



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 13, 2020

Ms. Jill L. Mata
General Counsel
Bexar County Juvenile Probation Department
301 East Mitchell Street
San Antonio, Texas 78210-3845

OR2020-20331

Dear Ms. Mata:

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# 840061 (Reference No. R002811-021420).

The Bexar County Juvenile Probation Department (the "department") received a request for information pertaining to a specified investigation involving a named individual. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2020-12735 (2020). In that ruling, we ruled the department (1) may withhold the information you indicated as attorney work product under Texas Rule of Civil Procedure 192.5; (2) must withhold the information we have marked pursuant to section 552.117(a)(10) of the Government Code; and (3) must release the remaining information. However, we note the requestor in this instance is an individual whose information was at issue in the previous ruling. Thus, the requestor has a right of access to her information pursuant to section 552.023 of the Government Code and it may not be withheld from her on the basis of section 552.117 of the Government Code. *See* Gov't Code § 552.023(a)

¹ Although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law. *See* Gov't Code § 552.022.

(“[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, we find the circumstances have changed with respect to the information belonging to the requestor, and the department may not rely on Open Records Letter No. 2020-12735 as a previous determination in regard to that information. *See* Open Records Decision No. 673 at 7 8 (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 that information is or is not excepted from disclosure). Therefore, the department may not withhold the information belonging to the requestor under section 552.117, but instead must release this information to this requestor pursuant to section 552.023 of the Government Code. However, as to the remaining information that was the subject of the prior ruling, we have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Thus, the department must continue to rely on Open Records Letter No. 2020-12735 as a previous determination and withhold or release this remaining information in accordance with that ruling.² ORD 673.

Next, we note the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). The remaining information consists of a completed investigation that is subject to section 552.022(a)(1). The department must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.103 and 552.111 of the Government Code. However, these sections are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

remaining information at issue under section 552.103 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. Further, as section 552.117 of the Government Code applies to confidential information, we will consider the applicability of this section to the remaining information.³

Rule 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.* 192.5; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORR 677 at 7.

You inform us the information at issue pertains to an investigation conducted by the department in response to allegations of discrimination and favoritism against a department employee. You state the information at issue consists of work product prepared for the department in anticipation of litigation related to the claims of discrimination and favoritism. Based on your representations and our review, we conclude the department

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

may withhold the information you indicated as attorney work product under Texas Rule of Civil Procedure 192.5.

Section 552.117(a)(10) of the Government Code excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a juvenile justice program or facility, as those terms are defined by section 261.405 of the Family Code, regardless of whether the current or former employee complies with section 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(10). *See also* Fam. Code § 261.405(a)(2)(C) (defining “juvenile justice program” for purposes of section 261.405 as including a juvenile probation department). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, if the cellular telephone services are not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked pursuant to section 552.117(a)(10) of the Government Code. Conversely, if the cellular telephone services are paid for by a governmental body, the department may not withhold the information at issue under section 552.117(a)(10).

In summary, with the exception of the information that must be released to this requestor pursuant to section 552.023 of the Government Code, the department must continue to rely on Open Records Letter No. 2020-12737 as a previous determination and withhold or release the information at issue in accordance with that ruling. The department may withhold the information you indicated as attorney work product under Texas Rule of Civil Procedure 192.5. To the extent the cellular telephone services are not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked pursuant to section 552.117(a)(10) of the Government Code. The department must release the remaining information.⁴

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

⁴ We note the requestor has a right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a) (“person or a person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect that person’s privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, if the department receives another request for this same information from a different requestor, the department must again seek a ruling from this office.

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/rm

Ref: ID# 840061

Enc. Submitted documents

c: Requestor
(w/o enclosures)