

Before the Presiding Judges of the Administrative Judicial Regions

Per Curiam Rule 12 Decision

APPEAL NO.: 23-012

RESPONDENT: Presiding Judge, 407th Civil District Court, Bexar County

DATE: November 16, 2023

SPECIAL COMMITTEE: Judge Stephen Ables, Chair; Judge Ray Wheless; Judge Dib Waldrip; Judge Ben Woodward; Judge Alfonso Charles

Petitioner requested from Respondent the following:

- “All emails, texts, or other communications which were sent or received by you relating to [a certain case] which were not filed in the case, or relating to me [Petitioner] personally, including on your personal cellphone. Please search on [certain names] and ‘csc’ between the dates of March 5th and August 7th, 2023[;]: and
- “Your application for judgeship, resume, background investigation, evaluation of character and fitness, and any biographical information used in connection with your election to the bench.”

Respondent informed Petitioner that general administrative counsel for the Bexar County Office of Civil District Courts Administration (“General Counsel”) would provide Petitioner with a response to the request. General Counsel then wrote Petitioner that the first category of records related to a specific case and therefore were not subject to disclosure under Rule 12. Nonetheless, General Counsel disclosed certain relevant records to Petitioner despite their status as case records under Rule 12. The disclosure did not, however, contain certain communications between General Counsel and Respondent on the grounds that the communications were privileged. Moreover, General Counsel wrote, the substance of the communications was also part of the adjudicative process and thus not subject to disclosure under Rule 12. With regard to the second category of records, General Counsel informed Petitioner that Respondent did not have judicial records responsive to the request. General Counsel also claimed that “records regarding investigations of character and conduct and personal information regarding [Respondent’s] family members” were exempt from production under Rule 12 and that campaign materials were not part of Respondent’s judicial records and were not subject to disclosure under Rule 12.

Following the limited withholding and denial of access to the records, Petitioner and General Counsel exchanged additional messages¹ on the precise nature of the communications sought by Petitioner. Included in these messages was Petitioner’s request for a privilege log related to withheld communications. In a subsequent reply, General Counsel noted that he did not believe

¹ Petitioner submitted records requests to multiple judges in the Bexar County system, and General Counsel has overseen responses for respondent replies. Materials submitted in this appeal overlap with other requests submitted by Petitioner.

Rule 12 required a privilege log, but he produced a list of dates of communications withheld as attorney-client privileged. General Counsel declined to elaborate on the substance of the withheld communications.

Petitioner timely appealed the original denial of access and contested several grounds relied on by Respondent for the withholding of documents ostensibly responsive to its requests. Petitioner disagreed that Respondent, as custodian of the requested records, could delegate to General Counsel its responses to Petitioner. Petitioner alleged that there was a conflict of interest in General Counsel (as counsel for the office of civil district courts administration) advising Respondent (the custodian of the records) on the withholding of documents and asserting a privilege claim against disclosure. As its complaint relates to the actual records, Petitioner complained that General Counsel had failed to produce: (1) a privilege log; (2) texts from Respondent's personal cellphone and messages from Respondent's personal email account; and (3) evidence of Respondent's educational qualifications. In a response to the petition, General Counsel provided to the special committee documents withheld under the lawyer-client privilege for *in camera* review.

We first address Petitioner's complaint regarding Respondent's use of counsel in its responses to the records request. Respondent looped General Counsel into its reply process very shortly after receiving the request, and General Counsel took the lead in communicating with Petitioner about request matters. Petitioner suggested Respondent could not "delegate" its replies to General Counsel and contended that the use of General Counsel created a conflict of interest in advising Respondent. We disagree with Petitioner's assertions, as representation by counsel is not required by nor prohibited by Rule 12 and the use of counsel by a respondent does not change the custodianship of records, which is set by Rule 12.2(e). In examining Rule 12, we find that nothing in the text of the rule demands or prohibits the use of counsel by either a petitioner or a respondent, and we will not read a requirement or limitation into Rule 12. Under Rule 12.2(e)(1), "[t]he judicial records of a court with only one judge, such as any trial court, are in the custody of that judge." The 407th Civil District Court is just this sort of court, and no amount of assistance by General Counsel to Respondent can dislodge custodianship. And to the extent Respondent relied on General Counsel to coordinate and advise on responses to a Rule 12 request, we disagree a conflict of interest is created by the relationship. Petitioner's appeal on these points is denied.

Next, we briefly consider Petitioner's privilege log request. Rule 12 is not a litigation mechanism, and Rule 12 does not operate like rules governing the litigation process. Rule 12 does not contain a privilege log requirement, and we will not read one into it. Additionally, Rule 12.4(a)(1) specifically states that Rule 12 does not require Respondents to create a record in response to a request. Petitioner's appeal on this point is denied.

We next consider the withheld search-term responsive emails and texts. In its reply to the petition, Respondent informed Petitioner that the sought records related to a specific case and were therefore not judicial records subject to disclosure under Rule 12. Despite their non-judicial record status, Respondent disclosed the responsive records other than those subject to attorney-client privilege. Respondent provided *sua sponte* the withheld documents for the special committee's *in camera* review. In reviewing the *in camera* materials, we conclude that some of the records are related to a case before a court and not subject to Rule 12 and the remainder are lawyer-client

communications that are privileged under Rule 503 of the Texas Rules of Evidence. Rule 12 does not apply to records that are subject to a rule of evidence. Rule 12.3(a)(1)(c). *See also* Rule 12 Decs. No. 08-006, 22-001, and 22-007. Where Rule 12 does not apply to a record, the special committee is without authority to grant a petition or sustain denial of access to the record.

Finally, we consider the withheld educational credential records sought by Petitioner. This issue is similar to one discussed in Rule 12 Decision No. 19-005. There the petitioner requested records maintained in a personnel file such as university transcripts and a high school diploma. The panel concluded that these records were presumptively subject to disclosure under Rule 12, subject to reviewable exemption claims. In the instant appeal we are unable to determine, from General Counsel's response, whether the requested educational credential record is in fact maintained by Respondent or Respondent's court as a judicial record. If it is being maintained by Respondent or Respondent's court, for example as part of a personnel file, then this record is a judicial record subject to Rule 12 and should be released unless subject to an exemption under Rule 12. If such record exists, and Respondent believes the record contains information that is exempt from disclosure under Rule 12.9, we give Respondent leave to submit the record to us for our inspection within 10 days of the date of this decision.

In sum: Petitioner's appeals on Respondent's use of counsel and the privilege log are denied, the special committee is without authority to grant the petition or sustain denial of access to the petition on the search-term responsive emails and texts, and the withheld educational credentials — if maintained by the Respondent as a judicial record — are presumptively disclosable under Rule 12. Respondent must either release the educational credential or submit the record to the special committee for its review within the timeframe provided by this decision.