



May 3, 2000

Mr. Richard A. Munisteri
General Counsel
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2000-1724

Dear Mr. Munisteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135357.

The Comptroller of Public Accounts (the “comptroller”) received a request for all of the agency’s electronic mail. On March 17, 2000, the requestor amended and limited the original request to encompass the electronic mail correspondence from five specified comptroller employees from June 30, 1999 through March 1, 2000. The requestor also sought other requests regarding electronic mail received by the comptroller since March 1, 2000. Because you raise no exceptions in regard to the other requests, we assume that you have given the requestor access to this information. In regard to the requested electronic mail correspondence, you claim that portions of this information are excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement

¹In reaching our conclusion here, 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.

or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). Although you submitted information to this office with your letter of March 24, 2000, you also submitted additional information with your letter of April 21, 2000, more than fifteen business days after receiving the request. Therefore, the comptroller has failed to comply with section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that portions of the information submitted after the fifteenth business day are confidential under section 552.101 in conjunction with section 54.643 of the Education Code. You also contend that the information is excepted from disclosure by section 552.101 and common law privacy and section 552.117 of the Government Code. This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or implicates the privacy interest of a third party. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will consider the comptroller's arguments for withholding the information submitted after the fifteenth business day.

You assert that the marked portions of the submitted information are excepted from disclosure by section 552.101 and common law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* 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. *Id.* at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

After reviewing the marked information, we conclude that one of the documents contains information protected by common law privacy. We have marked the information that you may withhold. The remaining marked information may not be withheld under section 552.101 and common law privacy.

You also assert that marked information is excepted from disclosure by section 552.101 in conjunction with section 54.643 of the Education Code. Section 552.101 also encompasses information protected by statute. Section 54.643(a) is a confidentiality provision found in Subchapter F which deals with the prepaid higher education tuition program.² Section 54.643(a) of the Education Code provides the following:

Records in the custody of the board relating to the participation of specific purchasers and beneficiaries in the program are confidential.

Educ. Code § 54.643(a). Section 54.601 defines “board” as the Prepaid Higher Education Tuition Board (“board”) and defines “program” as the prepaid higher education tuition program. *Id.* § 54.601(2), (8). Further, section 54.602 provides that the board is in the office of the comptroller and shall administer the program. *Id.* § 54.602. Section 54.601 also defines “purchasers” as a person who is obligated to make payments under a prepaid tuition contract and “beneficiaries” as a person who is entitled to receive benefits under a prepaid tuition contract. *Id.* § 54.601(1), (12). After reviewing the submitted information, we conclude that portions of the documents relate to the participation of specific purchasers and beneficiaries in the prepaid higher education tuition program. Therefore, you must withhold the marked information under section 552.101 in conjunction with section 54.643(a) of the Education Code.

You assert that a portion of the submitted information is excepted from disclosure by section 552.106 of the Government Code. Section 552.106(a) protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the

²The program is also known as the “Texas Tomorrow Fund.”

exception is similar to that of section 552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material, but rather excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. Section 552.106 applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. *Id.*

You assert that a portion of the submitted information consists of working papers that are associated with the preparation of proposed legislation. However, after reviewing these documents, we conclude that only one contains policy, judgments, recommendations, and proposals relating to the preparation of proposed legislation. We have marked the document that you may withhold under section 552.106. However, the remaining information contains merely factual material and you have not demonstrated that the documents pertain to the proposal of legislation. Therefore, you may not withhold the remaining information under section 552.106.

You also assert that portions of the submitted information are protected under section 552.107(1). Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). A "confidential communication" is a communication "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." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

After reviewing the submitted information, we conclude that some of the information is protected by section 552.107(1). However, we conclude that portions of the submitted information contain purely factual communications that are not protected. *See* Open Records Decision No. 574 (1990) (the factual recounting of events, including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1)). We have marked the information which you may withhold under section 552.107(1).

You also assert that a portion of the submitted information is excepted under section 552.108. Section 552.108(a)(1) provides that information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if release of the information would interfere with the detection, investigation, or prosecution of crime. The comptroller is a law enforcement agency for purposes of administering the Tax Code. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-679 (Tex. 1995). In *A&T Consultants*, the court agreed that the comptroller uses audits to further the comptroller's law enforcement objectives.

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See Gov't Code §§ 552.108(a), (b), .301(b)(1)*; *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that some of the submitted information pertains to ongoing tax examinations or audits. However, the submitted information appears to relate to computer problems rather than the ongoing examination or audit of a taxpayer. After reviewing the submitted information, we conclude that the comptroller has failed to demonstrate how release of the submitted information would interfere with law enforcement. Therefore, you may not withhold the information under section 552.108.

You claim that some of the submitted documents are excepted from disclosure by section 552.111 of the Government Code. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See also City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

After reviewing the submitted information, we conclude that some of the information consists of advice, recommendations, opinions, and other material reflecting the policy-making processes of the governmental body, whereas some of the submitted information contains purely factual information. Accordingly, we have marked the information that you may withhold under section 552.111.

You also assert that section 552.117 excepts the marked information from disclosure. Section 552.117(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or

former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Portions of the submitted information reveal family member information of comptroller employees. Therefore, if the employees have elected for confidentiality under section 552.024 prior to the date on which the request for this information was made, the comptroller must withhold the family member information under section 552.117(1). We have marked the information that the comptroller must withhold under section 552.117(1).

In conclusion, we have marked information protected by section 552.101 and common law privacy. We have also withheld information protected by section 552.101 in conjunction with section 54.643 of the Education Code. Further, we have marked one document that you may withhold under section 552.106 of the Government Code. We have also marked entire documents and portions of documents that you may withhold under sections 552.107(1) and 552.111. You must also withhold marked family member information under section 552.117(1) if the employees made a timely election under section 552.024. You must release the remaining information.

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).

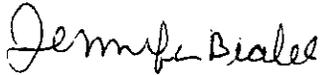
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/nc

Ref: ID# 135357

Encl. Marked documents

cc: Mr. John Moritz
Fort Worth Star-Telegram
1005 Congress, Suite 920
Austin, Texas 78701
(w/o enclosures)