



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-01466

Dear Mr. Swope:

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# 334342.

The Harris County Juvenile Probation Department (the "department") received a request for information related to an employee rating given to the requestor. You state the department has released some of the requested information. You claim some of the submitted information is not responsive to the request. In the alternative, you claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that Exhibit B is not responsive to the request. In part, the request seeks "all documentation/written proof used to justify/support the 3.665 overall employee rating given to me." We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Upon review, we conclude Exhibit B is responsive to the request. Thus, we will address the department's arguments against the disclosure of Exhibit B, as well as the remaining submitted information.

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 confidentiality provisions, such as section 58.007 of the Family Code. Section 58.007 makes confidential the law enforcement records of a juvenile who, on or after September 1, 1997, engaged in delinquent conduct or conduct indicating a need for supervision. *See* Fam. Code § 51.03 (defining "delinquent conduct" and "conduct indicating a need for supervision"). The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Id. § 58.007(c). For purposes of section 58.007, "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). You claim the police report contained in Exhibit B is subject to section 58.007. Upon review of the submitted information, we agree the report at issue identifies a juvenile suspect alleged to have engaged in delinquent conduct that occurred after September 1, 1997. Thus, this report falls within the purview of section 58.007(c) of the Family Code. Since it appears that none of the exceptions to disclosure in section 58.007 apply, we conclude Exhibit B is confidential pursuant to section 58.007(c) of the Family Code and must be withheld in its entirety under section 552.101 of the Government Code.

Next, you raise section 552.107 of the Government Code for Exhibit C. Section 552.107(1) 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. 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 "for the purpose of facilitating 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). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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 explain the letter contained in Exhibit C is a confidential communication between a senior assistant Harris County attorney assigned to provide legal assistance to the department and a department employee. You state the communication was made for the purpose of facilitating the rendition of professional legal service and that the communication was intended to be and has remained confidential. Based on your representations and our review of the information at issue, we conclude Exhibit C consists of a privileged attorney-client communication that the department may withhold under section 552.107 of the Government Code.

In summary, the department must withhold Exhibit B pursuant to section 552.101 of the Government Code in conjunction with section 58.007 of the Family Code. The department may withhold Exhibit C under section 552.107(1) 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 http://www.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Jordan Hale".

Jordan Hale
Assistant Attorney General
Open Records Division

JH/eb

Ref: ID# 334342

Enc. Submitted documents

cc: Requestor
(w/o enclosures)