



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2010

Ms. Sheri Bryce Dye
Assistant Criminal District Attorney
Civil Section
300 Dolorosa 4th Floor
San Antonio, Texas 78205

OR2010-11589

Dear Ms. Dye:

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#388744.

The Bexar County District Attorney's Office (the "district attorney") received a request for all documents, memoranda, e-mails, or other materials related to Case File-2005-CR3726W. In a letter dated June 7, 2010, the requestor clarified his request to only include: 1) court documents, including a copy of the judgement, probation, and terms of probation; 2) the original criminal report filed by the complainant; 3) a specified letter concerning a restitution offer; and 4) a specified e-mail. You claim that the requested information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

As a preliminary matter, we note that because of the clarified request, most of the submitted information is not responsive to the clarified request. Accordingly, we find this information need not be released. Furthermore, we understand you do not maintain some of the specific information requested in the clarified request. We note the 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 *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, we 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 [the Act] 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[.]

Gov't Code § 552.022(a)(1). The responsive information is part of a completed investigation made by the district attorney. Thus, the district attorney may only withhold this information if it is excepted from disclosure under section 552.108 or expressly confidential under "other law." Although you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, we note that these are discretionary exceptions to disclosure that protect a governmental body's interests 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); Open Records Decision No. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, sections 552.103 and 552.111 are not "other law" for purposes of section 552.022. Thus, the district attorney may not withhold the responsive information under section 552.103 or section 552.111 of the Government Code. However, 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 . . . are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). However, the Texas Rules of Civil Procedure apply only to "actions of a civil nature." *See* TEX. R. CIV. P. 2. Thus, because you inform us the responsive information was prepared in connection with a criminal prosecution, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to the responsive information and it may not be withheld on that basis. However, we will consider your argument under section 552.108 of the Government Code.

Section 552.108 provides in relevant part as follows:

(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 [required public disclosure] 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(b)(3). 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 "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 *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)). Accordingly, the court concluded in such an instance, the district attorney's entire litigation file is privileged attorney work product.

You cite to section 552.108 in connection with your assertion of attorney work product and argue that the present request is a request for the district attorney's entire prosecution file. In this instance, however, the clarified request submitted by the requestor narrowed the request to four specific types of information. Thus, we conclude that the present request is not a request for the district attorney's entire case file. As a result, you may not withhold the submitted information under *Curry*, and you must demonstrate how the specified documents are excepted under section 552.108(b)(3) of the Government Code.

You state that the submitted information was prepared by an attorney representing the State of Texas in anticipation of, or in the course of, preparing for criminal prosecution. You further assert that the submitted information reflects the district attorney's mental impressions and legal reasoning. Upon review, agree that portions of the submitted information consist of information prepared by an attorney representing the State and reflect the mental impressions or legal reasoning of a prosecuting attorney. Thus, you may withhold the information we have marked as attorney work product under section 552.108(b)(3) of the Government Code. However, the remaining information consists of a communication from opposing counsel. Therefore, this information does not constitute attorney work product and the district attorney may not withhold any portion of the remaining information under section 552.108(b)(3) of the Government Code.

In summary, the district attorney may withhold the information we have marked under section 552.108 of the Government Code. The remaining responsive information must be released.

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, 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/em

Ref: ID#388744

Enc. Submitted documents

c: Requestor
(w/o enclosures)