



February 25, 2016

Ms. Ann-Marie Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2016-04591

Dear Ms. Sheely:

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# 599542.

The Travis County District Attorney's Office (the "district attorney's office") received a request for copies of all communications or other records pertaining to named individuals and specified terms during a specified time period.¹ You state you will be releasing some information to the requestor. You claim portions of the submitted information are not subject to the Act or, in the alternative, are excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code.² We have also received arguments from an Attorney Pro Tem for the Collin County District Attorney's Office (the "attorney

¹We note the district attorney's office 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); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. See ORD 676 at 1-2.

pro tem”) claiming section 552.108 of the Government Code for portions of the submitted information. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you assert some of the submitted information consists of records held on behalf of a grand jury. The judiciary is expressly excluded from the requirements of the Act. *See id.* § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury’s constructive possession when the same information is also held in the other person’s or entity’s own capacity. Such information, when not produced at the direction of the grand jury, may well be protected under one of the Act’s specific exceptions to disclosure; but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. Upon review, we find the district attorney’s office has failed to demonstrate any portion of the submitted information consists of records of the judiciary. Further, we find the submitted information is held by the district attorney’s office in its own capacity and, therefore, is subject to the Act. *See* Gov’t Code § 552.002 (providing information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is “public information”). Accordingly, we will address the applicability of the Act to the submitted information.

Next, we note some of the requested information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2014-17188 (2014) and 2015-11560 (2015). In Open Records Letter Nos. 2014-17188, we ruled the district attorney’s office must withhold the information at issue under section 552.101 of the Government Code in conjunction with article 581-28 of the Texas Securities Act. In Open Records Letter No. 2015-11560, we ruled (1) portions of the information at issue consist of records of the judiciary not subject to disclosure under the Act; (2) with the exception of basic information, the district attorney’s office may withhold the remaining information under section 552.108(a)(2) of the Government Code; and (3) the district attorney’s office must release the basic information. We note section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to

³We 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.

any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district attorney's office may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. As we have no indication the law, facts, and circumstances on which Open Records Letter Nos. 2014-17188 and 2015-11560 were based have changed, the district attorney's office must continue to rely on those rulings as previous determinations and withhold or release the requested information that is identical to the information previously requested and ruled upon by this office in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). However, we will consider the submitted arguments for the requested information that is not subject to Open Records Letter Nos. 2014-17188 and 2015-11560.

Section 552.108(a)(1) of the Government Code exempts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably 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). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

You inform us some of the submitted information relates to pending criminal investigations and prosecutions of the district attorney's office. Additionally, you inform us some of the remaining submitted information relates to a pending criminal prosecution by the attorney pro tem. Further, we note the attorney pro tem has provided correspondence to this office objecting to release of this information because its release would interfere with the attorney pro tem's pending criminal prosecution. Based on these representations and our review, we find 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, the district attorney's office may withhold the information at issue, which we have marked, under section 552.108(a)(1) of the Government Code, portions of which are on behalf of the attorney pro tem.⁴

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* 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 has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information you marked pertains to concluded investigations that did not result in convictions or deferred adjudications. Based on your representations and our review, we agree the district attorney's office may withhold the information you marked under section 552.108(a)(2) of the Government Code.⁵

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 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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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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 claim the information you marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys and staff for the district attorney’s office. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district attorney’s office. You further state 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 district attorney’s office may withhold the information you marked under section 552.107(1) of the Government Code.

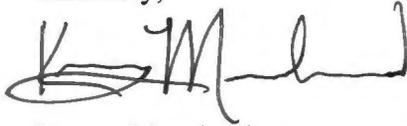
In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the district attorney’s office must continue to rely on Open Records Letter Nos. 2014-17188 and 2015-11560 as previous determinations and withhold or release the identical information in accordance with those rulings. The district attorney’s office may withhold the information we have marked under section 552.108(a)(1) of the Government Code, portions of which are on behalf of the attorney pro tem. The district attorney’s office may withhold the information you marked under section 552.108(a)(2) of the Government Code. The district attorney’s office may withhold the information you marked under section 552.107(1) of the Government Code. The district attorney’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, 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,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', with a stylized flourish at the end.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/sdk

Ref: ID# 599542

Enc. Submitted documents

c: Requestor
(w/o enclosures)