



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2007

Ms. Tina M. Coronado
General Counsel
Texas Veterans Commission
P.O. Box 12277
Austin, Texas 78711-2277

OR2007-05359

Dear Ms. Coronado:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#277765.

The Texas Veterans Commission (the "commission") received a request for six categories of information pertaining to correspondence between and among named individuals. You state that some of the responsive information has been released to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Section 5701 of title 38 of the United States Code states in pertinent part:

- (a) All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary and the names and addresses of present or former members of the Armed Forces, and their dependents, in the possession of the [Department of Veterans Affairs] ("VA")

shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section.

(b) The Secretary shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:

(1) to a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Secretary, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 5109 or 7109 of this title.

38 U.S.C. § 5701(a), (b)(1); *see also* 38 C.F.R. §§ 1.500-1.1527. You state that “the VA can disclose information contained in claimants’ files only to a claimant or the duly authorized agent or representative of a claimant.” You further inform us that “[f]or a veteran service organization to become the authorized agent or representative of a claim and thereby obtain access to the claimant’s file, a power of attorney must be executed on VA form 21-22, Appointment of Veterans Service Organization as Claimant’s Representative.” You state that “[r]epresentatives holding a power of attorney may only disclose the information in a claimant’s file in accordance with title 38, [and] sections 1.500 *et seq.* of the Code of Federal Regulations” and that “[a]ll other information in the files shall be treated as confidential and will be used only in determining the status of the cases inspected or in connection with the presentations of the claim to the VA.” *See id.* § 1.525(a). You state that the information at issue contains “veteran claims and claimant information filed with the VA.” You further state that this information “was accessed and obtained by recognized representatives holding the appropriate power of attorney in compliance with federal law.” Accordingly, as we understand the commission obtained the information at issue from the VA pursuant to 38 U.S.C. § 5701(b)(1), we agree that the information you have marked is confidential under section 5701(a) of title 38 of the United States Code, and the commission must withhold this information under section 552.101 of the Government Code.

Section 552.107(1) of the Government Code protects information 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). 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. 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. Finally, 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 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) 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). Upon review of your arguments and the information at issue, we determine that Exhibits C, D2, and D3 constitute confidential attorney-client communications for section 552.107 purposes. Accordingly, the commission may withhold Exhibits C, D2, and D3 under section 552.107 of the Government Code.¹

In summary, the commission must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 5701(a) of title 38 of the United States Code. The commission may withhold Exhibits C, D2, and D3 under section 552.107 of the Government Code.

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

¹As our ruling is dispositive, we need not address your remaining argument against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/ceg

Ref: ID# 277765

Enc. Submitted documents

c: Ms. Kathy Matelski
1601 Brenda Hursh Drive
Wichita Falls, Texas 76302
(w/o enclosures)