



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 15, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Rita Monterrosa
Litigation Paralegal
Office of the City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604-0060

OR2016-05982

Dear Ms. Monterrosa:

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# 601601.

The Abilene Police Department (the "department") received a request for all information related to a specified call for assistance. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2016-05287 (2016). In that ruling, we determined, in pertinent part, the department must: (1) withhold certain information under section 552.101 of the Government Code in conjunction with common-law privacy; (2) withhold certain information under section 552.1175 of the Government Code, to the extent the officers whose information was at issue elected to restrict access to the information in accordance with section 552.1175(b) of the Government Code; (3) withhold certain information under section 552.130 of the Government Code; and (4) release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the department must rely on Open Records Letter No. 2016-05287 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists

where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against release of the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the submitted information consists of communications between department employees and attorneys and officials for the City of Abilene (the “city”). You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city and the department and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to some of the submitted communications, which we have marked. Therefore, the department may generally withhold the marked information under section 552.107(1) of the Government Code. However, we note some of the otherwise

privileged e-mail strings include e-mails sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the department maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then this information may not be withheld under section 552.107(1). Furthermore, we find the remaining information was sent to parties you have not shown to be privileged. Accordingly, the department may not withhold any portion of the remaining information under section 552.107(1) 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 doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. You claim portions of the remaining information are subject to common-law privacy. Upon review, we find you have not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

We note portions of the remaining information, including the marked non-privileged e-mails, are subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Upon review, we find the department must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code; however, the department may only withhold this cellular telephone number if the cellular telephone service is not paid for by a governmental body.

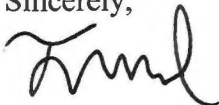
¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the department must rely on Open Records Letter No. 2016-05287 as a previous determination and withhold or release the identical information in accordance with that ruling. With the exception of the information we have marked as non-privileged, the department may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the department maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The department must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code; however, the department may only withhold this cellular telephone number if the cellular telephone service is not paid for by a governmental body. The department must release the remaining information.

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, 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 601601

Enc. Submitted documents

c: Requestor
(w/o enclosures)

APR - 5 2018 RT

At 2:30 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-16-001160

SUSAN LEWIS KING and AUSTIN KING, M.D., <i>Plaintiffs,</i>	§ § § § § § § § § §	IN THE DISTRICT COURT
V.		TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY GENERAL OF TEXAS and THE CITY OF ABILENE, TEXAS, <i>Defendants.</i>		53 RD JUDICIAL DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that on this day came to be considered Plaintiffs Susan Lewis King and Austin King, M.D.’s Motion for Summary Judgment, Defendant Attorney General’s Cross-Motion for Summary Judgment, Defendant City of Abilene’s Cross-Motion for Summary Judgment, and Intervenor Abilene-Sweetwater Broadcasting Company d/b/a KTXS TV’s Cross-Motion for Summary Judgment.

After considering the motion, cross-motions, the competent summary judgment evidence, pleadings on file, argument of counsel and applicable law, the Court grants in part and denies in part Plaintiffs’ Motion for Summary Judgment, the Court grants in part and denies in part Defendant Attorney General’s Cross-Motion for Summary Judgment, and the Court grants in part and denies in part Intervenor Abilene-Sweetwater Broadcasting Company d/b/a KTXS TV’s Cross-Motion for Summary Judgment.

The “information at issue” in this suit consists of: (1) a ten-page narrative report stemming from Abilene Police Department Incident 15-020170 of October 11, 2015; (2) two audio recordings; (3) three video recordings made by Abilene Police Department in-car cameras; and (4) five pages of emails between the Abilene Police Department, the Abilene City Attorney, and the Department of Public Safety.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that portions of the information at issue, as indicated by the Court's decision letter of March 1, 2018, are EXCEPTED FROM DISCLOSURE. The City of Abilene shall WITHHOLD all such identified information.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that portions of the information at issue, as indicated by Attorney General Open Records Letter Rulings OR2016-05287 and OR2016-05982, are EXCEPTED FROM DISCLOSURE. The City of Abilene shall WITHHOLD all such identified information.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining portions of the information at issue, which were not found to be excepted from disclosure by either the Court's decision letter of March 1, 2018, or by Attorney General Open Records Letter Rulings OR2016-05287 or OR2016-05982, are not excepted from required disclosure and may not be withheld. The City of Abilene shall RELEASE all such remaining information at issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, consistent with the above orders:

- 1) Plaintiffs Susan Lewis King and Austin King, M.D.'s Motion for Summary Judgment against Defendants Ken Paxton, Attorney General of Texas, and The City of Abilene, Texas is hereby GRANTED IN PART AND DENIED IN PART as indicated above.
- 2) Defendant Ken Paxton, Attorney General of Texas's Cross-Motion for Summary Judgment is hereby GRANTED IN PART AND DENIED IN PART as indicated above.

- 3) Intervenor Abilene-Sweetwater Broadcasting Company d/b/a KTXS TV's Cross-Motion for Summary Judgment is hereby GRANTED IN PART AND DENIED IN PART as indicated above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

- 1) Plaintiffs Susan Lewis King and Austin King, M.D.'s request for reasonable costs and attorneys' fees is hereby DENIED.
- 2) Defendant Ken Paxton, Attorney General of Texas's request for attorney's fees is hereby DENIED.

By virtue of Plaintiffs Susan Lewis King and Austin King, M.D. and the City of Abilene's Rule 11 Agreement, Defendant City of Abilene's Cross-Motion for Summary Judgment is MOOT.

All other relief prayed for, but not granted herein, is denied. This order disposes of all claims and all parties and is an appealable final order.

Signed on this 3rd day of April, 2018.




JUDGE LORA J. LIVINGSTON
PRESIDING DISTRICT JUDGE

AGREED AS TO FORM:



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