



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2012

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Civil Division
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2012-00856

Dear Ms. Clarke:

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# 442632.

The Lubbock County Criminal District Attorney's Office (the "district attorney") received a request for the district attorney's file on a specified individual. You claim the requested information is excepted from disclosure under sections 552.101, 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, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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

(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 submitted information is a completed investigation subject to section 552.022(a)(1). Although you raise section 552.111 of the Government Code for this information, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see also* Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.111), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, the district attorney may not withhold 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 . . . are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). We note, however, the Texas Rules of Civil Procedure apply only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the submitted information relates to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply to the information at issue, and the information may not be withheld on that basis. However, section 552.101 of the Government Code protects information made confidential under law. Therefore, we will consider the applicability of this exception as well as section 552.108 to the submitted information.

First, the district attorney asserts section 552.101 of the Government Code in conjunction with common-law privacy protects all of the information because the requestor knows the identity of the alleged sexual assault victim. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses common-law privacy and excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by a common law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.*

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy; however, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identities of witnesses to

and victims of sexual harassment were highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). Thus, this office has held when a requestor knows the identity of the alleged sexual assault victim, an agency must withhold all of the information because withholding only the identifying information would not preserve the victim's common-law right to privacy. However, a requestor challenged this analysis in *Austin Chronicle Corp. v. City of Austin*, No. 03-08-00596-CV, 2009 WL 483232 (Tex. App.—Austin Feb. 24, 2009, no pet.) (mem. op., not designated for publication).

In *Austin Chronicle*, the court reviewed this office's conclusion that the governmental body must withhold an entire police report under common-law privacy because the requestor knew the names of the victims of alleged sexual assault. The court found although the report was not admitted into evidence at trial, there was undisputed evidence the general substance of the information in the report, including the names and testimony of two child victims, was a matter of public record because it was made public at trial. *Austin Chronicle*, 2009 WL 483232, at *6. The requestor provided copies of published articles on the investigation and trial and transcript excerpts from the trial. *Id.* Accordingly, the court held because there was no evidence to show the information in the report had not been made public, the report is not excepted from public disclosure under section 552.101 in conjunction with common-law privacy, and the requestor is entitled to disclosure of the report. *Id.* at *7-8. In reaching its conclusion, the court did not distinguish the report from the information it contains.

Here, a jury found the individual at issue guilty of aggravated sexual assault. The individual was posthumously pardoned for the crime in 2009. The charge, trial, and pardon have been well publicized and there are published news accounts naming the alleged victim and discussing the details of her allegations. Further, the victim has spoken publicly about the incident. Thus, because the requested information contains information that is a matter of public record and pursuant to *Austin Chronicle*, we conclude although the requestor knows the identity of the alleged sexual assault victim, the district attorney may not withhold all of the requested information.

Section 552.108 of the Government Code 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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). 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). 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 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." *Curry*, 873 S.W.2d at 380 (internal quotations omitted) (quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)).

The present request seeks the district attorney's file on a named individual. You assert the instant request is for the district attorney's entire prosecution file for the case at issue. You explain this information was compiled by the district attorney in preparation for trial and reflects the district attorney's mental impressions and legal reasoning. Based on your representations and our review, we conclude section 552.108(a)(4) of the Government Code is applicable to the information at issue.

We note, however, that 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). Section 552.108(c) refers to basic "front-page" information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. 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 considered to be basic information). Thus, with the exception of basic information, the district attorney may withhold the submitted information under section 552.108(a)(4) of the Government Code and the court's ruling in *Curry*.²

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,

²As our ruling is dispositive, we need not address your remaining argument under section 552.108(b)(3) of the Government Code.

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,

A handwritten signature in cursive script, appearing to read "Michelle R. Garza".

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/em

Ref: ID# 442632

Enc. Submitted documents

c: Requestor
(w/o enclosures)