



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2010

Ms. Michelle Tapia
Assistant District Attorney
Dallas County District Attorney's Office
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2010-14954

Dear Ms. Tapia:

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# 396611.

The Dallas County District Attorney's Office (the "district attorney") received three requests from the same requestor for: (1) information pertaining to illegal or undocumented workers turned over to United States Immigration and Customs Enforcement over the last three years; (2) information pertaining to individuals convicted in Dallas County who have been exonerated and released from prison over a specified time period; (3) a copy of the Annual Statistics Report for the district attorney over a specified time period; (4) a list of all acquittals and "not guilty" verdicts during the tenure of a named district attorney; (5) information pertaining to the named district attorney's travel, entertainment, and food expenses; (6) record of calls sent or received on a phone provided to the named district attorney by Dallas County; (7) documents kept by a claims investigator pertaining to the named district attorney and damage to county cars; and (8) a list of websites accessed by the named district attorney on any Dallas County computer. You state the district attorney is in the process of releasing some of the information requested. You also state the district attorney has received a clarification from the requestor withdrawing his request for several categories of information and, therefore, the district attorney is withdrawing the portion of its request for a ruling that pertains the information the requestor no longer seeks.¹ You claim portions of the submitted information are excepted from disclosure under

¹We note that, as a result of the district attorney's partial withdrawal, the submitted information we have marked is not responsive to the present request for information. The district attorney need not release nonresponsive information in response to this request, and this ruling will not address it.

sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by other statutes. Gov’t Code § 552.101. Section 552.101 encompasses chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Id. art. 55.04, § 1. This office has previously determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You inform us the information you

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

have marked is subject to expunction orders and, thus, confidential under article 55.03 of the Code of Criminal Procedure. However, you have not submitted the expunction orders for our review. Accordingly, to the extent that the marked information is related to arrests or convictions that are the subject of a final order of expunction, the district attorney must withhold the marked information under section 552.101 of the Government Code in conjunction with article 55.03.

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 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). 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(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 pet.). 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 responsive communications are protected by the attorney-client privilege. You state the information at issue consists of communications between and among district attorney staff and employees that were made in furtherance of the rendition of professional legal services to the district attorney. You also state the communications were made in

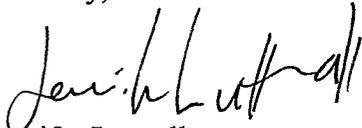
confidence, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the responsive communications. Thus, the district attorney may withhold this information under section 552.107 of the Government Code.³

In summary, to the extent that the marked information is related to arrests or convictions that are the subject of a final order of expunction, the district attorney must withhold the marked information under section 552.101 of the Government Code in conjunction with article 55.03 of the Code of Criminal Procedure. The district attorney may withhold the responsive communications under section 552.107 of the Government Code. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 396611

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As our ruling on this information is dispositive, we need not address your remaining argument against disclosure.