



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 31, 2003

Mr. Michael Wied
Office of Project Finance and Construction Assistance
Texas Water Development Board
1700 North Congress Avenue
Austin, Texas 78711-3231

OR2003-2159

Dear Mr. Wied:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178576.

The Texas Water Development Board (the "board") received three requests from the same requestor for (1) information related to a specific loan application submitted by a named individual for Northridge Acres Water Supply Corporation, (2) information related to any other loan application submitted by the same named individual, and (3) information related to a specific phone survey conducted on December 7, 2002. You state that you have released some information to the requestor. However, you ask whether you may rely on prior rulings issued by our office with respect to some information and claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

You ask whether you may rely on Open Records Letter Nos. 99-2087 (1999) and 99-3173 (1999) as previous determinations to withhold the information you have not yet released from the phone survey. In Open Records Decision No. 673 (2001), we set forth the circumstances under which, pursuant to section 552.301(a) of the Government Code, a governmental body could rely on a ruling from this office as a previous determination. Open

¹We 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.

Records Decision No. 673 clarified the two types of previous determinations. The first type of previous determination exists where the requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling was addressed to the same governmental body, the ruling concluded that the information is or is not excepted from disclosure and the facts, circumstances, and law on which the prior ruling was based have not changed. The second type is an attorney general decision that explicitly grants a governmental body or class of governmental bodies a previous determination that, if certain conditions are met, may be relied upon to withhold information in response to subsequent requests for the same type of information without seeking an attorney general's ruling.

In this case, we do not have the precise information before us that was ruled upon in Open Records Letter Nos. 1999-2087 and 1999-3173, and therefore, the first type of previous determination is inapplicable in this instance. Further, as neither Open Records Letter No. 1999-2087 nor Open Records Letter No. 1999-3173 explicitly provide that the governmental body or bodies to which the decisions apply may withhold the type of information at issue without the necessity of again seeking a decision from this office, we conclude that the criteria for a previous determination of the second type was not met in these prior rulings. Therefore, as Open Records Letter Nos. 99-2087 and 99-3173 do not constitute a previous determination of either the first or second type as set forth in Open Records Decision No. 673, the board may not rely on them as previous determinations to withhold the information in the phone surveys that was requested in this case.

You further argue that personal financial information contained in the phone surveys is excepted by section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has concluded that financial information concerning an individual is in some instances protected by a common law right to privacy. See Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that "all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 at 3 (1983). We have marked the personal financial information that you must withhold under section 552.101 and common-law privacy.

We now turn to your argument that documents four through fourteen are protected by section 552.107 of the Government Code. 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 assert that the information at issue consists of communications between privileged parties for the purpose of rendering professional legal services. You further state that these communications were intended to be confidential. Based on your representations and our review of the submitted information, we agree that the board may withhold documents four through fourteen under section 552.107(1).

In summary, you must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy. You may withhold documents four through fourteen under section 552.107.

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).

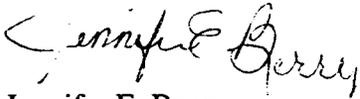
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 cursive script that reads "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 178576

Enc: Submitted documents

c: Ms. Nettie Brown
Northridge Acres HOA
3805 Prairie Lane
Austin, Texas 78728
(w/o enclosures)