



January 21, 2015

Ms. Annalisa Davila  
Deputy Director  
West Texas Community Supervision and Corrections Department  
800 East Overland, Suite 100  
El Paso, Texas 79901

OR2015-01110

Dear Ms. Davila:

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# 550776.

The West Texas Community Supervision and Corrections Department (the "department") received a request for all e-mails during a specified time period sent or received by a named individual containing specified key words. You state the department released some information to the requestor. You claim some of the submitted information is not subject to the Act. You further claim the remaining information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the present request because it does not pertain to the specified time period. This ruling does not address the public availability of the non-responsive information, and the department need not release it in response to this request.

You argue the documents labeled Group 1 and Group 4 constitute judicial records not subject to the Act. The Act applies only to information that is "written, produced, collected, assembled, or maintained . . . in connection with the transaction of official business . . . by a governmental body[.]" Gov't Code § 552.002(a)(1). The Act generally requires the disclosure of information maintained by a governmental body. *Id.* A governmental body under the Act "does not include the judiciary." *Id.* § 552.003(1)(B). However, in Open

Records Decision No. 646 (1996), this office 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 the day-to-day management of the department are subject to the Act. ORD 646 at 5; *see also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ) (in determining whether governmental entity falls within judiciary exception, this office looks to whether governmental entity maintains relevant records as agent of judiciary with regard to judicial, as opposed to administrative, functions). In contrast, specific records held by a community supervision and corrections department that concern individuals who are on probation and subject to the direct supervision of a court are not subject to the Act, because such records are held on behalf of the judiciary. ORD 646 at 5. In this instance, you state the responsive information at issue constitutes specific records held by the department that concern individuals who are on probation and subject to the direct supervision of a court. Thus, the documents labeled Group 1 and Group 4 consist of records of the judiciary that are not subject to the Act and need not be released in response to the present request.<sup>1</sup>

Next, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). We note you did not raise section 552.111 of the Government Code by the tenth business day after receiving the request for information. Thus, the department failed to comply with the requirements mandated by subsection 552.301(b) as to its claims under section 552.111 of the Government Code. Generally, if a governmental body fails to timely raise an exception or a privilege, that exception or privilege is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.111 is a discretionary exception to disclosure and may be waived. *See Gov't Code* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, in failing to comply with section 552.301 of the Government Code, the department has waived its arguments under section 552.111 of the Government Code and may not withhold any of the remaining information on this basis. However, we will consider the department's timely-raised arguments for this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 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

---

<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. See 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. See *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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See 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, 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.” See *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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim some of the responsive information consists of communications between the department and the department’s attorney that were made for the purpose of facilitating the rendition of professional legal services to the department. We understand these communications were intended to be confidential 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. Thus, the department may generally withhold the information we have marked under section 552.107(1) of the Government Code.<sup>2</sup> We note some of the privileged e-mail strings we have marked include e-mails received from or sent by an individual you have not demonstrated is a privileged party. If these e-mails are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails we have marked are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this 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 exception encompasses information that other statutes make confidential. Section 76.006(g) of the Government Code provides that “[a] document evaluating the performance of an officer of the department who supervises defendants placed on community supervision is confidential.” *Id.* § 76.006(g). The term “department” in this section “means a community supervision and corrections department established under [chapter 76 of the Government Code].” *Id.* § 76.001(4). You claim some of the remaining responsive information evaluates the performance of officers of the department who supervise defendants placed on community supervision. Upon review, we find none of the remaining responsive information evaluates the performance of an officer of the department. Thus, no portion of the remaining responsive information may be withheld under section 552.101 in conjunction with section 76.006(g).

In summary, the documents labeled Group 1 and Group 4 consist of records of the judiciary that are not subject to the Act and need not be released in response to the present request. The department may withhold the information we have marked under section 552.107(1) of the Government Code; however, the department must release the non-privileged e-mails we have marked if the department maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The department must release the remaining 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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein  
Assistant Attorney General  
Open Records Division

LMD/som

Ref: ID# 550776

Enc. Submitted documents

c: Requestor  
(w/o enclosures)