

Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 22-005

RESPONDENT: Office of Court Administration

DATE: July 1, 2022

SPECIAL COMMITTEE: Judge Stephen B. Ables, Chair; Judge Susan Brown; Judge Billy Ray Stubblefield; Judge Dean Rucker; Judge Ana Estevez

In December 2021, Petitioner requested from Respondent information, including letters, memos, emails, and texts, related to certain named individuals as well as the estate, guardianship, and probate of one of the named individuals. Petitioner also requested six other categories of records and Respondent informed Petitioner that the request was overly broad. Respondent withheld certain records and informed Petitioner that no action would be taken on the remaining items until it received clarification from Petitioner on what was sought. Petitioner then filed an appeal for access to the withheld record. Certain documents from that request became the focus of Rule 12 Decision No. 22-001. On March 18, 2022, Petitioner attempted to revise and narrow the outstanding categories of records from the December request that Respondent designated as overly broad. The revised request divided records into four categories. Three of these categories (Parts B-1, B-2, and B-3) collectively contain over 40 sub-requests related to information held by the Guardianship Abuse, Fraud, and Exploitation Deterrence Program (GAFEDP) and various divisions of the Office of Court Administration (OCA); the remaining category (Part A) seeks “any items not yet produced but requested” from the December 2021 request. Respondent, in its reply to Petitioner, noted it had disclosed all records responsive to Part A and that there were no additional responsive records to this portion of the request. Respondent’s answers to Parts B-1, B-2, and B-3 vary by the request, but at bottom did not provide any documents to Petitioner. In summary, Respondent indicated it did not have documents responsive to some requests or had previously disclosed documents responsive to some requests, stated it could not ascertain what was being sought in some requests without clarification, and denied access to documents responsive to certain requests because the documents were exempt from disclosure under Rule 12.5. Petitioner then filed a petition for review. Respondent did not submit a reply to Petitioner’s petition nor submitted documents identified as exempt to the special committee for invited *in camera* review. For ease of navigation, this opinion analyzes Petitioner’s requests and Respondent’s answers to the requests under the Petitioner’s Part B-1, B-2, and B-3 rubric.

Part B-1 Records

Part B-1 of Petitioner’s request contains 25 sub-requests “[n]ot limited to any certain subjects but inclusive of any existing records on any subject” as identified by Petitioner. These subjects cover various GAFEDP records, correspondence with certain judges, certain guardianship records and related complaints, correspondence with or between OCA staff, and complaints related to OCA staff. In response to items:

- B-1, 1.a – 1.g, Respondent stated the records sought were exempt from disclosure under Rule 12.5(j) as judicial records relating to litigation or settlement negotiations, and that records responsive to the request had previously been disclosed under the December 2021 request;
- B-1, 2 – 10, Respondent stated the records sought were exempt from disclosure under Rule 12.5(j) as judicial records relating to litigation or settlement negotiations;
- B-1, 11 – 13, Respondent declared the request overbroad and requested Petitioner narrow or restrict the request or otherwise clarify the request because it was vague;
- B-1, 14 – 15, Respondent stated the records sought were exempt from disclosure under Rule 12.5(j) as judicial records relating to litigation or settlement negotiations;
- B-1, 16, Respondent stated the records sought were exempt from disclosure because they were adjudicative records, not judicial records, and that the records are exempt from disclosure under Rule 12.5(i) as lawyer-client privileged information; and
- B-1, 17 – 19, Respondent stated the March request restated parts of the December request without clarification or restriction, were overbroad, and could not be responded to without clarification to focus and narrow the request. In a separate part of Respondent’s answer to Petitioner, Respondent indicated it had previously disclosed documents responsive to item B-1, 18.

We first separate out items B-1, 11 – 13, 17, and 19. Respondent declared these items overbroad and immune to resolution without narrowing, restriction, or clarification. A petition for review must contain a copy of the request and the records custodian’s notice of denial of the request. Rule 12.9(b). Materials submitted with the petition do not indicate that Petitioner narrowed, restricted, or clarified these requests to thereby permit Respondent to respond to the requests. Petitioner’s petition on these items thus remains unripe for review and we do not consider them in this appeal.

We next address item B-1, 18. On its face, request items B-1, 17 – 19 would include item B-1, 18, and logically Respondent’s “overbroad” label would apply to item B-1, 18. However, Respondent’s reply to Petitioner’s request also suggests Respondent previously disclosed records responsive to item B-1, 18. Because Respondent did not submit a reply in response to Petitioner’s petition for review and there is tension between Respondent’s replies on B-1, 17 – 19 generally and B-1, 18 specifically, we consider item B-1, 18 unripe and leave it unaddressed here.

