



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 16, 2010

Mr. Bob Schell  
Assistant District Attorney  
Dallas County District Attorney's Office  
411 Elm Street, 5th Floor, Suite 500  
Dallas, Texas 75202

OR2010-02307

Dear Mr. Schell:

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# 370274.

The Dallas County Criminal District Attorney (the "district attorney") received a request for: 1) all closed cases handled by the public integrity unit during a specified time period, and 2) copies of any lists of closed cases handled by the public integrity unit, including name of defendant(s), date of filing, nature of the allegations, and disposition of the case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.130, and 552.147 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted information.

Initially you state no list of closed cases handled by the public integrity unit exists and the district attorney is not required to create such a list. We agree the Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). We note, however, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. *See Open Records Decision No. 561* (1990). Thus, to the extent the district attorney maintains records from

which the requested information may be obtained, the district attorney must provide such records to the requestor.

We next note the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

*Id.* § 552.022(a)(1). Exhibits 3, 4, and 5 are completed investigation files from the district attorney's public integrity division. A completed investigation must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you seek to withhold the submitted information under section 552.111 of the Government Code, this section is a discretionary exception to disclosure that a governmental body may waive. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (discretionary exceptions generally). Accordingly, section 552.111 is not other law that makes information confidential for purposes of section 552.022. Therefore, the district attorney may not withhold any of the submitted information under section 552.111. The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). The Texas Rules of Civil Procedure, however, apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because Exhibits 3, 4, and 5 relate to criminal investigations, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to any of the information at issue. However, because information subject to section 552.022(a)(1) may be withheld under sections 552.101, 552.108, 552.130, and 552.147 we will address these claims.

Section 552.108 of the Government Code provides in pertinent 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). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire litigation file" was "too broad" and held that "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." *Id.* at 380 (quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)). In this instance, the requestor seeks all cases handled by the district attorney's public integrity unit during a specified time period. We agree this request is so broad as to encompass the district attorney's entire files for the responsive cases. You assert the files were created by prosecutors in anticipation of litigation. Based on your representations and our review, we agree section 552.108(a)(4) is applicable to Exhibits 3, 4, and 5.

However, section 552.108 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 Publ'g 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) (court delineates law enforcement interests that are present in active cases) and includes the identity of the complainant and a detailed description of the offense. *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). You assert, however, that some of the information, which could be characterized as basic information, is otherwise excepted from disclosure. Accordingly, we will address your arguments for this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal

or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

We understand you to assert the identities of the complainants in Exhibits 3, 4, and 5 are protected by the informer's privilege because the complainants reported alleged violations of law to the appropriate law enforcement entity. Upon review, however, the submitted information reveals that the subjects of the complaints know the identities of the complainants. Accordingly, the district attorney may not withhold the identities of the complainants in Exhibits 3, 4, and 5 under section 552.101 in conjunction with the informer's privilege.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. We note you have redacted the identity of the complainant in Exhibit 5. Although you do not explain your redactions or otherwise make any specific arguments concerning this redacted information, we understand you to claim this information is excepted from disclosure under common-law privacy because it reveals the identity of a sexual assault victim. This office has held, in certain instances, information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. Open Records Decision No. 393 at 2 (1983); see Open Records Decision No. 339 (1982). Although the complainant in Exhibit 5 initially alleged she had been sexually assaulted, the documents in Exhibit 5 reveal the complainant was not the victim of a sexual assault. Therefore the complainant's identity in Exhibit 5 may not be withheld under common-law privacy.

You also claim the allegations made against the subjects of the investigations in Exhibits 3 and 4 are protected under common-law privacy because they are highly embarrassing. We understand you to assert the detailed descriptions of the offenses contain these allegations. The allegations in Exhibits 3 and 4 concern alleged misconduct by peace officers in the scope of their employment and a public official's alleged misrepresentation of her qualifications for public office. This office has held that the public has a legitimate interest in information pertaining to the work conduct and qualifications of public employees and officials. See Open Records Decision Nos. 484 at 5-6 (1987) (information relating to off-duty incidents involving police officers not protected by common-law privacy), 444 at 5-6 (1986) (public

has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, the allegations in Exhibits 3 and 4 may not be withheld under common-law privacy. Therefore, with the exception of basic information, which must be released, the district attorney may withhold Exhibits 3, 4, and 5 from disclosure under section 552.108(a)(4) of the Government Code.<sup>1</sup>

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales  
Assistant Attorney General  
Open Records Division

JCE/rl

Ref: ID# 370274

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.