



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

June 5, 2018

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

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

OR2018-13173

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# 710064.

The Travis County Attorney's Office (the "county attorney's office") received a request for a specified deferred prosecution agreement (the "agreement"). 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 information.

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.

Gov't Code § 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 submitted information, we find the opposing party in the litigation at issue has seen this information. 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 the county attorney's office may not withhold the submitted information under section 552.103.

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 submitted 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 a privileged attorney-client communication for the purposes of section 552.107(1). Accordingly, the county attorney’s office may not withhold the submitted information under section 552.107(1) 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). 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 agreement pertains to a criminal case that was dismissed subject to the conditions of the agreement. However, you state the term of the agreement has not concluded and, if at the end of the agreement term the subject fails to comply with the conditions of the agreement, the criminal case will be re-filed. Therefore, you claim the agreement pertains to a pending criminal case. 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 defendant signed the agreement, acknowledging his receipt of the agreement. Thus, because a copy of the agreement was previously released to the defendant, we find you have not shown release of the agreement will interfere with the detection, investigation, or prosecution of crime; thus, the county attorney’s office may not withhold the submitted information under section 552.108(a)(1) of the Government Code. *See Gov’t Code* § 552.108(a)(1).

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 case against the defendant was dismissed after the agreement was executed. However, you also state the term of the agreement has not concluded. Upon review, we find you have failed to demonstrate the submitted 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 submitted information under section 552.108(a)(2) of the Government Code. As you raise no other exception against disclosure, the county attorney’s office must release the submitted 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/mo

Ref: ID# 710064

Enc. Submitted documents

c: Requestor
(w/o enclosures)

NO. D-1-GN-18-003097

DAVID A. ESCAMILLA, TRAVIS COUNTY ATTORNEY	§	353rd JUDICIAL DISTRICT COURT
	§	
V.	§	
	§	
KEN PAXTON, STATE OF TEXAS ATTORNEY GENERAL	§	TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Texas Public Information Act (PIA), Texas Government Code chapter 552. All matters in controversy between Plaintiff David A. Escamilla, Travis County Attorney (Travis County Attorney), and Defendant Ken Paxton, Attorney General of Texas (the Attorney General) have been resolved, and the parties agree to the entry and filing of an agreed final judgment. *See* Exhibit A (Settlement Agreement).

Pursuant to Tex. Gov't Code § 552.325(d), the Court shall allow the requestor a reasonable period of time to intervene after the Attorney General attempts to notify the requestor of the proposed settlement. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Tex. Gov't Code § 552.325(c), on May 28, 2020, the Attorney General sent a letter by certified mail, return receipt requested to the requestor, Mr. Sean Kelner, notifying him of the settlement and informing him of his right to intervene in the lawsuit. As of this date, Mr. Kelner has not intervened or notified the parties of his intent to intervene.

After considering the agreement of the Parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

THE COURT THEREFORE FINDS AND ORDERS THAT:

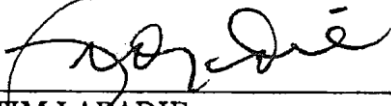
1. The Travis County Attorney and the Attorney General have agreed that in accordance with the PIA and under the facts presented, the deferred prosecution agreement may be withheld in accordance with Texas Government Code section 552.108 and *Paxton v. Escamilla*, 590 S.W.3d 617 (Tex. App.—Austin 2019, pet. denied).
2. The Travis County Attorney may withhold the Deferred Prosecution Agreement at issue in this case;
3. All court cost and attorney fees are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between the Travis County Attorney and the Attorney General in this cause and is a final judgment.

Signed on August 5, 2020.



TIM SULAK, JUDGE PRESIDING

AGREED:



TIM LABADIE

State Bar No. 11784853

Assistant Travis County Attorney

P.O. Box 1748

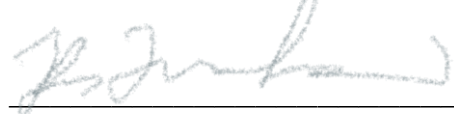
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ATTORNEY FOR DEFENDANT