For items B-1, 1.a – 1.g, 2 – 10, and 14 – 15, Respondent stated the records sought were exempt from disclosure under Rule 12’s “litigation exemption.” Respondent also informed Petitioner that it had previously disclosed records responsive to items B-1, 1.a. – 1.g in response to Petitioner’s December request. Rule 12.5(j) reads as follows:

Any judicial record relating to civil or criminal litigation or settlement negotiations: (1) *in which a court or judicial agency is or may be a party*; or (2) in which a judicial officer or member of a judicial agency is or may be a party as a consequence of the person’s office or employment. (emphasis added)

In its reply to Petitioner’s March request, Respondent informed Petitioner that it had discovered — after it had made initial disclosures relating to the requests in the December request — that many of the sought-after records related to cases involving various judges as parties in recent or pending

litigation. Respondent named in its reply to Petitioner specific lawsuits allegedly tied to the requested records. Respondent's litigation exemption claim in the instant petition appears to present a novel issue for our consideration not previously covered by our Rule 12 opinions — namely whether Rule 12's litigation exemption, without scrutiny, applies where the Respondent is *not* clearly a party to or involved in the underlying litigation relied upon for the exemption claim.

When our prior opinions are silent on pertinent Rule 12 issues, we frequently examine the Public Information Act (PIA) and its interpretation in guiding our decision on those issues. Like Rule 12, the PIA contains a litigation exception provision. Gov't Code §552.103(a). In interpreting the PIA, Texas Supreme Court caselaw holds that “a party seeking to withhold requested information bears the burden of proving that the information is not subject to disclosure under the [PIA].” *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (citing *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App. – Austin 2002, no pet.), which held that it was the local sheriff's burden to prove the PIA's litigation exception permitted the records withholding at issue and, that where no evidence was provided to prove the exception's application, the trial court did not err in concluding the requested information was not subject to the exception). Applied to the instant case, then, we find that Respondent bears the burden of proving that the information is not subject to disclosure under the litigation exemption. Because Respondent has not carried this burden, we conditionally grant Petitioner access to items B-1, 1.a – 1.g¹, 2 – 10, and 14 – 15. We grant Respondent 14 days leave from the date of this decision to submit to the special committee the items withheld from Petitioner for our *in camera* review, along with a written response detailing why the items are exempt from disclosure under Rule 12.5(j). Should Respondent not submit the items and its written response within the timeframe listed above, it must release the withheld items to Petitioner.

Finally, for item B-1, 16, Respondent replied to Petitioner that the record sought referenced a communication made to the General Counsel of OCA related to matters pending in court, placing the record outside the scope of Rule 12. Respondent also wrote that item B-1, 16 was exempt from disclosure as a privileged lawyer-client communication. The threshold issue in a Rule 12 appeal is whether a requested record is a “judicial record,” which is defined by Rule 12.2(d):

Judicial Record means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its *adjudicative function*, regardless of whether that function relates to a specific case. A record of any nature *created, produced, or filed* in connection with any matter than is or has been before a court is not a judicial record. (emphasis added)

In this case, a record can slip outside Rule 12's scope by pertaining to a judicial agency's adjudicative function or by being created, produced, or filed in connection to a matter before a court. Respondent, in its answer to Petitioner's request, informed Petitioner that many of the records sought in the request *related to* various lawsuits. This ostensibly included item B-1, 16, which Respondent claimed “was made to the General Counsel of [OCA] relating to matters pending in court.” Based on the terms of Rule 12.5(d), however, that a requested record “relates to” matters pending before a court does not axiomatically push it outside of Rule 12's purview. Here the record still must fall outside Rule 12 based on its status as an adjudicative record (“pertaining to its adjudicative function”) or because it is a case record (“created, produced, or filed in connection with any matter . . . before a court”). Without being able to review the communication at issue in item B-1,16, we cannot determine whether or how the record “pertains to [OCA's] adjudicative function” or is

¹ We were unable to discern from the Respondent's reply to the request whether all responsive records requested in items B-1, 1.a – 1.g had been provided to Petitioner. To the extent that any responsive records do exist that were not previously provided to Petitioner, we grant conditional access to those.

otherwise a record “created, produced, or filed in connection with any matter that is or has been before a court,” nor can we assess whether Respondent’s privilege exemption applies. We thus conditionally grant Petitioner access to item B-1, 16. We grant Respondent 14 days leave from the date of this decision to submit to the special committee the item withheld from Petitioner for our *in camera* review, along with a written response detailing why the item is not a judicial record and, alternatively, if it is, why it should be exempt from disclosure. Should Respondent not submit the item and its written response within the timeframe listed above, it must release the withheld item to Petitioner.

Part B-2 Records

Part B-2 of Petitioner’s request contains 4 sub-requests covering “[a]ll records regarding any complaints, grievances, reprimands, corrections, including any accusations of any of these (inclusive of all), concerning OCA, including but not limited to” the following:

- “All regarding performance of OCA and any of its Representatives (inclusive of all) covering the items referenced in in [sic] B-2 above.”
- “All between OCA and any Texas legislator, legislator Representative or legislative committee (inclusive of all) covering the items referenced in B-2 above.”
- “All between OCA and any representative of the Texas Governor’s office covering the items referenced in B-2 above.”
- “All regarding any dismissal or resignation of any OCA Representative if based on any item referred to To [sic] B-2 above.”

