



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 8, 2022

Ms. Jennifer Slack
Assistant District Attorney
Lubbock County
904 Broadway, 2nd Floor
Lubbock, Texas 79401

OR2022-27494

Dear Ms. Slack:

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# 971095 (Ref. No. 21-ORR-0553).

The Lubbock County Medical Examiner's Office (the "medical examiner's office") received two requests from the same requestor for records pertaining to a named individual during a stated period of time. You state the medical examiner's office does not have information responsive to a portion of the present requests.¹ You also state the medical examiner's office has released some information to the requestor. You claim some of the submitted information is not responsive to the present requests. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you assert some of the submitted information is not responsive to the present requests. We note the Act requires a governmental body to make a good-faith effort to relate a request to 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, 534 at 2-3 (1989). Because you have submitted the information at issue for our review and you raise an exception to disclosure of the information at issue, we find the medical examiner's office has made a good-faith effort to submit information that is responsive to the present requests.

¹ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Upon review, we note the information at issue consists of a record pertaining to the individual named in the present requests. Therefore, we find the information at issue is responsive to the instant requests, and we will address your remaining argument against its disclosure.

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. This section encompasses information made confidential by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the medical examiner’s office is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, you indicate, and the information at issue demonstrates, some of the submitted information was used in an investigation by the Lubbock Police Department of alleged or suspected child abuse or neglect. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of section 261.201). Thus, we conclude the information we have indicated is subject to chapter 261 of the Family Code. We note the requestor’s client may be a legal guardian of the child victim listed in the information at issue who is not alleged to have committed the abuse or neglect. However, the medical examiner’s office is not the investigating agency for purposes of section 261.201(k) of the Family Code. *See id.* § 261.201(k). Accordingly, we conclude the medical examiner’s office must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.²

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.

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

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 assert the remaining information consists of privileged communications between Lubbock County attorneys and employees of the medical examiner’s office in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the medical examiner’s office. Further, 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 the information at issue. Accordingly, the medical examiner’s office may withhold the remaining information under section 552.107 of the Government Code.

In summary, the medical examiner’s office must withhold the information we have indicated under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The medical examiner’s office may withhold the remaining information under section 552.107 of the Government Code.

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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jxd

Ref: ID# 971095

Enc. Submitted documents

c: Requestor
(w/o enclosures)