

Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 17-026

RESPONDENT: Bexar County Community Supervision and Corrections Department

DATE: January 29, 2018

SPECIAL COMMITTEE: Judge Stephen B. Ables, Chair; Judge Mary Murphy; Judge Dean Rucker; Judge David L. Evans; Judge Kelly G. Moore

Petitioner requested from Respondent the following information:

- 1) “the specific date in April 2017, where ‘During the first week of April’ was used to allege” Petitioner’s solicitation of one of the residents;
- 2) “incident reports from 6/15/17 and 6/27/17 used against” Petitioner in the investigation;
- 3) “statements from all individuals, (employees and residents), who were questioned during the investigation.”

Respondent informed Petitioner that it did not have any information responsive to request number 1, provided some of the records responsive to requests number 2 and number 3, and denied access to some of the records responsive to requests number 2 and number 3. Petitioner then filed this appeal.

In its response, Respondent explains that it has no records responsive to request number 1. Rule 12 does not require records custodians to create records to respond to requests. Accordingly, we sustain the denial of request number 1.

Respondent denied access to one of the records responsive to request number 2 asserting that it was not subject to Rule 12 because it is a probationer infraction report and constitutes a part of the probationer’s file. We have previously concluded that records related to a probationer that are in a probationer’s case file maintained by a probation officer are records that are created, produced or filed in connection with criminal cases that have been before the court which placed the probationer under community supervision and are not subject to Rule 12. *See* Rule 12 Decisions No. 16-016 and No. 00-003. We have reviewed the responsive document provided to us for our *in camera* review and agree with Respondent’s assertion that is not a judicial record as defined by Rule 12; therefore, we are without authority to grant petitioner access or sustain the denial of access to the requested record.¹

¹ We note, however, that case records or court records that are not “judicial records” within the meaning of Rule 12 may be open pursuant to other law and to other process, such as the common-law right to public access and mandamus. *See* Rule 12 Decisions 00-001 and 00-003. The primary significance of a Rule 12 decision finding that a record is not subject to Rule 12 is that the Rule 12 procedures for responding to requests and appealing the denial of requests do not apply. Neither the fact that a record is not subject to Rule 12 nor a decision making this

Respondent asserts that the records it withheld that are responsive to Petitioner's request number 3 for statements from individuals who were questioned during the investigation are exempt from disclosure under Rule 12.5(k) because their release would interfere with the investigation into Petitioner's conduct.

Rule 12.5(k) exempts from disclosure "any record relating to an investigation of any person's character or conduct, unless: (1) the record is requested by the person being investigated; and (2) release of the record, in the judgment of the records custodian, would not impair the investigation." The records at issue in this appeal concern the investigation of Petitioner's conduct. Thus, Respondent should not deny Petitioner's request unless, in the judgment of the records custodian, releasing the records would impair Respondent's investigation.

Respondent explains that its policies allow the chief probation officer ten days after an appeal hearing to conduct further investigation, if necessary, before providing the employee with a Final Notice of Adverse Action. Respondent also states that in nearly all cases the chief probation officer conducts additional interviews or orders the director of human resources to conduct additional analysis and, in some instances, orders a new investigation. Respondent argues that releasing the responsive information would impair its ability to conduct this additional investigation because of testimony received during the investigation that indicated the Petitioner was attempting to interfere with the investigation.

We have reviewed the responsive records provided by Respondent and agree that their release could interfere with an investigation ongoing at the time of the request. Accordingly, Respondent's denial of access to the records responsive to Petitioner's request number 3 is sustained. Having found that the records are exempt under Rule 12.5(k), we need not address whether they are exempt under Rule 12.5(j).