



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 13, 2006

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

OR2006-13410

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#264667.

The Comptroller of Public Accounts (the "comptroller") received a request for information regarding two named companies over a specified period of time. You state that you will provide some of the requested information to the requestor. However, you claim that the remaining information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes.

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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.

Section 552.101 encompasses section 111.006(a)(2) of the Tax Code which 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 n. 6. Thus, the fact of a deficiency or refund is not confidential under section 111.006.

Based on our review of the information at issue, and *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 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. However, you have failed to demonstrate how the remaining information constitutes information obtained from or derived from a taxpayer’s records for section 111.006 purposes. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

You seek to withhold a portion of the remaining information under section 552.101 of the Government Code in conjunction with section 151.027 of the Tax Code. Section 151.027(a) provides that, with certain exceptions, “[i]nformation in or derived from a record, report, or other instrument required to be furnished under this chapter is confidential and not open to public inspection.” Tax Code § 151.027(a). Upon review of the information at issue, we find that you have failed to demonstrate how any of the information at issue is confidential for section 151.027 purposes. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on this basis.

Section 552.107(1) of the Government Code protects information that comes 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). 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.*, 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) 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). After review of your arguments and the requested information, we find that section 552.107 of the Government Code is applicable to a portion of the requested information. Accordingly, the comptroller may withhold the information we have marked on this basis.

You assert that some of the remaining information is excepted under section 552.111 of the Government Code, which excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 of the Government Code is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 of the Government Code excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Upon review, we find that you have failed to demonstrate how any portion of the remaining information constitutes advice, recommendations, opinions, and other material reflecting the policymaking processes of the comptroller for section 552.111 purposes. Accordingly, no portion of the remaining information may be withheld on this basis.

You seek to withhold a portion of the remaining information under section 552.116 of the Government Code. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that “portions of the documents at issue are internal notations that were prepared by agency personnel in the course of conducting examinations under the authority of section 111.004 of the Tax Code.” Based on your representations and our review, we find that a portion of the remaining information is confidential pursuant to section 552.116 of the Government Code. Accordingly, the comptroller may withhold the information we have marked on this basis.

In summary, the comptroller must withhold the information we have marked pursuant to 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 pursuant to section 552.107 of the Government Code. Finally, the comptroller may withhold the information we have marked pursuant to section 552.116 of the Government Code. The remaining information must be released.

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); *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/krl

Ref: ID# 264667

Enc. Submitted documents

c: Mr. Antonio Puente, Jr.  
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(w/o enclosures)