



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 13, 2017

Mr. Billy W. Byrd  
Criminal District Attorney  
Upshur County Criminal District Attorney's Office  
405 North Titus Street  
Gilmer, Texas 75644

OR2017-15645

Dear Mr. Byrd:

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# 665827.

The Upshur County Criminal District Attorney's Office (the "district attorney's office") received a request for specified categories of information pertaining to the requestor's client and any communications involving the district attorney's office that pertain to another named individual. You state you have released some information to the requestor. You state you do not have information responsive to a portion of the request.<sup>1</sup> You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you argue a portion of the submitted information is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Gov’t Code § 552.002(a). Information is “in connection with the transaction of official business” if it is “created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body.” *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *See* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You contend some of the submitted information is not subject to the Act because it consists of text messages sent from the district attorney’s personal cellular telephone, for which the service is not paid for by a

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<sup>2</sup>Although you do not raise section 552.107 of the Government Code in your brief, we understand the district attorney’s office to assert this exception based on the substance of your argument. Further, although you also raise section 552.101 of the Government Code in conjunction with common-law privacy, section 552.109 of the Government Code, and section 552.111 of the Government Code for the submitted information, you provide no arguments explaining how this doctrine and these exceptions are applicable to the information at issue. Therefore, we assume you no longer assert this doctrine and these exceptions. *See* Gov’t Code §§ 552.301, .302.

governmental body. However, we note the information at issue was written, produced, collected, assembled, or maintained in connection with the transaction of official business of the district attorney's office. Thus, we find the information at issue is subject to the Act and the district attorney's office must release it unless the information falls within an exception to public disclosure under the Act. Gov't Code § 552.006, .021, .301, .302. Accordingly, we will consider the district attorney's office's claimed exceptions to disclosure of this information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses article 20.02(a) of the Code of Criminal Procedure, which provides "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). The Fourth Court of Appeals addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, orig. proceeding).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02. *See* Crim. Proc. Code art. 20.02; FED. R. CRIM. P. 6(e)(6) ("Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."). Article 20.02(h) states "[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors to consider in making such a determination, and even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would be secret only "for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury." *Id.*

Although you seek to withhold some of the submitted information under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure, you have not submitted any arguments explaining the matter upon which the information at issue was based is still "before the grand jury" to warrant keeping it secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, this provision makes the information at issue confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the information at issue may not be withheld under section 552.101 of the Government Code in conjunction with article 20.02 of the Criminal Code of Procedure.

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 information you have indicated consists of communications between an employee in the district attorney’s office and outside counsel for the district attorney’s office that were made for the purpose of providing legal services to the district attorney’s office. You state the communications were intended to be confidential. We understand these communications have remained confidential. Based on your representations and our review, we find the information you have indicated consists of privileged attorney-client communications. Therefore, the district attorney’s office may withhold the information you have indicated under section 552.107(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. 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); Open Records Decision No. 434 (1986). You state the information you have indicated pertains to criminal investigations that did not result in conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the information at issue.

However, 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” 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). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, which must be released, the district attorney’s office may withhold the information you have indicated under section 552.108(a)(2) of the Government Code.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.<sup>3</sup> Gov’t Code § 552.1175. Section 552.1175 applies, in part, to “peace officers as defined by Article 2.12, Code of Criminal Procedure[.]” *Id.* § 552.1175(a)(1). Thus, to the extent the information we have marked relates to a licensed peace officer who elects to restrict access to her information in accordance with section 552.1175(b), it must be withheld from disclosure under section 552.1175 of the Government Code. However, if the individual whose information is at issue is not currently a licensed peace officer or does not elect to restrict access to the information at issue in accordance with section 552.1175(b), the marked information may not be withheld under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the district attorney’s office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.*

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).


§ 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the district attorney’s office must withhold the account number we have marked under section 552.136 of the Government Code.

In summary, the district attorney’s office may withhold the information you have indicated under section 552.107(1) of the Government Code. With the exception of basic information, which must be released, the district attorney’s office may withhold the information you have indicated under section 552.108(a)(2) of the Government Code. To the extent the information we have marked relates to a licensed peace officer who elects to restrict access to her information in accordance with section 552.1175(b) of the Government Code, it must be withheld from disclosure under section 552.1175 of the Government Code. The district attorney’s office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district attorney’s office must withhold the account number we have marked under section 552.136 of the Government Code. The district attorney’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](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,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/tdw

Ref: ID# 665827

Enc. Submitted documents

c: Requestor  
(w/o enclosures)