4) of the Government Code.

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 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); 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 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:

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.

You claim the attorney work product privilege of section 552.111 of the Government Code for the information submitted as Exhibit D. You state the information at issue consists of e-mailed discussions between two employees of the district attorney's office, including an attorney for the district attorney's office, that were created in anticipation of litigation. Upon review, we find you have established the information at issue consists of communications made in anticipation of litigation by the district attorney's office or representatives of the district attorney's office. Therefore, the district attorney's office may withhold Exhibit D as attorney work product under section 552.111 of the Government Code.

You seek to withhold information relating to an undercover officer from the information submitted as Exhibit E. Section 552.152 of the Government Code provides,

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You represent the release of the undercover officer's identity would subject the officer to a substantial threat of physical harm. Therefore, we find section 552.152 is applicable to the identity of the undercover officer within the information at issue. Accordingly, the district attorney's office must withhold the identifying information of the undercover officer, which we have marked within Exhibit E, under section 552.152 of the Government Code. However, we find you have not demonstrated the release of any of the remaining information at issue would subject an employee of the district attorney's office to a substantial threat of physical harm. Thus, the district attorney's office may not withhold any of the remaining information under section 552.152 of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common-law physical safety exception. The Texas Supreme Court has recognized a separate common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this new standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119.

The district attorney's office argues the release of some of the remaining information would pose a substantial risk of harm to peace officers. However, upon review, the district attorney's office has not demonstrated release of any of the information at issue would subject anyone to a specific risk of harm. Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district attorney's office may not withhold any of the remaining information on that basis.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n 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 . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). This section is intended to protect "information which, if released, would

permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The district attorney’s office contends release of the remaining information in Exhibit E would “hinder ongoing and/or upcoming undercover investigations and prosecutions[.] Upon review, we find the district attorney’s office has not adequately explained the release of the remaining information at issue would interfere with law enforcement or crime prevention. Therefore, we conclude the district attorney’s office may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code.

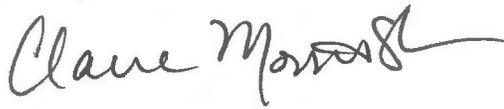
Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov’t Code* § 552.117(a)(1). Upon review, we find none of the remaining information at issue consists of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee of the district attorney’s office, and the remaining information at issue may not be withheld under section 552.117(a)(1).

In summary, the district attorney’s office may withhold Exhibits A and B under section 552.108(a)(1) of the Government Code and may withhold Exhibit C under section 552.108(a)(4) of the Government Code. The district attorney’s office may withhold Exhibit D under the attorney work product privilege of section 552.111 of the Government Code. The district attorney’s office must withhold the identifying information of the undercover officer, which we marked within Exhibit E, under section 552.152 of the Government Code. The district attorney’s office must release the remainder of Exhibit E.

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](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 "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 600042

Enc. Submitted documents

c: Requestor  
(w/o enclosures)