



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2012

Mr. Michael J. Sandlin
Assistant District Attorney
Dallas County Criminal District Attorney's Office
133 North Riverfront Boulevard LB-19
Dallas, Texas 75207-4399

OR2012-04011

Dear Mr. Sandlin:

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# 448346.

The Dallas County Criminal District Attorney's Office (the "district attorney's office") received a request for "all pertinent case information regarding [three specified case files]." You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.²

We note the submitted information related to case numbers F09-57350 and MA09-44905 falls within the scope of section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made

¹Although you do not specifically raise section 552.111 of the Government Code, we understand you to claim this exception, based on your arguments.

²This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district attorney's office to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; *Open Records Decision Nos.* 499 at 6 (1988), 497 at 4 (1988).

confidential under the Act or other law. Gov't Code § 552.022(a)(1). In this instance, the submitted information related to cases F09-57350 and MA09-44905, which you state are closed, constitutes completed investigations made by the district attorney's office. Although you seek to withhold the information related to those cases as attorney work product under 552.111 of the Government Code, section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, section 552.111 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the district attorney's office may not withhold any of the information related to case numbers F09-57350 and MA09-44905 under section 552.111 of the Government Code. We note the attorney work product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure, which have been held to be "other law" within the meaning of section 552.022, *see In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Those rules are only applicable, however, to "actions of a civil nature." *See TEX. R. CIV. P.* 2. Thus, rule 192.5 is not applicable to the information related to case numbers F09-57350 and MA09-44905, which pertains to criminal investigations. Therefore, the district attorney may not withhold any of the information related to those cases on the basis of Texas Rule of Civil Procedure 192.5. Because information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your claims for the information related to case numbers F09-57350 and MA09-44905 under section 552.108. We also will consider your claims for that information under sections 552.101 and 552.130 of the Government Code, both of which make information confidential for purposes of section 552.022(a)(1).

We next note section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is confidential under the Act or other law. Gov't Code § 552.022(a)(17). Thus, the court documents related to case number MA10-22575 we have marked in Exhibit I are subject to section 552.022(a)(17). As previously explained, section 552.111 of the Government Code does not make information confidential for purposes of section 552.022(a)(17). Likewise, sections 552.103 and 552.108 of the Government Code are discretionary exceptions to disclosure and do not make information confidential for purposes of section 552.022(a)(17). *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 Gov't Code § 552.103); Open Records Decision No. 177 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the court documents encompassed by section 552.022(a)(17) may not be withheld under section 552.103, section 552.108, or section 552.111. Moreover, the court documents do not contain any information made confidential under sections 552.101 or 552.130 of the Government Code. Therefore, the marked court documents must be released pursuant to section 552.022(a)(17) of the

Government Code. We will consider your other claims for the remaining information related to case number MA10-22575.

Next, we address your claim for the information related to case numbers F09-57350 and MA09-44905 under section 552.108(a)(4) and (b)(3) of the Government Code, which provide as follows:

(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.

(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) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). 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); *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 that 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 (Tex. 1993, orig. proceeding), 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. You contend the present request for "all pertinent case information regarding [case numbers F09-57350 and MA09-44905]" encompasses all of the submitted information related to those cases. Based on your representations and our review, we conclude section 552.108(a)(4) and (b)(3) are generally applicable to the submitted information related to case numbers F09-57350 and MA09-44905.

We note 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 the basic front-page offense and arrest 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). The district attorney's office must release basic offense and arrest information, including detailed descriptions of the offenses, even if the information does not literally appear on the front page of an offense or arrest report.³ See 531 S.W.2d at 186-188; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The district attorney's office may withhold the rest of the submitted information related to case numbers F09-57350 and MA09-44905 under section 552.108(a)(4) and (b)(3) of the Government Code and the decision in *Curry*.

Lastly, we address your claim under section 552.111 of the Government Code for the remaining information related to case number MA10-22575. Section 552.111 excepts from disclosure "an 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. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as consisting of

- (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.

³We note basic information includes an arrested person's social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information on this basis under section 552.111 bears the burden of demonstrating 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 the information was developed or the communication was made 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.

The attorney work product privilege under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *See Curry v. Walker*, 873 S.W.2d at 381; *see also U.S. v. Nobles*, 422 U.S. 225, 236 (1975). As previously noted, the Texas Supreme Court held in *Curry* that a request for a district attorney's "entire file" was "too broad," 873 S.W.2d at 381, and 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. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation or for trial, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. *See Open Records Decision No. 647 at 5 (1996)*; *see also Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes).⁴ You state the present request for "all pertinent case information regarding [case number MA10-22575]" is a request for all the submitted information related to that case. Based on your representation and our review, we conclude the district attorney's office may withhold the remaining information related to case number MA10-22575 as attorney work product under section 552.111 of the Government Code.

In summary, the district attorney's office (1) must release the marked court documents related to case number MA10-22575 pursuant to section 552.022(a)(17) of the Government

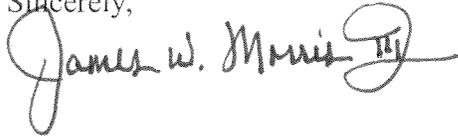
⁴We note the court also held in *National Union* that a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. *See* 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

Code; (2) may withhold the information related to case numbers F09-57350 and MA09-44905 under section 552.108(a)(4) and (b)(3) of the Government Code and the decision in *Curry*, except for basic information under section 552.108(c), which must be released; and (3) may withhold the remaining information related to case number MA10-22575 as attorney work product under section 552.111 of the Government Code. As we are able to make these determinations, we need not address the other exceptions you claim.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, stylized initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 448346

Enc: Submitted documents

c: Requestor
(w/o enclosures)