



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 24, 2020

Mr. Ira Davis
Executive Director
Capital Area Private Defender Service
507 West 11th Street
Austin, Texas 78701

OR2020-11765

Dear Mr. Davis:

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# 821216.

The Capital Area Private Defender Service ("CAPDS") received a request for (1) information pertaining to a specified cause number and (2) information pertaining to the organization of CAPDS. You indicate you have released some information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, CAPDS asserts some of the submitted information is not responsive to the request for information. The Act requires a governmental body to make a good-faith effort to relate a request for information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because CAPDS has submitted information for our review and arguments against its disclosure, we find CAPDS has made a good-faith effort to submit information that is

¹ We note you did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because sections 552.101 and 552.107 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of these sections to the submitted information. *See id.* §§ 552.007, .302, .352. In addition, although you also raise section 552.103 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this section applies to the submitted information. *See id.* §§ 552.301, .302.

responsive to the request. Accordingly, we will address the arguments of CAPDS against disclosure of the submitted responsive information.

Next, we note CAPDS has redacted portions of the submitted information. We understand CAPDS has redacted e-mail addresses under section 552.137 of the Government Code as permitted by Open Records Decision No. 684 (2009).² However, CAPDS has also redacted additional information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of the records indicate, CAPDS has been authorized to withhold this information without seeking a ruling from this office. *See id.* § 553.301(a); *see also* Open Records Decision No. 673 (2000). As such, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we are unable to discern the nature of some of the redacted information. Consequently, CAPDS has failed to comply with section 552.301 of the Government Code as to this information, and this information is presumed public under section 552.302 of the Government Code. Because the attorney-client privilege under section 552.107 of the Government Code and section 552.101 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address the applicability of these sections to the submitted information.

CAPDS seeks to withhold the information at issue pursuant to article 39.14 of the Code of Criminal Procedure. We note, however, article 39.14 governs the discovery of information and testimony of witnesses in criminal proceedings. *See* Crim. Proc. Code art. 39.14. Article 39.14 does not expressly make information confidential for purposes of the Act. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality under section 552.101 must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1978) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public); *see also* Open Records Decision No. 575 at 2 (1990) (explicitly stating discovery privileges are not covered by statutory predecessor to section 552.101). Therefore, we conclude CAPDS may not withhold any of the submitted information under article 39.14 of the Code of Criminal Procedure.

Section 552.101 of the Government Code excepts 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 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

² Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. TEX. R. EVID. 503(b)(1). 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.*, 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). While you assert the information at issue is protected by the attorney-client privilege, upon review, we find you have failed to demonstrate the information at issue constitutes communications between privileged parties made in furtherance of the rendition of professional legal services to CAPDS for the purposes of section 552.107(1) of the Government Code. Thus, CAPDS may not withhold any of the information at issue on that basis. As no further exceptions to disclosure have been raised, CAPDS 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/eb

Ref: ID# 821216

Enc. Submitted documents

c: Requestor
(w/o enclosures)