



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 17, 2004

Ms. Trinidad Galdean  
Adams & Graham, L.L.P.  
P.O. Drawer 1429  
Harlingen, Texas 78551

OR2004-7972

Dear Ms. Galdean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209582.

The Cameron Appraisal District (the "district"), which you represent, received a request for information concerning allegations of sexual harassment against a former employee of the district and a lawsuit filed against the district. You advise that the requestor clarified the request, and you have submitted a copy of the requestor's written clarification. *See* Gov't Code § 552.222 (governmental body may ask requestor to clarify request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999)(discussing requests for clarification). You claim that the information at issue is excepted from disclosure under section 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

As a preliminary matter, you advise that the information you have submitted as Exhibit 3 is identical to the information that was the subject of a prior ruling of this office, issued as Open Records Letter No. 2004-5433 (2004) on July 2, 2004. *See* Open Records Decision

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<sup>1</sup> We 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.

No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act (the "Act"); and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). Because the records you have submitted as Exhibit 3 are precisely the same the records at issue in Open Records Letter No. 2004-5433 and you do not indicate that the pertinent facts and circumstances have changed, we determine that the district may rely on Open Records Letter No. 2004-5433 as a previous determination for such records. Thus, the district must continue to follow Open Records Letter No. 2004-5433 with respect to the information in Exhibit 3.

We next address your claims regarding the representative sample documents you have submitted as Exhibit 2-A. You contend that this information is excepted from disclosure under section 552.107 of the Government Code, which excepts information protected by the attorney-client privilege. Section 552.107(1) of the Government Code excepts from disclosure information protected by 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.<sup>2</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>3</sup> TEX. R. EVID. 503(b)(1)(A), (B),

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<sup>2</sup> The privilege does not apply when an attorney or representative is acting in a 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 a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

<sup>3</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer").

(C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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) of the Government Code 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). In this case you state, and the documents reflect, that the information submitted as Exhibit 2-A is a communication between the district’s attorney and a representative of the district made for the purpose of rendering professional legal advice to the district. You state that the communication was intended to be confidential, and you indicate that the confidentiality has been maintained. Based on your representations and our review, we find you have established that Exhibit 2-A is protected by the attorney-client privilege. We therefore conclude the district may withhold Exhibit 2-A pursuant to section 552.107(1) of the Government Code.

In summary, the district must continue to follow our previous determination in Open Records Letter No. 2004-5433 with respect to the information in Exhibit 3. Exhibit 2-A may be withheld under section 552.107(1) of the Government Code as information protected by the attorney-client privilege. Based on these findings, we do not reach your remaining claimed exceptions to disclosure.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 209582

Enc: Submitted documents

c: Mr. Brian Mylar  
KSAT-12 TV  
1408 North St. Mary's Street  
San Antonio, Texas 78215  
(w/o enclosures)