



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 1, 2017

Ms. Ann-Marie Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2017-02283

Dear Ms. Sheely:

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# 644018.

The Travis County Attorney's Office (the "county attorney's office") received a request for any report or final determination regarding a specified investigation of a named individual and specified communications between named individuals.¹ You state the county attorney's office will release some of the requested information. You also state the county attorney's office has no information responsive to a portion of the request.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111,

¹We note the county attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²The 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).

and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note the submitted information includes court-filed documents subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[.]” unless the information is expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although the county attorney’s office raises sections 552.107, 552.108, and 552.111 of the Government Code for this information, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the county attorney’s office may not withhold any of the information subject to section 552.022(a)(17), which we marked, under section 552.107, section 552.108, or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). However, we note the Texas Rules of Civil Procedure are applicable only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the information at issue pertains to a criminal case, the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure does not apply, and the information at issue may not be withheld on that basis. However, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17) of the Government Code. We will also address your arguments against disclosure of the information not subject to section 552.022(a)(17) of the Government Code.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must explain how and why the release of the submitted information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state some of the remaining information relates to a pending criminal prosecution. *See* Gov’t Code § 552.108(a)(1). Based upon your representation and our review, we conclude the release of the information we marked would interfere with the detection, investigation, or

³We 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 that those records contain substantially different types of information than that submitted to this office.

prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) of the Government Code is applicable to the information we marked.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. The county attorney's office asserts some of the remaining information pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to the information we marked.

However, 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). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the county attorney's office may withhold the information we marked under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code.⁴

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You indicate one of the documents subject to section 552.022(a)(17) is an attachment to an e-mail between county attorney’s office attorneys and representatives made for the purpose of facilitating the rendition of professional legal services to the county. You state the communication was intended to be confidential and was not disclosed to non-privileged parties. Upon review, we find you have demonstrated the information at issue is part of a privileged communication for purposes of rule 503 of the Texas Rules of Evidence. Thus, the county attorney’s office may withhold the information we marked under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state some of the remaining information consists of communications between county attorney’s office attorneys and representatives made for the purpose of facilitating the rendition of legal services. You also indicate these communications were intended to be confidential and that confidentiality has been maintained. Upon review, we find the county attorney’s office has demonstrated the applicability of the attorney-client privilege to the

remaining information you marked. Thus, the county attorney's office may withhold the remaining information you marked under section 552.107(1) of the Government Code.⁵

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. Upon review, we find the county attorney's office has failed to demonstrate any of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the county attorney's office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized, for the first time, a common-law physical safety exception to required disclosure. *Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, "information may be withheld [from public release] if disclosure would create a substantial threat of physical harm." *Id.* In applying this standard, the court noted "deference must be afforded" law enforcement experts regarding the probability of harm, but further cautioned, "vague assertions of risk will not carry the day." *Id.* at 119. You indicate the remaining information should be withheld for the protection of a client of the county attorney's office. However, you do not provide this office with any specific threats made against the client. Upon review, we conclude you have failed to demonstrate the applicability of the common-law physical safety exception to the remaining information. Accordingly, the county attorney's office may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Upon review, we find the county attorney's office must generally withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure. We note, however, the requestor is the spouse of the individual whose e-mail addresses is at issue, and may be acting as her authorized representative. *See id.* § 552.137(b). Accordingly, if the requestor is his spouse's

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

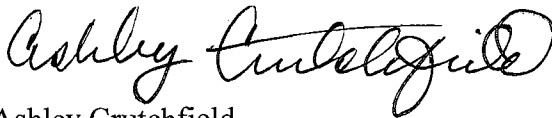
authorized representative, then he has a right of access to her e-mail address, and that information may not be withheld from this requestor under section 552.137 of the Government Code. However, if the requestor is not acting as his spouse's representative, the county attorney's office must withhold her e-mail address, which we marked, under section 552.137 of the Government Code, unless the requestor's spouse affirmatively consents to its public disclosure.

In summary, with the exception of basic information, which must be released, the county attorney's office may withhold the information we marked under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code. The county attorney's office may withhold the information we marked that is subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. The county attorney's office may withhold the remaining information you marked under section 552.107(1) of the Government Code. The county attorney's office must withhold the e-mail address we marked, unless the individual to whom the e-mail address belongs affirmatively consents to its release; however, the county attorney's office may not withhold the e-mail address if the requestor has a right of access to the e-mail address under section 552.137(b) of the Government Code. The county attorney's office must release the remaining information.⁶

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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/bw

⁶We note the requestor may have a special right of access to the information being released in this instance. Because such information is confidential with respect to the general public, if the county attorney's office receives another request for this information from a different requestor, the county attorney's office must again seek a ruling from this office.

Ref: ID# 644018

Enc. Submitted documents

c: Requestor
(w/o enclosures)