In response to the B-2 requests, Respondent replied to Petition that the March request restated parts of the December request without clarification or restriction, were overbroad, and could not be responded to without clarification to focus and narrow the request. Respondent further elaborated that the terms used in the request were open to interpretation. Respondent requested that Petitioner narrow the request to more specifically identify the records sought.

As we noted above, a petition for review must contain a copy of the request and the records custodian’s notice of denial of the request. Rule 12.9(b). Materials submitted with the petition do not indicate that Petitioner narrowed, restricted, or clarified this request to thereby permit Respondent to respond to the requests. Petitioner’s petition on these items thus remains unripe for review and we do not consider them in this appeal.

Part B-3 Records

Part B-3 of Petitioner’s request contains 18 sub-requests covering GAFEDP audits, certain wards, the Petitioner, various estates, and any court overseeing matters related to the subjects listed by Petitioner “limited to these matters unless a different subject is specifically noted” by Petitioner. In response to items:

- B-3, 1 – 12, Respondent stated the records sought were exempt from disclosure under Rule 12.5(j) as judicial records relating to litigation or settlement negotiations;
- B-3, 13, Respondent stated records responsive to the request were previously disclosed to Petitioner;
- B-3, 14, Respondent answered that there were no records responsive to the request;

- B-3, 15 – 17, Respondent stated that the records sought by Petitioner could not be ascertained, as Petitioner’s requested documents flowed from cross-referenced topics in a non-existent section of the request letter; and
- B-3, 18, Respondent stated records responsive to the request were previously disclosed to Petitioner.

We first consider item B-3, 14. Here, Respondent informed the Petitioner that it does not have any documents responsive to Petitioner’s request. There being no records responsive to the request, the appeal on this item is denied.

We next take up items B-3, 13 and 18. Here, Respondent informed Petitioner that it had previously disclosed records responsive to Petitioner’s request. Rule 12 does not require a records custodian to create documents in response to a request. See Rule 12.4(a)(1), Rule 12 Decision Nos. 19-018, 18-001, and 16-012. Respondent has no further obligation regarding these request items.

We next consider items B-3, 15 – 17. In its reply to Petitioner, Respondent alerted Petitioner that the documents sought were tethered to a non-existent section in the letter referenced by the Petitioner and therefore could not be ascertained. Materials submitted with the petition do not indicate that Petitioner clarified these requests to thereby permit Respondent to respond to the requests. Petitioner’s petition on these items thus remains unripe for review and we do not consider them in this appeal.

Finally, we review items B-3, 1 – 12. Similar to its response for the records requested in Part B-1 of Petitioner’s letter, Respondent stated that the records sought were exempt from disclosure because the records related to litigation or settlement negotiations in which a court or judicial agency is or may be a party. Respondent did not provide the special committee with any additional information related to its exemption claim, and therefore our analysis of items B-1, 1.a – 1.g, 2 – 10, and 14 – 15, above, applies to items B-3, 1 – 12. As we did with the applicable B-1 items, we conditionally grant Petitioner access to items B-3, 1 – 12. We grant Respondent 14 days leave from the date of this decision to submit to the special committee the items withheld from Petitioner for our *in camera* review, along with a written response detailing why the items are exempt from disclosure under Rule 12.5(j). Should Respondent not submit the items and its written response within the timeframe listed above, it must release the withheld items to Petitioner.

In conclusion, then, and for the reasons stated above, for items:

- B-1, 1.a – 1.g, to the extent any records remain that were not previously provided to Petitioner, we conditionally grant Petitioner access to these items; Respondent has 14 days from the date of this opinion to submit the items plus a written response to the special committee for review; alternatively, it must release the items;
- B-1, 2 – 10, we conditionally grant Petitioner access to these items; Respondent has 14 days from the date of this opinion to submit the items plus a written response to the special committee for review; alternatively, it must release the items;
- B-1, 11 – 13, the items remain unripe for review and are not considered in this appeal;
- B-1, 14 – 15, we conditionally grant Petitioner access to these items; Respondent has 14 days from the date of this opinion to submit the items plus a written response to the special committee for review; alternatively, it must release the items;

- B-1, 16, we conditionally grant Petitioner access to the item; Respondent has 14 days from the date of this opinion to submit the item to the special committee for review; alternatively, it must release the item;
- B-1, 17 – 19, the items remain unripe for review and are not considered in this appeal;
- B-2, the items remain unripe for review and are not considered in this appeal;
- B-3, 1 – 12, we conditionally grant Petitioner access to these items; Respondent has 14 days from the date of this opinion to submit the items plus a written response to the special committee for review; alternatively, it must release the items;
- B-3, 13, Respondent has no further obligation regarding these request items;
- B-3, 14, the appeal on this item is denied;
- B-3, 15 – 17, these items remain unripe for review and are not considered in this appeal; and
- B-3, 18, Respondent has no further obligation regarding this request item.