



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

July 18, 2017

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

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

OR2017-16049

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# 666635.

The Travis County Attorney's Office (the "county attorney's office") received a request for specified deferred prosecution agreements.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We note the county attorney's office 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). We also note the requestor limited the request to exclude the social security numbers and dates of birth of certain individuals.

²We 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.

Initially, the requestor claims the submitted information is subject to section 552.022(a)(18) of the Government Code. Section 552.022(a)(18) provides for required public disclosure of “a settlement agreement to which a governmental body is a party[.]” unless the information is expressly made confidential under the Act or other law. *Id.* § 552.022(a)(18). Upon review, we find none of the submitted information is subject to section 552.022(a)(18). Accordingly, we consider the arguments of the county attorney’s office against disclosure of the submitted information.

Section 552.108(a)(2) of the Government Code excepts from disclosure “information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.” *See id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that 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). You state the submitted information relates to concluded criminal investigations that did not result in convictions or a deferred adjudications. Based on your representation and our review, we find the county attorney’s office may withhold the information we marked under section 552.108(a)(2) of the Government Code. However, we find you have failed to demonstrate the remaining information relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. Accordingly, the county attorney’s office may not withhold the remaining information under section 552.108(a)(2) 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[.]” *Id.* § 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). You inform us the remaining deferred prosecution agreements (the “agreements”) pertain to criminal cases that have been dismissed subject to the terms of the agreements. However, you state the terms of the agreements have not concluded and, if at the end of the agreement terms the subjects fail to comply with the terms of the agreements, the criminal case will be re-filed. Therefore, you claim the agreements pertain to pending criminal cases. Generally, the release of information pertaining to an open case is presumed to interfere with the criminal investigation. *See Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases). We note, however, the defendants signed the remaining agreements, acknowledging their receipt of the agreements. Thus, because copies of the agreements have previously been released to the defendants, we find you have not shown release of the agreements will interfere with the detection, investigation, or prosecution of crime; thus, the remaining agreements may not be

withheld under section 552.108(a)(1) of the Government Code. See Gov't Code § 552.108(a)(1).

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Although you assert section 552.103 for the remaining information, we find the remaining information either is not related to the litigation at issue or has been seen by the opposing parties in the litigation at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. See ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we conclude none of the remaining information may be withheld under section 552.103 of the Government Code.

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 assert the remaining information is protected under section 552.107(1) of the Government Code. However, we find you have failed to establish the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the county attorney’s office may not withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the county attorney’s office may withhold the information we marked under 552.108(a)(2) of the Government Code. The county 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, 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,

A handwritten signature in black ink that reads "Ashley Crutchfield". The signature is written in a cursive style with a large initial 'A' and 'C'.

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/bw

Ref: ID# 666635

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Filed in The District Court
of Travis County, Texas

APR 26 2018

At 10:40 a.m. NWL
Velva L. Price, District Clerk

NO. D-1-GN-17-004329

DAVID A. ESCAMILLA,
TRAVIS COUNTY ATTORNEY

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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

FINAL JUDGMENT

The Court, after reading Plaintiff's Motion for Summary Judgment, Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, and Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment, reviewing the summary judgment evidence, and hearing the arguments of counsel, is of the opinion that Plaintiff's motion should be granted and Defendant's cross-motion should be denied.

Thus, the Court declares and orders that:

- (1) the deferred prosecution agreements pertaining to dismissed criminal cases that have not been refiled are excepted from public disclosure by section 552.108(a)(2) of the Texas Government Code;
- (2) the deferred prosecution agreements pertaining to dismissed criminal cases that have been refiled and then dismissed again are excepted from public disclosure by section 552.108(a)(2) of the Texas Government Code;
- (3) the deferred prosecution agreements pertaining to dismissed criminal cases that have been refiled and that are still pending are excepted from public disclosure by sections 552.108(a)(1), 552.103, and 552.107 of the Texas Government Code.

The Court orders that costs of suit are taxed against the parties incurring same. The Court further orders that this judgment finally disposes of all claims and all parties and is appealable.

Signed on April 25, 2018.



DUSTIN M. HOWELL
JUDGE PRESIDING

APPROVED AS TO FORM:



Tim Labadie
State Bar No. 11784853
Assistant Travis County Attorney
P. O. Box 1748
Austin, Texas 78767
512.854.5864
512.854.9316 (fax)
tim.labadie@traviscountytexas.gov

Attorney for Plaintiff



Matthew Entsminger
State Bar No. 24059723
Chief, Open Records Litigation
Administrative Law Division
ATTORNEY GENERAL OF TEXAS
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
512.475.4151
512.457.4686 (fax)
matthew.entsminger@oag.texas.gov

Attorney for Defendant