



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 16, 2003

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County Attorney
500 E. San Antonio, Room 503
El Paso, Texas 79901

OR2003-4936

Dear Ms. Lytle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184344.

The Office of the El Paso County Attorney (the "county attorney") received a request for certain information related to a particular protective order and to the requestor. You advise that most of the requested information has been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," which includes information made confidential by other statutes. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007 of the Family Code. 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.

Police report number 97-324049 involves juvenile conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007 apply; therefore, this information is confidential pursuant to section 58.007(c) of the Family Code. You must withhold report number 97-324049 from disclosure in its entirety under section 552.101 of the Government Code.

We now address your claim under section 552.108 of the Government Code in relation to the remaining submitted police reports. Section 552.108 provides, in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

....

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication

A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You inform this office that the information at issue pertains to criminal investigations that were either not referred for prosecution or were ultimately dismissed or declined. Therefore, you explain, none of these investigations resulted in conviction or deferred adjudication. Based on your representations, we find that section 552.108(a)(2) is applicable to these reports.

However, section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company 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 also Open Records Decision

No. 127 at 3-4 (1976) (summarizing the types of information deemed public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released in relation to each of the reports at issue, the county attorney may withhold the information pertaining to the police reports at issue under section 552.108(a)(2).

You claim that the remaining submitted information is excepted under section 552.107. 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 “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 Texas 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 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 advise that the information submitted as Attachment E consists of and reflects communications transmitted between an Assistant County Attorney and an applicant for a protective order. You state that in El Paso County, the County Attorney’s Office files an application for a protective order on behalf of an applicant. *See Fam. Code* § 81.007(a) (county attorney or criminal district attorney is prosecuting attorney responsible for filing

protective order applications); *see also* Attorney General Opinion JC-0439 at 7 (2001) (section 81.007 of Family Code makes county or district attorney's office responsible to file for county residents applications for protective orders in situations involving family violence). You explain that the Assistant County Attorney forms an attorney-client relationship with an applicant for a protective order, and you indicate that the information communicated is intended to be held in confidence. *See* Tex. R. Evid. 503(a)(1) ("client" includes person who is rendered professional legal services by lawyer, or who consults lawyer with view to obtaining professional legal services from that lawyer); *see also* Fam. Code § 81.0075 (prosecuting attorney who *represents* party in protective order proceeding may represent Department of Protective and Regulatory Services in subsequent action involving party); *id.* § 81.002 (applicant for protective order or attorney *representing* applicant may not be assessed fee, cost, charge, or expense in connection with filing, serving, or entering of a protective order). Upon review of your arguments and the submitted information, we conclude that the forms completed by the applicant in Attachment E are protected by the attorney-client privilege, and thus, may be withheld under section 552.107. However, we find that the remaining information in Attachment E does not reflect privileged attorney-client communications. Consequently, this information may not be withheld under section 552.107.

Therefore, with respect to the remaining information in Attachment E, we address your assertion of the attorney work product privilege as encompassed by section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.*

You explain that the attorney preparation sheet in Attachment E contains information that the Assistant County Attorney obtained from the protective order applicant and reflects the attorney's thought processes on how to handle the case. Further, the information you provided reflects that the attorney did in fact seek a protective order on behalf of the applicant. Based on your arguments and the relevant information, we find that the

information at issue was created in anticipation of litigation, and that the information reveals the mental processes, conclusions, and legal theories of the attorney. Accordingly, we conclude the county attorney may withhold the attorney preparation sheet under the work product privilege of section 552.111 of the Government Code.

In summary, the county attorney must withhold police report number 97-324049 in its entirety under section 552.101 in conjunction with section 58.007 of the Family Code. The remaining submitted police reports may be withheld under section 552.108, except that basic information must be released in relation to each of these reports. The forms completed by the applicant in Attachment E may be withheld under section 552.107, and the attorney preparation sheet in Attachment E may be withheld under section 552.111.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

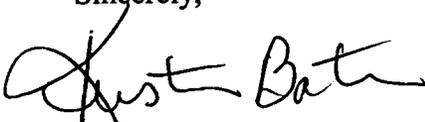
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Kristin Bates". The signature is written in a cursive, flowing style.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 184344

Enc. Submitted documents

c: Mr. Gerald M. Smola
7504 Parkland Drive
El Paso, Texas 79925
(w/o enclosures)