



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 2, 2020

Ms. Tracey L. Jennings
Civil Chief
Wichita County Criminal District Attorney
900 7th Street, Room 352
Wichita, Texas 76301

OR2020-24915

Dear Ms. Jennings:

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# 847471 [ORR# 02403].

Wichita County (the "county") received two requests for information pertaining to the requestor during a specified period of time.¹ You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.102, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert a portion of the submitted information is not subject to the Act because it consists of judicial records. The Act is applicable only to "public information." *See* Gov't Code § 552.021. Section 552.002(a) of the Government Code defines "public information" as follows:

[I]nformation 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;

¹ The county states it sought and 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).

(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.

Id. § 552.002(a). However, section 552.003 provides that, for purposes of the Act, the term “governmental body” does not include the judiciary. *Id.* § 552.003(1)(B). Information that is “collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules” and is not subject to the Act. *See id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under section 552.003(1)(B) prior to enactment of section 552.0035).

In determining whether information held by a governmental body falls within the judiciary exception to the Act, this office looks to whether the governmental body maintains the relevant records as an agent of the judiciary in a judicial, as opposed to an administrative, capacity. *See* Open Records Decision No. 646 at 3-4 (1996). This office has determined a community supervision and corrections department is a governmental body for purposes of the Act, and its administrative records, such as personnel files and other records reflecting day-to-day management of the department, are subject to the Act. *Id.* at 5. In contrast, specific records held by a community supervision and corrections department that concern individuals who are subject to the direct supervision of a court are not subject to the Act because such records are held on behalf of the judiciary. *Id.*

You state a portion of the submitted information consists of probation records provided to the county by the Wichita County Community Supervision and Corrections Department (the “department”). Thus, to the extent the information at issue is maintained by the county solely on behalf of the judiciary, these records are records of the judiciary and are not subject to the Act. However, to the extent the county holds the information at issue in its own capacity and not solely on behalf of the judiciary, we will consider your arguments against its disclosure.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the county received the requests. This ruling does not address the public availability of any information that is not responsive to the requests and the county is not required to release such information in response to these requests.

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. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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).

You state a portion of the responsive information consists of communications involving county attorneys and county employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the county. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we have indicated. Thus, the county may generally withhold the information we have indicated under section 552.107(1) of the Government Code.² We note, however, one of these e-mail strings includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the requests for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the county separate

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

and apart from the otherwise privileged e-mail string in which it appears, then the county may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. Further, we conclude you have failed to establish the remaining information constitutes communications between or among county employees and attorneys for the purposes of section 552.107(1). Thus, the county may not withhold any portion of the remaining responsive information on that basis.

Section 552.108(a) 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). Generally, 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 state a portion of the remaining information relates to an ongoing criminal investigation, and release of that information would interfere with the investigation and prosecution of the case. Based upon this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information we have indicated. However, we find you have failed to demonstrate release of any of the remaining responsive information would interfere with the detection, investigation, or prosecution of crime. Therefore, the county may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

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 information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, the county may withhold the information we have indicated under section 552.108(a)(1) of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand the county to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also

considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the county may not withhold any of the remaining information on that basis.

In summary, to the extent the information at issue is maintained by the county solely on behalf of the judiciary, these records are records of the judiciary and are not subject to the Act. The county may generally withhold the information we have indicated under section 552.107(1) of the Government Code; however, the county may not withhold the marked non-privileged e-mail if it is maintained separate and apart from the otherwise privileged e-mail string in which it appears. With the exception of basic information, the county may withhold the information we have indicated under section 552.108(a)(1) of the Government Code. The county must release the remaining responsive 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,

Paige Lay
Assistant Attorney General
Open Records Division

PL/be

Ref: ID# 847471

Enc. Submitted documents

c: Requestor
(w/o enclosures)