



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2005

Ms. Ruth H. Soucy  
Manager and Legal Counsel  
Open Records Division  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2005-03978

Dear Ms. Soucy:

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# 223803.

The office of the Texas Comptroller of Public Accounts (the "comptroller") received a request for information relating to Cabela's, Inc. ("Cabela's") and Sematech ("Sematech"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, and 552.137 of the Government Code. Further, you state that the request may involve third party interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified Cabela's and Sematech of the request for information and of their right to submit arguments explaining why the information concerning them should not be released. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered arguments submitted by Cabela's. *See Gov't Code* § 552.305(b).

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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.

First, the comptroller asserts some of the information is confidential under section 552.101 in conjunction with section 111.006 of the Tax Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 111.006(a)(2) of the Tax Code provides that information “secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer’s books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer” is confidential. Tax Code § 111.006(a)(2).

The Texas Supreme Court considered the applicability of section 111.006 to several categories of information in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). In doing so, the court not only considered if the information was derived from the taxpayer’s records, but also whether disclosure of the information would reveal anything about the taxpayer’s business affairs, operations, financial condition, profits, or losses. *Id.* at 676, 680. The court concluded that the starting and ending dates of an audit are not confidential under section 111.006 because although they may indicate the seriousness of an audit, they “reveal[] nothing about a taxpayer’s business affairs, operations, or profits or losses.” *Id.* at 676. Similarly, the court concluded that while the amounts of deficiencies or refunds are derived from the taxpayer’s records, the fact of a deficiency or refund “reveals nothing about taxpayers except that they miscalculated their tax.” *Id.* at 680; *see id.* at 680 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006.

Based on *A & T Consultants*, we conclude that a portion of the submitted information is confidential under section 111.006 because the information is obtained or derived from a taxpayer’s records and reveals the taxpayer’s business affairs, operations, financial condition, profits, or losses. Accordingly, the comptroller must withhold the information we have marked pursuant to section 111.006(a)(2) of the Tax Code. However, the remaining information at issue consists of taxability rulings issued by the comptroller. Section 552.025 of the Government Code reads as follows:

- (a) A governmental body with taxing authority that issues a written determination letter, technical advice memorandum, or ruling that concerns a tax matter shall index the letter, memorandum, or ruling by subject matter.
- (b) On request, the governmental body shall make the index prepared under Subsection (a) and the document itself available to the public, subject to the provisions of this chapter.
- (c) Subchapter C does not authorize withholding from the public or limiting the availability to the public of a written determination letter, technical advice memorandum, or ruling that concerns a tax matter and that is issued by a governmental body with taxing authority.

Gov't Code § 552.025. Subsection (c) states that a governmental body with taxing authority that issues rulings covered by section 552.025 shall make such rulings available to the public and that subchapter C of the Act, the chapter containing all of the exceptions to required public disclosure, does not authorize withholding such rulings from public disclosure. *See* Gov't Code § 552.025(b), (c). The comptroller is a governmental body with taxing authority. *See* Tax Code title 2. The express terms of section 552.025(c) are clear and unambiguous. Accordingly, the comptroller may not rely on the Act's exceptions and must release the taxability rulings in their entirety.

You also indicate that release of a portion of the submitted information may implicate the proprietary interests of Sematech and Cabela's. An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received arguments from Sematech indicating a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, we find the comptroller may not withhold the information submitted by Sematech on that basis.

Cabela's submitted a brief in which it claims that portions of its proposal are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). However, the remaining information for which Cabela's claims section 552.110 consists of taxability rulings that may not be withheld under any of the exceptions found in subchapter C. Therefore, we conclude that the taxability rulings may not be withheld under section 552.110.

The comptroller contends that section 552.107 excepts a portion of the submitted information from public disclosure. 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). The comptroller explains the documents are communications between the comptroller’s office and its attorneys, and that their confidentiality has been maintained. After reviewing the information, we agree the comptroller may withhold the portion of the submitted information we have marked under section 552.107. Because section 552.107 is dispositive, we do not address the comptroller’s section 552.111 claim for this set of documents.

Finally, the information not otherwise excepted from public disclosure includes a private e-mail address that is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov’t Code §552.137. You inform us that the member of the public has not affirmatively consented to the release of her e-mail address contained in the submitted materials. The

comptroller must, therefore, withhold the e-mail address of member of the public under section 552.137.

In summary, the comptroller must withhold the documents we have marked under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. The comptroller may withhold the information we have marked under section 552.107 of the Government Code. The e-mail address that the comptroller marked must be withheld under section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

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, 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); *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 10 calendar days of the date of this ruling.

Sincerely,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 223803

Enc. Submitted documents

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