



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 23, 2010

Ms. Ruth H. Soucy  
Deputy General Counsel for Open Records  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711

OR2010-04093

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# 373395 (Comptroller ID# 6098985016).

The Comptroller of Public Accounts (the "comptroller") received a request for seven categories of information pertaining to House Bill 11, enacted by the 80<sup>th</sup> Legislature. You state the comptroller has released some of the requested records. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, 552.108, 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 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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

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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.

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 pet.). 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).

You identify the individuals listed as parties to most of the marked e-mails as comptroller attorneys and employees. You represent these e-mails were communicated for the purpose of rendering legal services to the comptroller. Thus, based on your representations and our review, we agree most of the information you marked under section 552.107 of the Government Code is privileged attorney-client communication. However, the remaining e-mails, which are submitted in otherwise privileged e-mail chains, reflect they were communicated with parties outside the comptroller. You neither identify these outside parties, nor explain how they are privileged with respect to the remaining e-mails. Thus, we find these remaining e-mails are not privileged. However, you represent these non-privileged e-mails do not exist in comptroller records separate and apart from the privileged e-mail strings in which they are submitted. Accordingly, these non-privileged e-mails may be withheld along with the privileged e-mail chains under section 552.107 of the Government

Code.<sup>2</sup> However, there is handwriting on one of the submitted e-mail print-outs, which you identify as the handwriting of a comptroller employee. Although the underlying e-mail may be withheld as a privileged attorney-client communication, you do not explain, and the submitted information does not reflect, whether the handwriting was itself communicated. Thus, because the attorney-client privilege only protects privileged communications, this handwriting may not be withheld under section 552.107 of the Government Code. As you raise no other exceptions to disclosure of this handwritten information, it must be released.

You claim the remaining information at issue is excepted under section 552.108(a)(1) of the Government Code, which excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex Parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See Open Records Decision Nos. 493 (1988), 287 (1981)*. Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See Open Records Decision No. 199 (1978)*. The comptroller is a law enforcement agency for purposes of administering the Tax Code. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 678-79 (Tex. 1995). You inform us that the remaining information at issue pertains to a pending criminal investigation being conducted by the comptroller. Therefore, we agree the comptroller may withhold the information you marked under section 552.108(a)(1) of the Government Code.<sup>3</sup>

In summary, with the exception of the information we marked that must be released, the comptroller may withhold the information you marked under section 552.107 of the Government Code. The comptroller may also withhold the information you marked under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your other raised exceptions to its disclosure.

<sup>3</sup>As our ruling is dispositive for this information, we need not address your other raised exceptions to its disclosure.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 373395

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)