



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 3, 2015

Ms. Yahitza Nuñez  
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Hays County  
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San Marcos, Texas 78666

OR2015-15888

Dear Ms. Nuñez:

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# 573832 (Ref. No. 15-0335).

The Hays County Sheriff's Office (the "sheriff's office") received a request for (1) the portion of the sheriff's office's policy manual detailing complaints, (2) all information relating to a specified address or the immediate vicinity, and (3) all information relating to a specified case. The sheriff's office states it has released some of the requested information. The sheriff's office claims the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions the sheriff's office claims and reviewed the submitted representative sample of information.<sup>1</sup>

We note the information we have indicated is not responsive to the instant request for information because it pertains to an incident not involving the specified address or its immediate vicinity or the specified case number. This ruling does not address the public

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

availability of non-responsive information, and the sheriff's office is not required to release non-responsive information in response to this request.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). The sheriff's office states the information pertaining to case number C11-41927 relates to a concluded case that did not result in a conviction or deferred adjudication. Based on the sheriff's office's representation, we conclude section 552.108(a)(2) is applicable to the information we have marked. However, the remaining information relating to the incident at issue reflects it was generated as part of an internal investigation conducted by the sheriff's office that was purely administrative in nature. Therefore, we find the sheriff's office has failed to demonstrate the applicability of section 552.108(a)(2) to the remaining information at issue. Accordingly, the sheriff's office may not withhold any of the remaining information at issue under section 552.108(a)(2) of the Government Code.

Section 552.108, however, does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, the sheriff's office may withhold the information we have marked under section 552.108(a)(2) of the Government Code.<sup>2</sup>

Section 552.107(1) of the Government Code 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

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<sup>2</sup>As our ruling is dispositive, we need not address the sheriff's office's remaining arguments against disclosure of this information.

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)(A), (B), (C), (D), (E). 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: (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).

The sheriff’s office states some of the remaining information consists of communications involving the sheriff’s office, Hays County District Attorney’s Office, and the Travis County special prosecution unit, which was collaborating with the sheriff’s office in its investigation. The sheriff’s office states the communications were made for the purpose of facilitating the rendition of professional legal services to the sheriff’s office and these communications have remained confidential. Upon review, we find the sheriff’s office has demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the sheriff’s office may withhold the information we have marked under section 552.107(1) of the Government Code. However, we find the sheriff’s office has not demonstrated any of the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the sheriff’s office may not withhold the remaining information under section 552.107(1).<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive, we need not address the sheriff’s office’s remaining arguments against disclosure of this information.

Section 552.108(b) excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The sheriff’s office states some of the remaining information details tactical procedures the sheriff’s office used during one of the incidents at issue. The sheriff’s office explains revealing the information at issue may endanger officers and interfere with their duties. Upon review, we find the sheriff’s office has demonstrated release of the information we have marked and indicated would interfere with law enforcement. Accordingly, the sheriff’s office may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code. However, the sheriff’s office has failed to demonstrate how the remaining information would interfere with law enforcement. Thus, the sheriff’s office may not withhold the remaining information under section 552.108(b)(1) of the Government Code.<sup>4</sup>

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<sup>4</sup>As our ruling is dispositive, we need not address the sheriff’s office’s remaining argument against disclosure of this information.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); see *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). 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)(1)-(2). 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.*; ORD 677 at 6-8. In order for this office to conclude that 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 . . . 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; ORD 677 at 7. Upon review, we find the sheriff’s office has failed to establish any of the remaining information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the sheriff’s office or representatives of the sheriff’s office. Therefore, the sheriff’s office may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

We note the remaining information contains information subject to sections 552.117, 552.1175, 552.130, and 552.137 of the Government Code.<sup>5</sup> Section 552.117(a)(2) of the

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 and 552.1175 of the Government Code.<sup>6</sup> *See* Gov't Code § 552.117(a)(2). Section 552.117 also protects a peace officer's personal cellular telephone number if a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 670 at 6 (2001) (section 552.117(a)(2) excepts from disclosure peace officer's cellular telephone or pager number if officer pays for cellular telephone or pager service). Accordingly, we find the sheriff's office must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code if a governmental body does not pay for the cellular telephone service.

Section 552.1175 of the Government Code provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, emergency contact information, date of birth, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). The remaining information contains the cellular telephone numbers of peace officers who are employed by another law enforcement agency. Section 552.1175(b) applies to the personal cellular telephone number of an individual who falls within the scope of section 552.1175(a), provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, to the extent the marked cellular telephone numbers pertain to a peace officer who elects to restrict access to his marked information in accordance with section 552.1175(b), the sheriff's office must withhold the marked cellular

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<sup>6</sup>Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

telephone numbers under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service. Conversely, if the officers at issue do not elect to restrict access to their information in accordance with section 552.1175(b) or the cellular telephone service is paid for by a governmental body, the marked telephone numbers may not be withheld under section 552.1175.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a). Upon review, we find the sheriff's office must withhold the discernible license plate numbers in the remaining portions of the submitted video recordings under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Upon review, we find the sheriff's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, with the exception of basic information, which must be released, the sheriff's office may withhold the information we have marked under section 552.108(a)(2) of the Government Code. The sheriff's office (1) may withhold the information we have marked under section 552.107(1) of the Government Code; (2) may withhold the information we have marked and indicated under section 552.108(b)(1) of the Government Code; (3) must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code if a governmental body does not pay for the cellular telephone service; (4) to the extent the marked cellular telephone numbers pertains to a peace officer who elects to restrict access to his marked information in accordance with section 552.1175(b) of the Government Code, must withhold the marked cellular telephone numbers under section 552.1175 of the Government Code if a governmental body does not pay for the cellular telephone service; (5) must withhold the discernible license plate numbers in the remaining portions of the submitted video recordings under section 552.130 of the Government Code; and (6) must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The sheriff's office 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,



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Assistant Attorney General  
Open Records Division

DLW/dls

Ref: ID# 573832

Enc. Submitted documents

c: Requestor  
(w/o enclosures)