



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 25, 2017

Ms. Lindsey Aston
General Counsel
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2060

OR2017-11517

Dear Ms. Aston:

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# 657126.

The Office of the Secretary of State (the "secretary's office") received a request for eleven categories of information pertaining to voter issues during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.137 of the Government Code.² We have also received and considered comments from the Office of the Attorney General (the "OAG"). *See Gov't Code* § 552.304 (permitting interested third party to submit to attorney general

¹We note the secretary'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).

²We note the secretary's office failed to timely raise section 552.107 of the Government Code for some of the submitted information. *See Gov't Code* § 552.301(b). Nevertheless, because section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the information at issue. *See id.* §§ 552.007, .302, .352.

reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Next, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-27003 (2015), 2016-16898 (2016), and 2017-10298 (2017). You indicate there has been no change in the law, facts, and circumstances on which the prior rulings were based. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the secretary's office must continue to rely on the prior rulings as previous determinations and withhold or release the identical information in accordance with those rulings. *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 information is or is not excepted from disclosure).

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 31.006 of the Election Code. Section 31.006 of the Election Code provides the following:

(a) If, after receiving a complaint alleging criminal conduct in connection with an election, the [secretary's office] determines that there is reasonable cause to suspect that the alleged criminal conduct occurred, the secretary shall promptly refer the complaint to the [OAG]. The secretary shall deliver to the [OAG] all pertinent documents in the secretary's possession.

(b) The documents submitted under Subsection (a) are not considered public information until:

(1) the [secretary's office] makes a determination that the complaint received does not warrant an investigation; or

(2) if referred to the [OAG], the [OAG] has completed the investigation or has made a determination that the complaint referred does not warrant an investigation.

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

Elec. Code § 31.006. You state some of the submitted information was delivered to the OAG pursuant to section 31.006(a). You inform us this information is either still under investigation with the OAG or still being reviewed by the secretary's office. Based on your representations and our review, we agree the information at issue is not considered public information under section 31.006(b). Accordingly, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code.⁴ However, upon review, we find you have failed to demonstrate any of the remaining information at issue was delivered to the OAG pursuant to section 31.006(a). Accordingly, the secretary's office may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 273.001 of the Election Code, which provides, in relevant part, the following:

(a) If two or more registered voters of the territory covered by an election present affidavits alleging criminal conduct in connection with the election to the county or district attorney having jurisdiction in that territory, the county or district attorney shall investigate the allegations. If the election covers territory in more than one county, the voters may present the affidavits to the [OAG], and the [OAG] shall investigate the allegations.

(b) A district or county attorney having jurisdiction or the [OAG] may conduct an investigation on the officer's own initiative to determine if criminal conduct occurred in connection with an election.

...

(e) Not later than the 30th day after the date on which a county or district attorney begins an investigation under this section, the county or district attorney shall deliver notice of the investigation to the [secretary's office]. The notice must include a statement that a criminal investigation is being conducted and the date on which the election that is the subject of the investigation was held. The [secretary's office] may disclose information relating to a criminal investigation received under this subsection only if the county or district attorney has disclosed the information or would be required by law to disclose the information.

Id. § 273.001(a), (b), (e). You assert some of the remaining information is confidential under section 273.001(e) of the Election Code. We understand the information at issue consists of a notice from the Harris County District Attorney's Office (the "district attorney's office")

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

that was delivered to the secretary's office pursuant to section 273.001(e). *See id.* § 273.001(e). You state the secretary's office has no indication the district attorney's office has disclosed the information or would be required by law to disclose the information. Based on your representations and our review, we agree the information at issue is confidential under section 273.001(e). Accordingly, the secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 273.001(e) of the Election Code.⁵

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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).

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

You claim the information you indicated is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the secretary's office and officials with the secretary's office. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the secretary's office. You further indicate these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the secretary's office may withhold the information you indicated under section 552.107(1) of the Government Code.⁶

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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested 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). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987) (section 552.108 may be invoked by any proper custodian of information relating to pending investigation or prosecution of criminal conduct). Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. The OAG states some of the information at issue pertains to an active criminal investigation with the OAG’s Criminal Investigations Division. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or 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). Accordingly, the secretary’s office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the OAG. However, we note the OAG does not seek to withhold any of the remaining submitted information under section 552.108(a)(1). Consequently, the secretary’s office may not withhold the remaining information at issue under section 552.108(a)(1) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See*

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). A custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to a criminal case that has reached a conclusion other than a conviction or deferred adjudication and a representation from the law enforcement entity that it wishes to withhold the information. *See* Open Records Decision Nos. 474, 372 (1983). The OAG states some of the remaining information at issue pertains to a concluded criminal investigation with the OAG's Criminal Investigations Division that did not result in conviction or deferred adjudication. Based on this representation and our review, the secretary's office may withhold the information we have marked under section 552.108(a)(2) of the Government Code on behalf of the OAG. However, we note the OAG does not seek to withhold any of the remaining submitted information under section 552.108(a)(2). Consequently, the secretary's office may not withhold the remaining information at issue under section 552.108(a)(2) of the Government Code.

Section 552.101 of the Government Code also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You generally raise the common-law informer's privilege for some of the remaining information. Upon review, however, we find you failed to demonstrate the applicability of the common-law informer's privilege to any of the remaining information. Accordingly, the secretary's office may not withhold the remaining information under section 552.101 of the Government Code on that basis.


In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the secretary's office must continue to rely on Open Records Letter Nos. 2015-27003, 2016-16898, and 2017-10298 as previous determinations and withhold or release the identical information in accordance with those rulings. The

secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. The secretary's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 273.001(e) of the Election Code. The secretary's office may withhold the information you indicated under section 552.107(1) of the Government Code. The secretary's office may withhold the information we have marked under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code on behalf of the OAG. The secretary's office 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/tdw

Ref: ID# 657126

Enc. Submitted documents

c: Requestor
(w/o enclosures)